IN THE SUPREME COURT OF NEW ZEALAND SC 2/2014

[2014] NZSC Trans 13

PAKI HOANI TAIATINI

Appellant

v

THE QUEEN

Respondent

Hearing:	19 June 2014
Coram:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	T Sutcliffe and N P Chisnall for the Appellant M D Downs and M L Wong for the Respondent

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CRIMINAL APPEAL

ELIAS CJ:

Thank you, please sit.

MR SUTCLIFFE:

As the Court pleases, counsel's name is Sutcliffe. I appear together with Mr Chisnall.

ELIAS CJ:

Thank you Mr Sutcliffe, Mr Chisnall.

MR DOWNS:

Yes, may it please the Court, Downs and Ms Wong for the Crown as respondent.

ELIAS CJ:

Thank you Mr Downs, Ms Wong. Yes Mr Sutcliffe.

MR SUTCLIFFE:

As the Court pleases, Mr Taiatini was found guilty at trial on counts of sexual violation and indecent assault and his appeal to the Court of Appeal was dismissed. He's been granted leave, to appeal on three grounds before this Court, the first being was the evidence of the complainant's mother and her boyfriend admissible in terms of veracity or propensity provisions of the Evidence Act 2006? Secondly, if the evidence was admissible should there have been a direction from the trial Judge as to the use of the evidence could be made and was Mr Taiatini placed at any disadvantage by the manner in which the evidence arose in the course of the trial? And thirdly, if the evidence was admissible did its admission and or the absence of a direction from the trial Judge create the risk of a miscarriage?

In summary in respect of those three grounds the appellant's position is that neither witness's evidence was admissible. The complainant's mother LH opined that the complainant KH is incapable of lying and did not have the moral constitution to participate in an affair. The first part of that evidence, the inability to lie, constituted evidence about the complainant's veracity which it is argued is inadmissible and the latter was in effect propensity evidence bolstering and bolstered by the boyfriend's evidence that the complainant does not instigate sexual contact during the relationship with him. And it's the appellant's position that in terms of the veracity evidence, that is the complainant's inability to lie, in terms of section 37 it was not substantially helpful.

Moving on to the next ground in terms of the two questions posed, the appellant's position is that the Court of Appeal accepted that the mother was entitled to give direct observational evidence of how her daughter generally functioned and it is the appellant's position that had the evidence been restricted to that then arguably no direction would have been required, but unfortunately the adduction of the further

evidence that's complained of triggered on the appellant's appeal the requirement to provide tailored directions on demeanour and propensity given the importance of the complainant's characteristics as they played out at trial. It was a significant focus of the trial process, which I'll come to in more detail later in my submissions.

Secondly it's also submitted that the appellant was disadvantaged by the fact the evidence arose in the course of the trial as that process undermined his ability to offer an effective defence given the case that he anticipated the Crown would present at the trial.

In terms of the summary in respect of the third ground of appeal, really this was a contest of credibility. As the Crown in closing submissions to the jury repeated, it was a he said/she said case where credibility of either witness was central to the jury's inquiry and given that the complainant's mother's testimony that her daughter is incapable of fabrication was preceded by evidence about the complainant's intellectual and functional deficits it is submitted that the jury would have inferentially drawn the link between the complainant's condition and her capacity to lie which improperly, in the appellant's submission, bolstered her veracity, as did both the witness's opinion that she's not the type of person who would engage in an affair in the sense that her moral compass was so strongly defined as part of her personality traits that she couldn't possibly entertain such a relationship, and that was again supported by the boyfriend's description of the complainant's purported tendency to be sexually acquiescent. It is submitted that in those circumstances there was a miscarriage of justice and is not one that can be answered by reversion to the proviso.

And by way of background, the complainant and the appellant were both employed in a rest home and during the period of the time encompassed by the indictment she was a cleaner and the appellant was a caregiver.

ELIAS CJ:
Mr Sutcliffe, we have read the submissions –

MR SUTCLIFFE:
Thank you.

ELIAS CJ:

– so you don't need to develop this at any great length. Unless there's something in the background you particularly want to draw out of it.

MR SUTCLIFFE:

No. I can move through that part of it. What I would like to point out is in terms of how it is that the evidence came to be – objected to came to be admitted in the first place. And it really commences in the opening address of the Crown. The Crown opened the case on the basis that the complainant suffered from something akin to Asperger's syndrome. That was repeated twice in the Crown's opening address. It was also referred to in the evidence of two of the Crown witnesses. The position there is, by way of further background –

ELIAS CJ:

Do you want to just give us the reference to those?

