NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985

IN THE SUPREME COURT OF NEW ZEALAND

SC 9/2014
[2015] NZSC 35

BETWEEN	DH (SC 9/2014) Appellant
AND	THE QUEEN Respondent

Hearing: 22 October 2014

Court: McGrath, William Young, Glazebrook, Arnold and O'Regan JJ

Counsel: W C Pyke and S K Green for Appellant
A Markham for Respondent

Judgment: 16 April 2015

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

[1] The appellant appeals against a decision of the Court of Appeal dismissing his appeal against conviction on 16 counts of sexual offending against his daughter.[1]

[2] Counter-intuitive evidence is evidence admitted in cases involving allegations of sexual abuse of young persons for the purpose of correcting erroneous beliefs or assumptions that a judge or jury may intuitively hold and which, if uncorrected, may lead to illegitimate reasoning. The Law Commission said the purpose of such evidence is "to restore a complainant's credibility from a debit balance because of

[1] *DH (CA687/2012) v R* [2013] NZCA 670 (Harrison, Simon France and Dobson JJ) [*DH* (CA)]. Leave to appeal was granted by this Court on the approved question "whether the Court of Appeal was correct to dismiss the conviction appeal": *DH (SC 9/2014) v R* [2014] NZSC 50.

jury misapprehension, back to a zero or neutral balance".[2] The major focus of the present appeal is on counter-intuitive evidence given at the appellant's trial by a clinical psychologist, Dr Suzanne Blackwell.

[3] We heard this appeal immediately before the hearing of another appeal in which Dr Blackwell's evidence was also challenged, *Kohai v R*.[3] Judgment in that appeal is being delivered at the same time as the delivery of this judgment.

[4] Counsel for the appellant, Mr Pyke, did not mount a general challenge to the admissibility of counter-intuitive evidence in all cases. But he argued that the scope of Dr Blackwell's evidence in the present case was excessive and that parts of her evidence were inadmissible. He said it dealt with matters which were not relevant and the admission of the irrelevant material had been prejudicial to the defence at trial. He said the Court of Appeal had failed to appreciate the prejudicial effect of the potential misuse of Dr Blackwell's evidence by the jury.

[5] The other grounds of appeal that were pursued in this Court related to the directions given to the jury by the trial Judge, Judge D J McDonald, in relation to the counter-intuitive evidence, on the subject of memory and in relation to the good character evidence that was adduced at the trial. Mr Pyke also raised a concern about a comment made by the Judge in his summing up about the appellant's family doing their "dirty laundry".

[6] The case for the appellant is that the combined effect of these matters ought to have been assessed by the Court of Appeal. It was argued that the Court of Appeal should have found that there was a miscarriage of justice in terms of s 385(1)(c) of the Crimes Act 1961.[4]

[7] The focus of this judgment will be on the principal appeal point, dealing with the scope and impact of the counter-intuitive evidence. We will deal with that point first, before returning to the remaining issues identified above.

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2 Law Commission *Evidence; Evidence Code and Commentary* (NZLC R55 vol 2, 1999) at [C111].

3 *Kohai v R* [2015] NZSC 36.

4 Section 385 was repealed on 1 July 2013 by the Crimes Amendment Act (No 4) 2011.

Background

The Crown and defence cases

[8] The Crown case at trial was that the appellant had indecently assaulted or sexually violated the complainant, his daughter, on multiple occasions over a five-year period from late 2002 to the middle of 2007. In all, there were 16 counts in the indictment, ten of which were representative counts. Ten counts alleged sexual violation by the introduction of the appellant's fingers into the genitalia of the complainant, three counts involved sexual violation by connection between his mouth and her genitalia and there were single counts of indecent assault, inducing the complainant to do an indecent act upon the appellant and the appellant performing an indecent act upon the complainant.

[9] The complainant said the offending began when she was 11 years old and continued until she was 15. She said the first incident, when she was 11, involved the appellant putting her hand on his penis when both of them were in the appellant's bed. The conduct progressed to the appellant groping the complainant's breasts, putting his hand on her crotch and rubbing her genital area through her clothing. It then progressed to touching her breasts underneath her top and putting his hand down her pants and digitally penetrating her.

[10] The conduct giving rise to the charges occurred in a variety of locations. Some of it occurred while other people were present in a room in the family home. One incident occurred in a tent when the family were away camping. Others were present in the tent at the time. Another incident took place when the complainant and the appellant were in a boat but in the view of others. There were also incidents in a shed and in a car when the complainant and the appellant were on their own together. The complainant told of one incident when she said her mother (who was a defence witness at trial) walked in when the appellant was kneeling between the complainant's legs. The complainant said she did not think her mother realised what was happening, and the mother denied having ever seen the event occur. One incident occurred in the living room of the family home while the appellant and the complainant were on the couch and the complainant's mother was in the same room working on the computer.

[11] The complainant said that she grew up thinking the sexual conduct by her father towards her was "normal in a way". She said she did not know what was going on and was powerless to stop it. She said she let the appellant do what he wanted and "sort of enjoy[ed] it in a way but it also did hurt". She said she only came to realise that the offending was wrong when she was about 15 years old and attended a sex education course at school which involved discussion of parental sexual abuse. She said that after this she resisted her father's advances and he discontinued the more invasive abuse, although he continued to grope her breasts and bottom.

[12] The complainant gave evidence that she was 15 years old when she realised the offending was wrong. However, at one point in her evidential video interview, she said she realised when she was in year 12 at school (when she would have been 17 years old). Mr Pyke suggested we should find the complainant was 17 when she realised the offending was wrong. We think it is clear that 15 years old (year 10 at school) was the actual age. She said a number of times that she was 15 years old at the time and the single reference to year 12 seems to have been an aberration. It was not put to the complainant in cross-examination that she was 17 at the time. Mr Pyke accepted in oral submissions that the precise date on which the complainant realised the conduct was wrong is not a matter of great significance in relation to the matters at issue in the present appeal.

[13] The defence case at trial was a denial that any of the alleged incidents occurred. The defence case was that the complainant's allegations were lies and that her complaint was a false complaint.

Complaints and retractions

[14] The complainant said that she first disclosed the offending to her boyfriend when she was about 17 years old, but she did not think he believed her.[5]

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[5] At the trial she said she made another disclosure to him after they had broken up.

[15] The complainant first disclosed the offending to her mother and aunt[6] in January 2010, but was disbelieved. Shortly after this she left home and went to live in Auckland and made her complaint to the police in April 2010. An evidential video interview was conducted. The complaint to the police was, therefore, about eight years after the complainant said the offending began and about three years after she said it stopped.

[16] The appellant was arrested on 29 July 2010 and charged with the offences against the complainant. On 4 August 2010, the complainant's mother, the aunt to whom she had made the disclosure and the complainant's uncle arranged for the complainant to go with them to a family lawyer and sign a handwritten retraction of her allegations against the appellant. The complainant's mother and aunt had talked to the complainant until late in the previous night about withdrawing her allegations. On 5 August 2010, the lawyer arranged for the complainant to sign a typewritten version of the retraction in which she stated that the allegations were not true.

[17] On 12 August 2010, the complainant contacted the officer in charge of the investigation and told him about the retraction. She was upset and disavowed the retraction. She repeated her disavowal of the retraction at the trial.

[18] A further evidential video interview was conducted on 29 June 2011, and during this interview the complainant mentioned for the first time the incident of abuse which took place on the family's fishing boat. The complainant said in re-examination that she had agreed to retract her allegations because she felt sad and was pressured by the family, and because she felt the family was "falling apart".

[19] The matter first went to trial in August 2011, but the jury was unable to agree. Dr Blackwell was not called to give evidence at the first trial.

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6 'Aunt' and 'Uncle' were the terms used by the complainant to refer to cousins of the appellant.

[20] The second trial took place in July 2012. In October 2012, the appellant was sentenced to a term of imprisonment of 10 years and nine months.[7] No minimum period of imprisonment was imposed.

Dr Blackwell's evidence

[21] A brief of evidence of Dr Blackwell was prepared and provided to the defence prior to the second trial. This set out in detail Dr Blackwell's qualifications, the material she had considered, and the facts of the case including specific references to the aspects of those facts which appeared to Dr Blackwell to raise potential concerns about counter-intuitive reasoning by jury members. These aspects included the fact that the appellant was the complainant's biological father, the grooming and normalising of the alleged offending, the perceived lack of support for the complainant by her mother, the complainant's delayed disclosure and retraction of the allegations of offending, the continued close relationship between the complainant and the appellant, the fact that it was only after attending a sex education class that the complainant said she realised the sexual activity between her and the appellant was wrong, and the close proximity of others during some of the alleged offending. None of this material was intended to be included in her evidence at trial, but was provided as background.

[22] In her brief, Dr Blackwell prefaced her proposed evidence with a list of matters that she would cover, which arose from her analysis of the matters that would be an issue at the trial. The list was:

(a) delay in disclosure of sexual abuse, including:

(i) dead-end disclosures; and

(ii) reporting rates to police and other authorities;

(b) reasons for delayed reporting, including:

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[7] *R v [DH]* DC Kaikohe CRI-2010-027-1586, 3 October 2012 (Judge McDonald) (sentencing notes).

(i) a close relationship between child and perpetrator;

(ii) grooming and normalisation procedures;

(iii) perceived maternal support; and

(iv) other common reasons;

(c) retraction of allegations of sexual abuse;

(d) continuing contact between victims and perpetrators;

(e) the impact of sex education classes on disclosure of abuse; and

(f) the proximity of others during sexual offending.

[23] Dr Blackwell said that she would not discuss the statistics on false complaints because "while it is certain that there are some false complaints, there is no mainstream research literature specific to this area".

[24] The paragraphs outlining what Dr Blackwell intended to say at the trial were fully footnoted and there were dialogue boxes giving an explanation as to how the evidence related to the facts of the case. It was stated that Dr Blackwell would not be referring to the material in the dialogue boxes when giving her evidence. However, the brief provided information to defence counsel as to possible avenues for cross-examination, and would also have provided a basis for submissions as to the inadmissibility of aspects of the evidence if the evidence was directed at matters that were not going to be in issue in the trial.

[25] As it turned out, the appellant's trial counsel, Mr Fairley, did not object to the admissibility or scope of the evidence of Dr Blackwell and did not cross-examine her. His tactical decision was simply to allow the evidence to be given and then seek to minimise its significance in his closing address. Having dealt with specific aspects of Dr Blackwell's evidence in that address, he said:

> So, really very interesting, we're all educated now in these commonsense propositions so how far really does that take it? You've got to come back to what are the facts that you have to deal with? Because the expert made it clear she's not dealing with your things. She doesn't even know these people. She's not commenting on your things.

[26] The issues now raised in relation to Dr Blackwell's evidence must be seen against this background. Many of these issues could have been the subject of cross-examination at the trial if counsel had decided to challenge Dr Blackwell's evidence. It is not suggested that Mr Fairley was in error in the tactical decision he made not to cross-examine Dr Blackwell.

[27] Dr Blackwell gave viva voce evidence at the trial, responding with relatively lengthy answers to questions from the prosecutor. At the end of her evidence she gave a summary of the points she had made. While her evidence followed the general content of her brief, it was given in a relatively discursive fashion and with less precision than was inherent in the brief itself. The fact she summarised it at the end meant that most points were made twice. It may have been preferable for her to have simply read the relevant parts of the brief, which were in more precise language.

Admissibility

[28] The admissibility of counter-intuitive evidence was not challenged in the High Court or Court of Appeal, and there is no general challenge in this Court either.[8] Rather, Mr Pyke argued that the scope of the evidence was excessive, being greater than justified by the matters at issue in the trial and this meant that the jury heard evidence on topics which were not live issues at the trial. However, he also criticised Dr Blackwell for addressing matters which were specific to the complainant's allegations, which he said could have been construed by the jury as directly supportive of the complainant's version of events and prejudicial. There was an obvious tension between those two positions.

[29] In addition to the general provisions in ss 7 and 8 of the Evidence Act 2006, s 25 of the Evidence Act specifically governs the admissibility of expert opinion

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[8] A recent challenge to Dr Blackwell's evidence in another case was rejected by the High Court in *R v Linton* HC Palmerston North CRI 2012-009-13358, 21 February 2014.

evidence, including counter-intuitive evidence. Subsection (1) states that expert opinion evidence is admissible if it is likely to provide "substantial help" in understanding other evidence or ascertaining a fact in issue. For evidence to be substantially helpful requires more than mere relevance. Whether or not evidence will provide substantial help requires assessing the relevance, reliability and probative value of the expert's opinion.[9] Section 25(2) specifically states that expert evidence will not be inadmissible simply because it is about a matter of common knowledge or an ultimate issue to be determined in the proceedings.

[30] The Court of Appeal has held in a number of cases that counter-intuitive evidence may be admissible under the Evidence Act. We summarise the relevant factors that emerge from two of those cases, *M(CA23/2009) v R*[10] and *OY v Complaints Hearing Committee*.[11] Those points are:

(a) In many cases involving allegations of sexual abuse, the jury's verdict will depend critically on their assessment of the complainant's credibility. In such cases, there is a risk that unjustified behaviour assumptions may influence the jury's assessment, and expert evidence as to those assumptions may be admissible. The evidence should be directed at correcting erroneous beliefs the jury might otherwise hold about the likely conduct of a victim of sexual abuse. The objective is to allow the jury to consider the complainant's credibility on a neutral basis.[12]

(b) The evidence should not be linked to the circumstances of the complainant in the case in which the evidence is being given. This is an important limitation, designed to ensure that the evidence is not used in a diagnostic or predictive way. The witness should make it

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9 *Mahomed v R* [2010] NZCA 419 at [35].

10 *M(CA23/2009) v R* [2011] NZCA 191 [*M v R*]. Leave to appeal to this Court was declined. This Court's judgment said the counter-intuitive evidence at issue in that case was "certainly admissible" on the s 25 "substantially helpful" test for the reasons given by the Court of Appeal: *M v R* [2011] NZSC 134 at [3].

11 *OY v Complaints Hearing Committee* [2013] NZCA 107, [2013] NZAR 629.

12 See *M v R*, above n 10, at [24]–[25] and [32].

clear that the witness is not commenting on the facts of the particular case.[13]

(c) The evidence must be relevant to a live issue in the case. Evidence about features in other cases of sexual abuse that are not raised in the particular case will not be relevant or substantially helpful in terms of s 25 of the Evidence Act.[14] Having said that, it must be acknowledged that when the expert's brief of evidence is being prepared before a trial, it may not be apparent which matters involving counter-intuitive reasoning will arise in the trial.

(d) The witness should make it clear that the evidence draws on generic research in cases of sexual abuse and says nothing about the case in which evidence is being given. The witness should also make it clear to the fact finder that the purpose of the evidence is limited to neutralising misconceptions which may be held by the fact finder.[15]

(e) Where counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.[16]

Empirical basis of Dr Blackwell's evidence

[31] Mr Pyke argued that there is a degree of uncertainty about the empirical information underlying Dr Blackwell's evidence. He said that uncertainty was not reflected in the evidence given by Dr Blackwell at the appellant's trial.

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13 See *M v R*, above n 10, at [49]; and *OY v Complaints Hearing Committee*, above n 11, at [59].

14 See *OY v Complaints Hearing Committee*, above n 11, at [59].

15 See *M v R*, above n 10, at [49]; and *OY v Complaints Hearing Committee*, above n 11, at [59].

16 See *M v R*, above n 10, at [32] and [49]; and *OY v Complaints Hearing Committee*, above n 11, at [59].

[32] Dr Blackwell said at the beginning of her evidence that her evidence was:

> … based on what has been seen to be a sound and replicated body of knowledge in research that's developed over the last 30 years and it's also based on my clinical experience[.]

[33] Dr Blackwell's evidence then proceeded to report the results of the research she described above. For example, in relation to delayed complaint, she said "only about a third of adults who suffer childhood sexual abuse actually tell anyone about it during their childhood". She was then asked about the "general pattern for children who have been sexually abused" in reporting and responded, "[it] is that it's either delayed or they don't report at all until they're adults".

[34] She added later, "my clinical experience and available research tells us that disclosure of child sexual abuse is most commonly delayed".

[35] Dr Blackwell's brief set out in a lengthy footnote a description of the studies on which she relied. We will not reproduce that description in full, but the following extract gives an indication of its nature:

> Some studies report findings from children who have been abused by relying on information that is systematically collected from parents … or from others who know the child. Some research relies on the analysis of records kept by agencies who work with children … Other research is based on retrospective surveys … of adult populations and, in particular, adults who have reported being abused as a child.

[36] The statements in Dr Blackwell's brief about delayed complaint contained footnotes referring to two papers by Dr Kamala London and others.[17] Mr Pyke referred us to those studies and in particular their highlighting of some of the limitations in the data relied upon by Dr Blackwell. He argued that Dr Blackwell should have explained those limitations to the jury. He said Dr Blackwell's evidence is to the effect that the research is about actual sexual abuse, but that she should have said it was "about cases of abuse that may or may not have been cases of actual abuse".