MR SUTCLIFFE:

The reference to that is page 3, paragraph 7 and 8 of my submissions.

ELIAS CJ:

Oh, right, thank you. Sorry, I – do they give the reference in the –

MR SUTCLIFFE:

Yes.

ELIAS CJ:

Yes, thank you.

MR SUTCLIFFE:

Yes. So the Crown opened its case on the basis that the complainant suffered from something akin to Asperger's syndrome. As I have indicated, that was repeated twice in the opening. The background to this is that the complainant's mother had provided an affidavit in support of an application for screens pre-trial. That application it appears was opposed but the defence did not see fit to challenge that evidence in any way and the Crown sought an adjournment, it appears, of the commencement of the trial to consider whether or not the Crown would call expert evidence to support the submission that this complainant suffered from a condition

such as that but elected not to brief that evidence or call an expert. Arguably the Crown in opening on that basis were giving evidence, effectively should, perhaps arguably, trigger an application by the defence at that point for a mistrial because it was never intended that the Crown would call any evidence to substantiate those statements that she suffered from something akin to Asperger's syndrome. The mother's evidence was never intended to be called at all. The reason why the mother's evidence was called was initially because the manner in which the cross-examination of the complainant proceeded was on the basis that she had effectively engaged in a consensual affair with this man and subsequently felt guilty about it. Once it had been revealed to her family and they'd effectively spoken to her she effectively took their lead in a sense and either accepted or acquiesced to the proposition that it must have not, must have been non-consensual and therefore she stuck to that story. But the manner in which that was put to the complainant at trial was that in effect they had put her up to it, effectively, to put it bluntly, and the manner in which that defence was put in cross-examination resulted in the Crown deciding that they would reconsider calling the mother to effectively give rebuttal evidence in a sense to say, well, I did not or we did not put her up to it.

But in the context of that discussion with the trial Judge he then in the course of that discussion raised concern of his own volition as to whether or not the jury ought to hear evidence about her condition, because of course it was part of an affidavit that had been put before the Court for a pre-trial application and –

ELIAS CJ:
That was just the mother's affidavit?

MR SUTCLIFFE:
Yes. And the Crown had opened on it. And it's quite clear that the Judge perceived that she was, as a witness, the complainant was, as he saw it, compromised and she was very acquiescent from his view in terms of the answers that she was giving to the point, it would appear, of being somewhat suggestible. The prosecutor explained to the Court that it had not been intended to lead the evidence relating to her developmental progression and educational attainment because she hadn't been formally diagnosed with an intellectual impairment.

That matter was left where it stood but then later in the day after a second further consideration the Crown decided that they were going to call that witness to give the

evidence of her developmental issues and problems, and so – but it was not the primary reason for initially raising the calling of that witness in the first place. The Crown did not intend calling that witness for that reason until the Judge raised it as a concern.

Now, the Judge manifested the view that because the complainant in his view was significantly disadvantaged, that she'd simply acquiesced to the propositions put to her in cross-examination, because, as he saw it, she thinks that's the appropriate thing to do, the Judge described the evidence as rebutting the acceptance, the complainant's acceptance of the truth of propositions that were put to her during the course of cross-examination.

Now, this was opposed by defence counsel and defence counsel identified the procedural history of the matter whereby the trial was delayed while the Crown decided whether to obtain an expert's opinion regarding the complainant's condition, which the Crown elected not to do.

Now, importantly, however, the Crown would not touch upon whether KH was capable of lying.

Now, I've included in my submissions there that the witness, the mother that is, had included that in her affidavit but in fact that – I don't believe that's correct. That's not the case.

ELIAS CJ:
I don't know that we've got the affidavit.

MR SUTCLIFFE:
Between us we have an unsworn copy of it.

ELIAS CJ:
No, well I don't think we need it, it's just that –

MR SUTCLIFFE:
Yes.

ELIAS CJ:

– are you – you're not relying on it?

MR SUTCLIFFE:

No. Not relying on it.

ELIAS CJ:

No. Thank you.

MR SUTCLIFFE:

But essentially it clearly was discussed in the discussion between the Judge and counsel that there was some suggestion available that the complainant was incapable of lying, which was evidence that was not to be led, obviously, for obvious reasons.

Now, the mother was the penultimate witness for the Crown. There is a summary of what it is that the witness had to say at page 6, commencing at paragraph 20.

ELIAS CJ:

Do you want us to – it's just that – sorry, I'm flipping through some of the materials because we've only had the hard copy given to us this morning, but is the argument that preceded the recall of the mother something that you were going to take us to? I see it's at around page 231. Is that relevant in setting the background to your argument?