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[17] Kamala London and others "Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?" (2005) 11 Psychology, Public Policy, and Law 194; and Kamala London and others "Review of the contemporary literature on how children report sexual abuse to others: Findings, methodological issues, and implications for forensic interviewers" (2008) 16 Memory 29.

[37] Mr Pyke highlighted the discussion in Dr London's 2008 review of the literature of the problems with the criteria used in research studies to identify whether children have been abused and so are suitable participants if a study is to be reliable. Some studies classify children meeting one or more of the following criteria as abused: perpetrator convictions, plea bargains or confessions, medical evidence, other physical evidence, and children's statements. The highlighted problems included the possibility of plea bargains entered into under pressure, false convictions (that may have been quashed on appeal), possibly inaccurate medical evidence and unreliable children's statements.[18]

[38] As pointed out by counsel for the respondent, Ms Markham, Dr Blackwell did not say in her evidence that all of the studies to which she referred involved sexual abuse victims in respect of whom the abuse was an established fact. But she also said nothing to the contrary.

[39] We do not see any basis for criticising Dr Blackwell's evidence on the contended basis that it falsely claimed that the research on which it was based consisted of studies of sexual abuse victims where there was certainty that the abuse had actually occurred. She provided in her brief considerable information about the studies on which she could have been cross-examined if that had been seen as advancing the defence case. In her evidence on retractions, she specifically said that retractions "may come from a child who may or may not have been sexually assaulted". In her evidence about victims not realising the offending was wrong, she referred to a Canadian study involving a "sample of prosecuted cases".

[40] We also acknowledge that the Court of Appeal has said a witness giving evidence of this kind should make it clear that the evidence is based on generic research where there has been proven sexual abuse and says nothing about cases where false allegations were made.[19] Given the reality that all the studies referred to by Dr Blackwell are not able to be described as dealing only with "proven sexual abuse" for the reasons given by Dr London, that suggestion by the Court of Appeal would not have been appropriate in this case. It should not be followed except in

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[18] London and others "How children report sexual abuse to others", above n 17, at 38–39.

[19] *OY v Complaints Hearing Committee*, above n 11, at [59](e).

cases where the studies relied on can fairly be described as dealing only with proven sexual abuse.

[41] We do not accept Mr Pyke's submission that Dr Blackwell should have said the research was "about cases of abuse that may or may not have been cases of actual abuse". That would overstate the issues raised in Dr London's review of the literature and make the description of the research almost meaningless. However, it would have been preferable if Dr Blackwell had described the research as involving studies based on cases of reported abuse, where the researchers have used different sampling and research techniques, meaning that not every case can be verified as a case of actual abuse. If her professional opinion was that the researchers have concluded that the sample provides a proper basis for their conclusions as to conduct exhibited by those who have actually experienced child sexual abuse, she could have added a statement to that effect.

The criticisms of Dr Blackwell's evidence

[42] Mr Pyke raised a number of concerns about the content of Dr Blackwell's evidence in the present case. He made detailed arguments on each one, largely recapitulating his arguments in the Court of Appeal. He asked that we address these one by one and we will do so. He did not, however, challenge all aspects of her evidence. For example, she gave evidence that victims of child sexual abuse often continue to have affection for the perpetrator of the abuse.[20] Mr Pyke did not take issue with that aspect of Dr Blackwell's evidence in the present case. His particular criticisms related to nine aspects of Dr Blackwell's evidence. We will address each of these in turn.

(a) Delay in disclosure of sexual abuse

[43] Dr Blackwell's evidence dealt with the misconception that a delay in disclosure by a complainant of sexual abuse in childhood is something frequently

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[20] This was important because at the trial the appellant's counsel suggested it was implausible that the complainant would have agreed to put herself in situations where she was alone with the appellant if he had already sexually abused her. The Crown case was that some incidents of abuse took place when the complainant was alone with the appellant. One example was when the appellant and complainant were on a fishing trip together.

identified by defence counsel as an indicator of lack of credibility. In the present case the complainant, when questioned about why she had delayed in reporting, said that she had not realised that the sexual activity between herself and the appellant was wrong until she became aware that it was as a result of a sex education class dealing with intra-familial sexual abuse.

[44] Mr Pyke argued that, because the complainant had given a reason for the delay, there was no need for anything more than a very simplified discussion about delay, along the lines of the warning which may be given under s 127(2) of the Evidence Act in cases where it is suggested that a complainant delayed in making a complaint. In his oral submissions, he described this as the "real issue" in the appeal. It was a factor in his criticism of a number of aspects of Dr Blackwell's evidence.

[45] The evidence Dr Blackwell gave on this topic made the following points:

(a) the reporting of child sexual abuse is "most commonly delayed";[21]

(b) the timing of the complaint does not assist in determining its credibility because both true complaints and false complaints may be either immediate or delayed;

(c) there are many reasons for delay in reporting, including a close or family relationship between the complainant and the perpetrator, lack of understanding that the behaviour is wrong, normalisation by the perpetrator, loyalty by the victim to the perpetrator, fear for safety, fear of being blamed or not being believed and shame and embarrassment; and

[21] The phrase "most commonly delayed" is ambiguous – it is not clear whether it means "often delayed", "delayed more often than not" (that is, in more than 50 per cent of cases) or, "almost always delayed". Dr Blackwell's statement was based on her clinical experience and "available research" and we do not know exactly what phrase correctly describes the position. If the correct position, based on up to date research, is that complaints are almost always delayed, the phrase used by Dr Blackwell would not be of concern. If the position is that complaints are delayed often, that term should be used. If the position is that complaints are delayed in a bare majority of cases, it would be more accurate to say "more often than not".

(d) lack of parental support by the perpetrator's partner may be another reason.

[46] Mr Pyke accepted that the evidence dealt with misconceptions about the behaviour of sexual abuse victims that may be held by jurors and would in many cases be substantially helpful for that reason. But he said there was no need for this evidence to be given in this form in this case because the issues of delay and the reasons for it were explained by the complainant.

[47] The Court of Appeal said this argument was factually incorrect, because even after the complainant found out that the sexual contact between herself and her father was wrong, she delayed for some years in making a complaint, thus her explanation did not fully explain the delay.[22] We have dealt with those factual issues above.[23] But putting those to one side, we do not consider the fact that the complainant provided an explanation for delay meant that delay ceased to be a live issue.

[48] There was no reason to assume that the jury would necessarily accept the complainant's explanation for the delay. The jury was invited not to do so by the defence. We accept Ms Markham's submission that there is an inherent contradiction in the defence attacking the complainant's credibility on the basis of delay and then saying that there is no need for expert evidence to deal with the notion that delay signals untruth. In circumstances where s 127 of the Evidence Act permits a direction to be given by the Judge on the subject of delay, the mere fact that a complainant gives a reason for the delay does not displace the usefulness of the direction. Ms Markham said the same logic applies to expert evidence about delay. We agree.

[49] We are satisfied in the present case that the evidence given by Dr Blackwell on the issue of delay was substantially helpful, notwithstanding the fact that the complainant gave a reason for her delay in complaining. The defence did rely on delay as a basis for inviting the jury to treat the complainant's allegations as untruthful. We do not see the fact that the complainant gave a reason for at least part

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22 *DH* (CA), above n 1, at [18]–[19].
23 See above at [12].

of the delay as providing an assurance that the misconception would not be engaged.[24] Mr Pyke did not identify any prejudicial effect of the evidence. Given its limited purpose and the cautious terms in which it was expressed, we see no risk that it would have been seen by the jury as diagnostic of sexual abuse.

(b) Dead-end disclosures

[50] Dr Blackwell gave evidence to the effect that a child will sometimes tell another person about being sexually abused but with no resulting action so that the disclosure is a "dead-end". She said studies suggested that when a child tells somebody, especially of the same age, the person to whom the disclosure is made may keep the information in confidence and may not pass it on to a responsible adult. She said if repeated disclosures are required the child subject to abuse may give up and not bother to tell anyone. This amplified her discussion of delay in reporting abuse.

[51] Mr Pyke said there was no need for this evidence because, although there was a dead-end disclosure to the complainant's boyfriend, the history was explained and the complainant recounted the reasons why there was no onward reporting by her boyfriend. He said no elaboration was required.

[52] The Court of Appeal was satisfied that this evidence was admissible and we agree.[25] The evidence was in relation to a live issue at trial and was one of the reasons why victims of child sexual abuse may delay in reporting the abuse. It was therefore permissible as part of the evidence on delay, which we have found met the substantially helpful test in s 25 of the Evidence Act and was not rendered unnecessary by the fact that the complainant gave a reason for her delayed complaint. Again, Mr Pyke did not suggest it had a prejudicial effect that outweighed its probative value.

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[24] The minority in *R v DD* [2000] 2 SCR 275 at [29] rejected a similar argument in that case. The majority did not deal with the issue.

[25] *DH* (CA), above n 1, at [20].

(c) Family members as perpetrators

[53] Mr Pyke argued that Dr Blackwell's statement that "the large majority of perpetrators are family members, family friends, neighbours or authority figures" or someone known to the victim said nothing useful for the present case. He said it appeared to be intended to counter an assumption that child abuse is mostly perpetrated by strangers but said this was not part of the defence case and would be unlikely to be a view held by jurors these days.

[54] We think this mischaracterises the evidence. Dr Blackwell was asked about reasons for delayed complaints and answered that low reporting rates by victims of child sex abuse is "attributed in part to the fact that the perpetrator is usually somebody well known to the child". Linked to this are issues such as normalisation and unsupportive parents, which Dr Blackwell went on to explain. The statement that a large majority of perpetrators are in this category was part of the explanation for why these factors figure in the studies to which Dr Blackwell referred.

[55] We do not see any issue with her answer that a factor in delay is that the perpetrator is usually someone well known to the child. But we think it was not then appropriate to go on to say "the large majority of perpetrators are family members, family friends, neighbours or authority figures" because the more irrelevant detail that is added, the greater the risk that jurors could consider the factors identified are diagnostic of sexual abuse. The point about the influence on delay of the relationship between victim and perpetrator could have been made without these additional details. However, we see this as unnecessary emphasis rather than as something more serious. Mr Pyke did not suggest that the jury would have seen this evidence as diagnostic of sexual abuse having occurred in this case.

(d) Normalisation or grooming

[56] Dr Blackwell gave evidence that people who sexually abuse children sometimes normalise the abuse and do "what we call grooming" to make a child accept the abuse. This was in the context of a statement to the effect that child sexual abuse is not necessarily painful or frightening for a child, particularly where the perpetrator is close to the child and is trusted by the child. She said that some

children may even enjoy the sexual conduct and this may result in them feeling as if they are partly to blame.

[57] Mr Pyke was particularly critical of the reference to grooming and normalisation. He said this was prejudicially suggestive that grooming had been going on in the background and that it invited that interpretation of the evidence. Mr Pyke referred to the concept of grooming as referred to in the heading of s 131B of the Crimes Act and said there was no such conduct in this case. We do not think the reference to s 131B assists in this context. Grooming is not defined in that section. And jurors are unlikely to be familiar with the section.

[58] We accept the term "grooming" is often used to describe manipulative conduct to persuade a child to agree to sexual activities. But we think it is clear from the context in which the term was used in Dr Blackwell's evidence that she was referring to grooming as a description of a situation in which a victim comes to regard sexual activity as a normal and everyday activity, which was a feature of the offending in the present case as described by the complainant.

[59] The evidence was that the complainant was close to the appellant and had an affectionate relationship with him. The complainant said that the appellant would thank her and hug and kiss her after the offending concluded. She said he would then go about his normal activity. This made the sexual conduct seem "normal in a way" to her, hence her evidence that she did not realise it was wrong until she attended a sex education course dealing with sexual abuse. There was also one incident where the appellant gave a reward to the complainant after sexual activity – the return of a toy that had been confiscated.

[60] Mr Pyke relied on the decision of the Court of Appeal in *RA v R*, in which evidence given by Dr Blackwell about grooming was found to be irrelevant.[26] The reason for that finding was that, on the facts of the case, there was no evidence that the appellant's conduct prior to the offending ever went beyond acting as a good stepfather. We see that decision as fact-dependent. It does not assist us in this case.

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[26] *RA v R* [2010] NZCA 57, (2010) 25 CRNZ 138.

[61] Mr Pyke also referred us to the Victorian case, *SLS v R*, in which expert evidence in relation to grooming was excluded.[27] We do not see that case as bearing on the present situation. The Crown conceded in that case that the expert evidence was inadmissible.[28] The Court agreed that it was inadmissible, primarily because it did not comply with the particular statutory provisions and because the evidence was beyond the expertise of the witness.[29] The Court also saw the evidence as circular: the conduct would constitute grooming only if the sexual offending had, in fact, taken place.[30]

[62] In the present case, the reference to grooming was not made in a context suggesting that conduct that could be seen as grooming was diagnostic of offending. Rather, it was an explanation as to why a child subject to sexual abuse in a family context in which the conduct is made to seem normal may not realise that what is occurring is wrong and may therefore not complain or cease to be affectionate to the perpetrator. That was clearly relevant to the issues that arose on the facts of the present case, including to the issue of delay. It was a point made on the basis of research and professional experience, the reliability of which was not challenged. It did not claim to be diagnostic of abuse having occurred. We are satisfied it was not unfairly prejudicial to the defence by suggesting that grooming in the sense described above had occurred.[31] We are also satisfied that it met the substantially helpful test in s 25 of the Evidence Act.

[63] We do, however, comment that "grooming" is not a good term to describe what occurred in this case, namely the treating of sexual activity as an everyday activity. Normalisation is less problematic, but is a term with which jurors are unlikely to be familiar. As mentioned earlier, we consider that "grooming" should not be used in this context in future cases. We think it would be best to simply describe the situation in words the jury will readily understand, that is the victim coming to regard sexual activity as a normal and everyday activity.

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27 *SLS v R* [2014] VSCA 31.
28 At [192].
29 At [201]–[211].
30 At [213].
31 At [58].

(e) Self blame

[64] In answer to a question from the prosecutor, in the context of the reasons for delayed complaints and the effect of normalisation by the perpetrator, Dr Blackwell said that victims of child sex abuse may feel they are to blame, once they realise that the sexual conduct is wrong. She did not elaborate on this: the evidence on the topic consisted of that single statement.

[65] Mr Pyke again argued there was no live issue about this. The complainant had said she did not complain because she did not know the conduct was wrong, not because she blamed herself. Ms Markham pointed out that the complainant did refer to being ashamed of herself and said that once she became aware of the offending she was "really angry at myself, that it had happened". Given this evidence from the complainant, the issue of shame as a contributor to delay in making complaints was a live one. The very brief evidence on the topic was substantially helpful in providing another explanation for why victims delay in reporting, particularly where the conduct in issue has been normalised. Mr Pyke said the evidence invited speculation but we do not accept that it did. He did not identify any other prejudice arising from it.

(f) Availability of supportive adults

[66] Dr Blackwell gave extensive evidence on this topic. The essential message was that the willingness of a child sex abuse victim to report the sexual conduct to an adult caregiver will often be dependent on the child's perception of the caregiver's supportiveness and their prediction of what the likely reaction from the adult will be. She said it was important to note that while children are less likely to disclose to a parent or caregiver perceived to be unsupportive, some children may disclose to unsupportive parents and others will fail to disclose to highly supportive parents.

[67] Mr Pyke again said the unavailability of a supportive adult was not given as a reason for delayed reporting by the complainant. In fact, the complainant did report the alleged abuse to her mother although her mother did not believe her. The complainant went to the police soon after, so the mother's lack of acceptance of the complainant's allegations was of no moment. Mr Pyke said the evidence

"potentially infected the jury's assessment of the mother's evidence, by suggesting that she had not been a 'sympathetic' or caring mother at the time of the offending, and that this may be why the complainant kept it to herself". He said there was no foundation for this in the complainant's evidence.

[68] Ms Markham pointed out that the complainant had said that on an occasion when the appellant had groped the complainant's breasts, she had shoved him off and her mother had said "[y]ou should be hugging your father, not pushing him away". Later, she said that she had not resisted the appellant because "I didn't have the strength to do much at all because of what my mother was keep [sic] on telling me. You should be loving your father you shouldn't push him away".

[69] The complainant also said that she did not like discussing anything with her mother because her mother never listened to her. The evidence was that the relationship between the complainant and her mother had difficulties, and that the complainant had received counselling about it.

[70] The defence counsel said in his closing:

> Do you seriously think, because this is what you've been asked to swallow, do you seriously think there'd be a mother on this planet who would not say anything? Would not do anything about that? Just your average mum. Not a super-protective mum like this woman. Do you seriously think that[?]

[71] We think it is clear that the lack of support from her mother was a reason given by the complainant for her delayed complaint. Dr Blackwell's evidence was therefore addressing another aspect of delayed complaint that arose on the facts of the case. It was rightly admitted as another explanation why a complainant in an intra-familial child sex abuse situation may delay in complaining. Again, we do not see the fact the complainant gave another reason for delay as displacing the substantial helpfulness of the evidence. It was, however unnecessarily lengthy and detailed, as the Court of Appeal noted.[32]

[72] One aspect of Mr Pyke's criticism of this evidence was that it was evidence about the conduct of the complainant's mother, rather than about the complainant

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[32] *DH* (CA), above n 1, at [20].

herself. He added that the evidence invited stereotypical thinking about "imported brides" (the complainant's mother is an immigrant to New Zealand). He suggested that counter-intuitive evidence should be limited to dealing with the conduct of the complainant, not any other party. We reject this. The complainant cited the unsupportive conduct of her mother as a reason for the complainant's own conduct in delaying the reporting of the abuse so it was evidence about the conduct and credibility of the complainant (her delayed reporting of the abuse). As Dr Blackwell's evidence was referring to research on unsupportive parents in other cases and did not refer to either the complainant or her mother at all, we do not accept that it invited any thinking about the complainant's mother, stereotypical or otherwise.

[73] We consider the point made by the evidence was rightly made but this could and should have been done much more briefly than it was. However, the lengthiness of the evidence did not introduce any additional inadmissible material. It did not refer at any time to the complainant or her mother. We are satisfied that it met the requirements for admissibility set out at [30](a) to (e) above and its length did not make it unfairly prejudicial to the appellant.

(g) Sex education and fabricated allegations

[74] Dr Blackwell responded to a question from the prosecutor about sex education programmes by saying "[i]t's sometimes been asserted that allegations are false, having been fabricated by the child as a result of attendance at one of those child sexual education programmes that are run in primary schools". Dr Blackwell said that she had not found anything in her research to indicate that attendance at such programmes results in the fabrication of allegations by children. She said there was some evidence that sexual education programmes may trigger disclosure of actual substantiated sexual abuse.

[75] Mr Pyke said this evidence was irrelevant because no one suggested that the complainant had fabricated allegations as a result of attending a sex education programme. On the contrary, the relevance of sex education programmes was that the complainant explained that it was only after she had found out in such a

programme (when she was at secondary school, not primary school) that the sexual conduct between her father and herself was wrong. He said the evidence was merely an attempt to explain the complainant's "implausible" evidence that, despite attending sexual education classes that discussed sexual abuse during the period of the alleged offending, the complainant did not "join the dots" and conclude that her father's conduct was wrong.

[76] Ms Markham accepted that there was no allegation that the complainant had fabricated her allegations after attending a primary school sex education programme, and that Dr Blackwell was therefore addressing an erroneous idea that the defence had not raised. But Ms Markham argued that this did not make the evidence inadmissible, and pointed out that in a study conducted by Dr Blackwell, one third of jurors had subscribed to the myth that sex education classes may prompt false complaints. She submitted that, because jurors may be influenced by such misconceptions whether or not they are relied on by the defence, counter-intuitive evidence may therefore nevertheless be substantially helpful.

[77] We agree with Mr Pyke that as the defence did not suggest that the complaint in this case was triggered by knowledge gained from a primary school sex education programme and there was nothing in the facts of the case to suggest that possibility, there was no live issue calling for evidence from Dr Blackwell to explain that research showed no evidence that such programmes triggered false complaints. In this case, the disclosure came years after the complainant would have participated in such programmes so there was nothing to suggest that jury members may have laboured under the misconception that Dr Blackwell was countering. Dr Blackwell did not address complaints arising from sex education classes for older children. However, Mr Pyke did not identify any detriment to the defence from this evidence and we are of the view that its effect, in the overall scheme of the trial, was unlikely to have been material.

[78] As mentioned earlier, Dr Blackwell said that while there was some evidence such sex education programmes may trigger disclosure of actual substantiated abuse, there was no evidence they triggered false complaints. The passing reference to the evidence of such programmes triggering true complaints could potentially have been

relevant to the facts of this case. Dr Blackwell did not develop the point in any way. Rather, it seems to have been simply a counterpoint to her evidence that no studies show that false complaints are triggered by such programmes. The Crown does not seem to have relied on it at the trial. It was not suggested on appeal to this Court that this was a basis for its admission.

(h) Retractions of complaints

[79] As noted earlier, the complainant retracted her allegations shortly after making her complaint to the police.[33] She then disavowed the retraction.

[80] Dr Blackwell gave evidence about retractions as follows:

(a) A retraction of initial allegations may come from a child who may or who may not have been sexually abused.

(b) A retraction may be truthful in an attempt to repair earlier untruthfulness or the retraction itself may be untrue and an effort to repair the unforeseen consequences of a truthful allegation.

(c) Retraction of child sexual abuse allegations is not uncommon, especially in cases involving sexual offences perpetrated by family members.

(d) Some retractions may occur because of direct pressure from the perpetrator, from the child's mother or from other members of the family. The investigative process that follows a complaint may also impact on whether a child retracts or not, if the child finds the process traumatic or fears loss of their family.

(e) In a 2007 study of victims of child sex abuse, there was a reported retraction rate of almost a quarter: that is, almost a quarter of victims of sexual abuse had at one stage retracted their complaints. A child

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33 See above at [16].

abused by a parental figure was more likely to retract and younger children were more likely to retract than older children.

(f) A retraction is not diagnostic of sexual abuse but retractions may occur in some cases and the research literature indicates this is in response to anxiety, lack of support and family pressures and that many children who do retract later reaffirm their allegations.

[81] Mr Pyke said this evidence was prejudicially suggestive of truthful reaffirmation. He said the question for the jury was not whether and why retractions may occur in other cases, but why it occurred in this case. Since the complainant had explained why she retracted (because she was sad and wanted to avoid a fracture in the family), there was nothing counter-intuitive about what happened. He said the fact that other sexual abuse complainants may have retracted, then withdrawn their retraction, was "neither here nor there". He said Dr Blackwell's evidence on this topic was, effectively, advocacy for the Crown case, and that it downplayed the significance of the complainant's retractions.

[82] The Court of Appeal accepted that evidence on retraction was "of little value".[34] The Court said that the evidence in relation to retraction was strictly speaking inadmissible, but it saw it as harmless: it did not add anything to the case either way.

[83] We do not agree that the evidence was inadmissible. Although Dr Blackwell made particular reference to younger children in relation to retractions, there was nothing in her evidence that limited her discussion of retractions to children younger than the complainant. Her brief of evidence made this clear, identifying that the children who participated in the 2007 study ranged from the age of two to 17 years old.

[84] The fact that the complainant had retracted her allegations was something which could have been seen as supporting the defence view that the allegations were false. Jurors may have thought that a retraction was unusual and reasoned that the

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[34] *DH* (CA), above n 1, at [23].

fact the complainant retracted gave a strong signal that the initial and reinstated allegations were, therefore, untrue. Dr Blackwell's evidence that retractions are not uncommon among child sex abuse victims and that retraction does not necessarily indicate fabrication was substantially helpful in a context where the jury was being asked to infer from the retraction that the initial allegations were untrue. Dr Blackwell made it clear that a retraction was not diagnostic of sexual abuse and that whether the initial allegation (later reinstated) or the retraction was the true account remained to be decided by the jury. Her evidence did not go beyond the permitted bounds of evidence of this kind.

[85] The subject of retractions and recantations is dealt with in Dr London's review of the literature. The authors' conclusion is that:[35]

> … unless there are major external pressures on the child (e.g., removal from the family) most children do not retract disclosures when they are true. Even under circumstances of pressure, the recantation rate was less than 25%.

[86] The paper referred to the 2007 study relied on by Dr Blackwell as giving one of the "higher estimates of recantation".[36] Other available data indicates that only a minority of children (4–13%) retract.[37] It is suggested some will retract because the initial allegation is untrue, for example where a suggestive interview technique elicited the allegation.[38] We do not see the conclusions of Dr London and her fellow authors as undermining the reliability of the data on which Dr Blackwell based her evidence at the trial. We consider that her evidence met the threshold test of substantial helpfulness.

[87] However, we observe that if reference is to be made to the 2007 study, indicating a reported retraction rate of almost 25 per cent, that should be qualified by referring to other studies showing a lower rate. Dr Blackwell's reference to the 2007 study was made because the prosecutor specifically asked her about it, but that was presumably because Dr Blackwell's brief referred to the 2007 study but not to any other studies. Given the variations in the recantation rates referred to in the studies, it may be preferable in future cases that no reference be made to the studies in

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[35] London and others "How children report sexual abuse to others", above n 17, at 42.
[36] At 38.
[37] At 42.
[38] At 44.

evidence-in-chief but that Dr Blackwell's brief refer to the relevant studies and their reported retraction rates. That would give defence counsel the option of raising the reported rates in cross-examination if he or she wishes to do so.

[88] As mentioned earlier, Mr Pyke suggested this evidence was prejudicially suggestive of a truthful reaffirmation. We do not agree. Dr Blackwell specifically acknowledged that a retraction could be truthful in an attempt to repair earlier untruthfulness or may be untruthful in an effort to repair the unforeseen consequences of truthful allegation. This aspect of Dr Blackwell's evidence was picked up and emphasised by Mr Fairley in his closing address.

(i) Likelihood of offending in proximity to others

[89] Dr Blackwell was asked about literature and research on the presence or proximity of others during alleged offending. She responded that there are sometimes suggestions that because others might have been in the same vicinity as the child and the alleged perpetrator when the alleged abuse was happening, the abuse could not have occurred. She said that while sexual abuse of children usually takes place in secret, it does frequently occur with others nearby or in the same environs.

[90] In the present case there were a number of incidents in which others were in the vicinity at the time of the alleged abuse or there was a risk that the conduct would be observed by others. The complainant said her mother saw some of the acts, but her mother denied this.

[91] Mr Pyke said the focus of the defence was on the mother's denial that she observed any of the conduct occurring and the effect of that on the complainant's credibility, not on the basis that the offending could not have occurred because others were in the vicinity. He said there was not a live issue which called for evidence from Dr Blackwell.

[92] We do not accept that submission. The fact that the offending occurred in the presence or vicinity of others was a factor put forward by the defence to indicate

support for the defence case that the allegations were not true.[39] The reasoning that abuse could not have occurred if there were others nearby would have supported that contention. Dr Blackwell's counter-intuitive evidence was therefore substantially helpful to the extent of dispelling that erroneous reasoning. We accept that there is a fine balance between probative value and prejudicial effect in respect of evidence of this kind. We consider that it falls on the admissible side of that balance. The evidence was not presented as diagnostic of sexual abuse.

[93] At the end of the answer given by Dr Blackwell in relation to offending taking place in the presence or in the vicinity of others, she commented, "[a]nd for some perpetrators sexual offending may be compulsive, without regard to possible detection."

[94] Mr Pyke said this evidence should not have been given because it was not evidence about behaviour of complainants, which is what Dr Blackwell had said was the scope of her evidence. He said it also invited circular reasoning, and there was a danger the jury might have viewed the behaviour of the appellant as symptomatic of the risk taking behaviour of convicted offenders, and therefore likely to be an offender himself.

[95] We do not see this brief observation having the prejudicial effect described by Mr Pyke. The context in which the observation was made was the legitimate context of explaining why evidence that sexual abuse happened in the presence or vicinity of others did not necessarily indicate that it was untrue or that the complainant could not be believed. The jury was not asked to deduce from Dr Blackwell's observation about risk taking that the appellant was guilty because of the offending taking place in circumstances where there was a risk of it being observed.

Conclusion on Dr Blackwell's evidence

[96] As mentioned earlier the admissibility of counter-intuitive evidence was not challenged in principle and Mr Pyke did not take issue with the principles set out

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39 Mr Fairley was particularly critical of the complainant's evidence that some abuse happened in the appellant's bedroom when the mother entered and saw the appellant kneeling between the complainant's legs. See his comment in closing that is quoted at [70] above.

above.[40] Rather he argued that aspects of Dr Blackwell's evidence were not sufficiently grounded in the facts of the case to make them substantially helpful or were such that their prejudicial effect outweighed their probative value. We have addressed each point in turn. We now consider that evidence as whole. We think there is some cause for concern at the length of the evidence and the breadth of its scope.

[97] Mr Pyke made a number of general criticisms of Dr Blackwell's evidence. We address these in turn.

[98] He said her evidence went further than restoring a neutral balance, because it was not confined to what was "live" but reached into "off-point topics". He described this as a "creep over the boundaries of admissibility in order to secure a forensic advantage". We have addressed this submission in the context of the specific concerns raised by Mr Pyke and have found that in almost all cases the complaint that the evidence did not address a live issue is not made out.

[99] Mr Pyke submitted that, despite Dr Blackwell, the prosecutor and the Judge all stating that Dr Blackwell's evidence was not about the present case, it actually was. He said the jury would have deferred to Dr Blackwell's impressive credentials and experience and the jury would have concluded she "had something important to say about lots of things that mattered". In part this submission focused on the length of Dr Blackwell's evidence.

[100] The Court of Appeal was critical of the length of the evidence given by Dr Blackwell in the present case.[41] We agree with that criticism.[42] The question and answer format (with many points being repeated in the summary given at the end of her evidence) led to a degree of repetition that should have been avoided. We do not consider that the length of Dr Blackwell's evidence was such as to compromise its admissibility or make it unfair to the defence. However, evidence of the kind given

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40 At [30].

41 *DH* (CA), above n 1, at [20], where the Court described her evidence as "unnecessarily long and detailed".

42 Dr Blackwell's evidence took 50 minutes in total and the evidence in issue extends to about 13 pages of the notes of evidence. This can be contrasted to the brevity of Dr Blackwell's evidence in *M(CA23/2009) v R*, above n 10. The Court of Appeal noted at [12] of that judgment that the evidence in issue in that case covered four pages of the notes of evidence.

by Dr Blackwell should be kept as brief as possible (consistently with the need to ensure accuracy) to avoid any concern that a jury will treat it as having greater significance than it warrants.

[101] As we mentioned earlier, we consider that it may well have been preferable for Dr Blackwell to have read the relevant parts of her brief in this case, rather than giving viva voce evidence. Ms Markham said it was not uncommon for counsel to agree to that course in relation to evidence of this kind. Given that she was not to be cross-examined, another option would have been for the relevant parts of Dr Blackwell's brief to be read to the jury by the registrar. We think this would have removed the basis for any argument that Dr Blackwell could have been seen as an advocate of the Crown's position.

[102] We also question the need for Dr Blackwell to recite at length her qualifications and experience when giving evidence, in the absence of any anticipated challenge to her credentials. In the present case, Mr Fairley interrupted the prosecutor's questioning of Dr Blackwell to elicit her qualifications and indicated the defence did not challenge her expertise.

[103] We consider that, in cases where evidence of this nature is to be adduced, the trial judge and counsel should address any potential issues before the trial, with a view to ensuring that the evidence is given as briefly and clearly as possible. This could be a matter that is routinely addressed at callovers. For example, there could be a discussion about whether the expert's credentials will be challenged. If not, a short formulation of the expert's credentials could be agreed. If no cross-examination is anticipated, it may be that there could be agreement that the expert will read a brief, which could omit references to academic commentaries. There could also be a discussion about alternative methods of dealing with intuitive assumptions (a topic to which we now turn). Of course, none of this is intended to restrict the options of defence counsel to challenge such evidence and/or the expertise of the witness. We envisage that the practice of providing a brief of evidence setting out the expert's qualifications and giving references to all sources (as Dr Blackwell did in this case) would continue. That ensures defence counsel is

provided with full information so he or she can cross-examine the witness and/or brief potential witnesses for the defence.

Other ways of dealing with erroneous assumptions

Agreed statements

[104] In *M(CA23/2009) v R*, the Court of Appeal made suggestions for alternative methods of dealing with counter-intuitive reasoning in trials involving allegations of child sex abuse, obviating the need for evidence to be given by an expert.[43] The Court referred to an earlier Court of Appeal decision, *RA v R*, in which the suggestion was made that counsel could agree on material to be provided to the jury to educate jurors and have the resulting statement admitted by consent under s 9 of the Evidence Act.[44] In *M(CA23/2009) v R*, the Court of Appeal said it understood that the s 9 statement technique had been employed on at least one occasion and said that it saw no reason why this course could not be adopted.

Jury direction

[105] The Court in *M(CA23/2009) v R* also referred to the possibility of a judicial instruction to the jury, and cited the decision of the Criminal Division of the Court of Appeal of England and Wales in *Miller v R*,[45] which discusses that approach. The Court of Appeal also referred to the majority and minority judgments in the Supreme Court of Canada decision of *R v DD*[46] and said these indicated both the advantages and disadvantages of the use of judicial directions, as opposed to expert evidence.

[106] Ms Markham provided us with a copy of ch 17 of the Crown Court Bench Book issued by the Judicial Studies Board of England and Wales in March 2010. This contains a number of model directions dealing with matters such as "avoiding judgements based on stereotypes" and "late reporting". The latter includes the following statement:[47]

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43 *M v R*, above n 10, at [33].
44 *RA v R*, above n 26, at [32].
45 *Miller v R* [2010] EWCA Crim 1578.
46 *R v DD,* above n 24.
47 Judicial Studies Board "Crown Court Bench Book" (March 2010) at 358 <www.judiciary.gov.uk>.

> The experience of the Court is that victims of sexual offences can react to the trauma in different ways. Some, in distress or anger, may complain to the first person they see. Others, who react with shame or fear or shock or confusion, do not complain or go to authority for some time. It takes a while for self-confidence to reassert itself. There is, in other words, no classic or typical response. A late complaint does not necessarily signify a false complaint, any more than an immediate complaint necessarily demonstrates a true complaint. It is a matter for you to determine whether, in the case of this particular complainant, the lateness of the complaint, such as it is, assists you at all and, if so, what weight you attach to it.

[107] We can see the benefit in a direction of this kind being given, and therefore obviating the need for expert evidence. But the area of delay in reporting is less controversial than some other areas, such as retractions or normalisation, as is reflected by the inclusion in s 127 of the Evidence Act of a direction on delay. Not all of the topics covered by the evidence given by Dr Blackwell in the present case would be amenable to a jury direction of this kind.

[108] The majority of the Supreme Court of Canada in *R v DD* found that, as a matter of law, delay in disclosure by a complainant, standing alone, will never be a proper basis for an adverse inference against the credibility of the complainant. Delay was therefore an issue that could be dealt with by a judicial direction, which meant that expert evidence on the topic was not "necessary" (the statutory test for admission of evidence of this kind in Canada, in contrast to the "substantial help" test under the Evidence Act). The majority said that the trial judge should instruct the jury that there is no inviolable rule on how people who are the victims of trauma such as a sexual assault will behave. In assessing the credibility of complainants, the timing of the complaint is simply once circumstance to consider in the factual mosaic of a particular case.[48]

[109] In subsequent cases, *R v DD* has been seen as applying only where expert evidence dealing exclusively with the issue of delayed complaints is in issue. For example, in *R v Talbot*, a decision of the Ontario Court of Appeal, evidence called to explain that delayed or inconsistent disclosure and even recantation of claims of abuse is not unusual was found to be admissible despite the decision in *R v DD*.[49] In *R v Meyn*, expert evidence to the effect that it was common for victims of abuse to

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48 *R v DD*, above n 24, at [63]–[65].
49 *R v Talbot* (2001) 161 CCC (3d) 256 (ONCA) at [38]–[43].

continue involvement with their abusers was ruled admissible.[50] There appears to thus be a hybrid approach in Canada, whereby, if the only issue is the making of a delayed complaint, standing alone, this will be dealt with by jury direction as suggested in *R v DD*,[51] but counter-intuitive expert evidence will be allowed in relation to other issues.

Discussion

[110] We do not think it is appropriate to be prescriptive about how erroneous beliefs or assumptions are best to be countered in criminal trials. Judicial directions, s 9 statements and expert evidence are all possibilities. We do, however, consider that a cautious approach needs to be taken to the ambit of expert evidence given at trials of this kind to ensure that such evidence is confined to what would be substantially helpful, there is focus on live issues and that the evidence is not unduly lengthy or repetitive and is expressed in terms that address assumptions and intuitive beliefs that may be held by jurors and may arise in the context of the trial.

[111] Jury directions of the type used in England and Wales on topics where there is a general acceptance of the topic are a worthwhile alternative to expert evidence. If all the areas that would otherwise be covered by expert evidence are amenable to jury direction, this would obviate the need for the evidence and it would no longer be substantially helpful. If not, the jury directions could reduce the scope of the evidence to topics not covered in the directions.

[112] In the present case, Dr Blackwell gave a succinct summary of her evidence which, with some minor amendments and amplifications, could have formed the basis of a written statement that could have been read to the jury, whether by the witness or the registrar or, if she gave viva voce evidence, could have been the extent of that evidence. The summary was as follows:

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[50] *R v Meyn* (2003) 176 CCC (3d) 505 (BCCA) at [49]–[56]. See also *R v Tayebi* (2001) 161 CCC (3d) 197 (BCCA).

[51] See, for example, *R v Crampton* (2004) 188 OAC 357 (ONCA); *R v B (R)* (2005) 77 OR (3d) 171 (ONCA); *R v MWW* (2006) 205 CCC (3d) 410 (ONCA); *R v WB* (2005) 201 CCC (3d) 309 (ONCA); and *R v Wiebe* (2006) 205 CCC (3d) 326 (ONCA).

> In summary, the evidence that I have given does not prove or disprove that sexual offending has occurred in this case. My evidence has been intended to provide information about the behaviour of children and adolescents who have been sexually abused. Reading of the research literature, as well as my own experience, has indicated that reporting of child sexual abuse is most commonly delayed. But as I said before, the timing of a complaint does not assist us in determining its credibility because false complaints may be immediate or delayed and true complaints may be immediate or delayed. There are a number of reasons for non-reporting or delay of true complaints of child sexual abuse and these include the close or family relationship between the child and perpetrator. May be initial lack of understanding that the behaviour is wrong or illegal. Normalisation of the offending by both the victim and the perpetrator. Loyalty to and dependence on the perpetrator. Fear of the perpetrator, fear of being blamed, feelings of shame and embarrassment. So as I've said probably far too many times, delayed reporting is common and this is specially the case when the perpetrator is known to the child. And one of the findings in the literature is that parents and caregivers are less likely to support a child when the child accuses a family member or romantic partner of the parent or caregiver. And just as the child may be reluctant to disclose when the perpetrator is someone close to them, the parent may be less likely to support the child when the perpetrator is someone close to them. And so the availability of trusted, competent, protective adults to whom the child may disclose may be highly relevant in a child's decision making about reporting sexual offending. And the availability of trusted people who may believe them and able to protect them may be pivotal to their decisions to report the offending. Retraction of sexual abuse allegations may be truthful and an attempt to repair earlier untruthfulness. Or the retraction itself may be untrue and an effort to repair unforeseen consequences of the truthful allegations. And parental non-supportiveness is a non risk factor for retraction of true allegations. Some sexually abused children may come to hate their abusers, while others will – may continue to maintain a close relationship with them and in some cases continue to have feelings of love and affection for them, despite the sexual offending that has occurred.

[113] In its decision in the present case, the Court of Appeal suggested that Dr Blackwell's evidence should have been summarised and presented as an agreed statement to the jury.[52] This echoes the views expressed by that Court in *RA v R* and *M(CA23/2009) v R*. We agree that such an approach ought to be considered in cases of this kind. That will depend on the content of the evidence to be given (in particular whether it is limited to a topic such as delay not affecting the likelihood of a truthful or false complaint, on which there is apparently general acceptance or whether it includes evidence on more controversial topics, where there is not), whether the defence counsel wishes to cross-examine, whether a defence expert on the same subject is to be called, whether counsel are in agreement as to the method of presentation and other factors.

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[52] *DH* (CA), above n 1, at [26].

Jury direction about counter-intuitive evidence

[114] At the appellant's trial, the Judge gave a lengthy direction about Dr Blackwell's evidence. He emphasised that Dr Blackwell had not met the complainant and that her evidence was designed to educate, correct misunderstandings and remove false preconceptions. Having canvassed some of the evidence, he said:

> But this is all general, not specific to this case. That has to be emphasised again. As Dr Blackwell quite properly in her evidence said, and as I tell you, her evidence did not seek to prove or disprove that sexual offending occurred in this case. It says nothing about the credibility, the believability of [the complainant]. It is completely neutral, her evidence, in that regard.

[115] Mr Pyke argued that this direction was inadequate. He referred again to the observations of the Victorian Court of Appeal about grooming in *SLS v R*[53] where an expert witness had referred to the alleged offending as grooming behaviour but said that this was relied on only as evidence of grooming, not as evidence of the offending. The Court of Appeal of Victoria had expressed doubt that the jury would understand or maintain that distinction.[54] We agree, but we do not see this as having any relevance to the present situation.

[116] Mr Pyke said a cautious approach to Dr Blackwell's evidence required the Judge to explain to the jury that, if they accepted her evidence, they should not reason that because the complainant or the defendant behaved in a way that may be consistent with victims or perpetrators of sexual abuse, that meant that the offending had occurred.

[117] While a direction to that effect would have emphasised the clear message already given by the Judge that Dr Blackwell's evidence did not prove or disprove that sexual offending had occurred in the present case, we do not see its omission as material. Dr Blackwell had not suggested that because the complainant or the defendant behaved in a way that may be consistent with victims or perpetrators of sexual abuse, that meant that the offending had occurred. Neither had the prosecutor.

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[53] *SLS v R*, above n 27.

[54] At [201].

In fact, Dr Blackwell made it clear that her evidence did not prove or disprove that any offending occurred in the present case,

Jury direction about good character evidence

[118] The Judge gave a direction to the jury referring to the fact that the defence had elicited evidence from the officer in charge that the appellant did not have any previous convictions. The Judge added:

> The purpose of that evidence is twofold. The accused asks you to give it weight, as indicating he is not the sort of person likely to commit these offences. Secondly, he asked you to take it into account in assessing [the complainant's] truthfulness. Remember, of course, that logically there will have always been a first time for everyone who has offended. Every criminal offends for the first time. Evidence of good character, which this has been called for, is not of itself a defence, but you can, if you wish, take it into account in the way that I have said.

[119] Mr Pyke took exception to the passage indicating there will always be a first time for everyone who has offended, and that every criminal offends for the first time. He particularly deprecated the use of the term "criminal", which, he said, characterised the appellant as a criminal, notwithstanding that he had no previous criminal history. He said that a direction indicating that an offender must start somewhere suggests a prior disposition towards offending, which devalues the good character evidence in the eyes of the jury.

[120] The Court of Appeal rejected this submission pointing out the logic of the statement that there must always be a first time for everyone who has offended. However, the Court said it would have been preferable the Judge had not used the word "criminal".[55] We agree with the Court of Appeal that it would have been preferable not to use the term "criminal" in this context. We think, however, it is clear that the reference to "every criminal" was a reference back to the immediately preceding words, "everyone who has offended". Neither referred to the appellant and we do not think there is any real risk that the jury would have thought they did. We do not agree with Mr Pyke that a reference to the fact that there will be a first time for "every criminal" unfairly undermines the value of good character evidence. It is, as the Court of Appeal said, a logical statement.

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[55] *DH* (CA), above n 1, at [36].

Jury direction about memory

[121] The Judge said to the jury that it may be helpful to give some guidance about memories, given the witnesses were referring to events that had happened many, many years ago. He said:[56]

> [57] In view of the significance of these matters in the trial, it may be helpful if I give you some guidance about memories, given the witnesses are referring back to events that happened many, many years ago. Human memories are not permanently stored as if recorded on a tape, unaltered, to be played back at some later time as an exact recording of an event. I am sure you are all perfectly aware of that from your own experiences. Nor are memories always completely accurate. Memory depends in part on knowledge and in part on other sources of information additional to what is recorded when the event is first experienced.
>
> [58] There are three stages of memory, acquisition, when you see or hear or you acquire it, storage of the memory, and then recall of that memory. The processes used with each stage influence how accurately and completely any witness to an event will later be recalled. The stage at which memories are retrieved, that is, when a person is asked to recall what has happened in the past, will inevitably be influenced by cues available at the time, the things that are used to jog the memory, as we sometimes say. Those cues can include the nature of the questions asked, physical cues such a photographs or the nature of the occasion on which you are asked to recall. *So the accuracy and fullness of any person's recall may depend on factors such as the time that has passed since the event, and personal significance of the event. That is a matter of common sense, isn't it? I am sure we all in our memories have clear recollections of things that are personally significant to us. The emotive content of the event, the occurrence of other related events, why and by whom the person is being asked to recall, and the kinds of retrieving cues provided at the time of recall.* So you need to think about those sorts of things when making a decision about particular evidence which depends for its reliability on the accuracy and the fullness of the witness's recollection of what was said and done.

[122] The Court of Appeal pointed out that the direction then given by the Judge mirrored aspects of a report issued by the Law Commission on memory theory in 1999.[57] The Court of Appeal expressed the view that it would have been preferable if the Judge had not given the memory direction. It said the information was unnecessary and would not have assisted the jury.

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56 Emphasis added.

57 At [33], referring to Law Commission *Total Recall? The Reliability of Witness Testimony* (NZLC MP13, 1999). The Commission did not suggest this material was in a form that was suitable for jury direction.

[123] Mr Pyke submitted that the science in this field is complex and has developed considerably since 1999, when the Law Commission report was written. He referred us to an article by a Harvard Professor, Daniel Schachter, a leading scientist in this field, to illustrate how complex the science is. He suggested that the Judge's directions were old fashioned when compared to this more recent exposition of the relevant science. The direction went beyond the expertise of the Judge.

[124] Mr Pyke expressed particular concern about the Judge's comments on the impact on a memory of the personal significance of the event that is being remembered, in the passage we have highlighted above. Mr Pyke described this aspect of the direction as "oath helping". He said it suggested there might be a good explanation for the complainant's poor memory and the inconsistencies in her evidence.

[125] Mr Pyke said that because the direction was made in the summing up, counsel did not have a chance to counteract it. It was not likely to have provided assistance to members of the jury in their evaluative task. It involved an area of science outside the expertise of the Judge and, because it had not been foreshadowed, it was not something that counsel had the chance to comment on.

[126] We accept that the direction did not capture all the subtleties of recent memory research and did, in places, appear to be discussing matters of scientific fact, such as the reference to the three stages of memory. However, the focus of the defence in the present case was not on the accuracy of the memory of the complainant, but rather on whether she had fabricated the allegations. It was not suggested that she had made an error of memory but rather that she had lied. Mr Pyke did not point to any particular way that the direction could have affected the trial or the way the jury approached its task. His complaints were generalised.

[127] In light of those factors, we do not think it was helpful for the Judge to give directions on the issue of memory. We accept that it may be helpful in some cases to give guidance to a jury about memory, but we do not think this was such a case.

However, we do not consider the direction given by the Judge had a material impact on the present case for the reason given above.[58]

[128] We do not comment on the appropriateness of giving directions along the lines of those given by the Judge in a case where the accuracy of a witness's memory is in issue because of the developing science in the field and the fact that we did not have detailed submissions on the issue. We can see that a general direction on memory could assist a jury if a statement that does not involve divided scientific opinions can be identified. That is a topic which could be considered by the authors of the New Zealand jury trials bench book.

Jury direction: reference to "dirty laundry"

[129] One aspect of the defence case was that the complainant had "copycatted" her cousin, who made allegations of sexual abuse against an uncle. The cousin complained to her parents, but not to the police. In closing, the prosecutor said that the copycatting idea did not make sense. As no one had done anything in response to the cousin's complaint, it would not have made sense for the complainant to try to bolster her own complaint by reference to her cousin's experience.

[130] In his summing up, the Judge summarised this aspect of the prosecutor's closing as follows:

> Well, there is really no evidence of [copycatting] apart from what the mother immediately said to her daughter when she complained. [The mother had said "[the complainant] was only saying that it happened to her because it happened to … her cousin".] If she was copycatting I suppose [the cousin] might have never seen the light of day, because [the cousin] decided that her sexual abuse was not worth, even though she told us it was true, anything being done about it, some uncle who did it to her. Does that help you in any way that the [appellant's] family deal with their dirty laundry? It's a matter for you, ladies and gentlemen.

[131] In the Court of Appeal, Mr Pyke said that the meaning of this comment was transparently to the effect that the cousin had been persuaded not to complain to the police and that the family laundered the offending in-house. He said that there was no evidential foundation for such an inappropriately prejudicial inference. The Court

[58] At [126].

of Appeal rejected that submission. The Court said it was not satisfied that there was any suggestion that the appellant was involved either in the sexual abuse against the cousin or the suppression of its disclosure. However, the Court said it would have been preferable if the Judge had not used that "emotive sort of language" and described the remark as "unnecessarily gratuitous". But it said that, when considered in context, it was not unfair.[59]

[132] In this Court, Mr Pyke said that the Court of Appeal failed to address the combined effect of the dirty laundry remark and the reference to a "criminal" in the direction on good character. He said that because these were made in the summing up, the appellant did not have any right to reply to them.

[133] We agree with the Court of Appeal that the "dirty laundry" remark was gratuitous and should not have been made. However, we agree with that Court that, when it is considered in context, it is obvious that it does not refer to anything done by the appellant and does not reflect on him. There was no suggestion that the appellant had anything to do with the sexual abuse of the cousin or the decision not to report it to the police. The remark could not reasonably be construed as referring to him or reflecting on him. As neither the "dirty laundry" remark nor the reference to "criminal" reflected on the appellant, there was no need for the Court of Appeal to address their combined effect.

Cumulative effect

[134] Mr Pyke said that it was necessary to consider each of these grounds of appeal separately, and then to assess their cumulative effect. For the reasons we have given we do not see any of the grounds of appeal as being made out so the argument based on the cumulative effect of the grounds of appeal does not need to be addressed.

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59 *DH* (CA), above n 1, at [39].

Result

[135] The appeal is dismissed.

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