MR SUTCLIFFE:

In terms of – well –

ELIAS CJ:

You've touched on it, which is why –

MR SUTCLIFFE:

Yes.

ELIAS CJ:

– I'm asking if you want to take us to it.

MR SUTCLIFFE:

Not in – I can just perhaps go to that.

ELIAS CJ:

Because the suggestion's put, isn't it, by the Court that the defence could have called expert witness and the point is made in response, perhaps quite reasonably, well that's just an affidavit in support of a different application and there's been no notice that this evidence was going to be called.

MR SUTCLIFFE:

No, well that's right. the Judge does make that comment to the defence that, well, after all, you've known about this, you could've briefed your own expert, you could've challenged this information at the pre-trial stage. But you're quite right that the reasonable response from defence counsel was, well, that's an entirely different process. It's focused on a very narrow point and it's – it is not and has not been relevant to the questions of fact which this trial has proceeded on. The theory of the case for the Crown had never drawn on that information at all, notwithstanding that the Crown had the opportunity to brief – and I suppose at the end of the day the defence is entirely permitted to understand and appreciate when the Crown opens, in fact, that this is what the case is about, these are the witnesses who are going to be called, and it would not be a reasonable burden to place on the defence to, just in case something changes, to go and have an expert waiting. But, yes.

In terms of the witness's summary, and it's important contextually, with respect, as to how the mother's evidence –

ELIAS CJ:

I see that Crown counsel agrees that if you were going to have evidence that this woman can't lie, which he says is actually what some people have told us, which is in fact what emerged, that would have to be an appropriately qualified expert.

WILLIAM YOUNG J:

Where's that passage?

ELIAS CJ:

Page 236. Yes, thank you.

MR SUTCLIFFE:

Yes. Referring to the contextual argument of the evidence that was given by the mother I've included paragraph 20(a), the commencement that she's a clinical specialist nurse with a master's degree working in the rheumatology department, Waikato Hospital. That was in fact the last part of her evidence-in-chief, in terms of her qualifications, and, however –

ELIAS CJ:

Give us – is the page reference there in your – oh yes, I – oh well you – do you have a page reference to that?

GLAZEBROOK J:

Is that 166 of the notes of evidence is it?

MR SUTCLIFFE:

Yes.

ELIAS CJ:

Oh thank you. Oh I see, of the notes, yes.

MR SUTCLIFFE:

She did give general evidence of an observational nature and did comment on the Asperger's/autism syndrome for which her daughter had not been formally diagnosed and she opined that before – that was before she was seen by a paediatrician when she was younger before there was any real significant understanding about Asperger's or autism spectrum. She was stopped and didn't go any further but injected into her observations about her daughter's characteristics around this quasi-diagnosis of her daughter's condition. There were comments about what characteristics her daughter had which included that in general terms that she was very ordinary, in fact behind in terms of her social and educational development but that, consistent with what seems to be general knowledge about people with autism, that she has certain exceptional talents for memorising facts and details of things that she's interested in, which her mother spoke about in her evidence. She spoke about her being particular reserved and not necessarily trusting of individuals and somewhat acquiescent, and then she went on to speak about the circumstances in which the complaint was then made and how that was handled by the family.

In cross-examination she was asked whether she had indicated to her daughter that as her mother she accepted that her daughter would not have consented to what had happened; in other words giving some, a bit of subliminally or direct support for her daughter to sort of effectively hang on to and confirm that she didn't consent, so this was the suggestibility proposition that was being put to her, that she, her daughter might accept in some way a suggestion from her that she had not been consenting when in fact, according, as according to the defence she had. That was then the response was elicited that is complained of, as the mother responded, "You see," referring to her daughter, "she hasn't got the ability to fabricate things, she just tells the truth. She tells it as it is and I've known, you know, that's just the way she is."

There has been some suggestion that as a result of this coming out in cross-examination it somehow lessens the seriousness of the impact of this evidence. But it is – it was not the type of – it wasn't a question that would naturally elicit that response. The question that was being asked was something quite different and the answer that came out would have been entirely unanticipated and could not have been foreseen.

There has also been the suggestion that in response to this, well, a jury could possibly just brush that off and deal with it as being a supportive mother simply sticking up for her daughter, and if that was in isolation to the other evidence that might well be something that could be countenanced, but this was in the context of describing specific characteristics of a person with a particular type of as-yet-undiagnosed condition which rendered it far more prejudicial than simply a throwaway line, and given what the jury was told about this woman's condition by her mother, with a background of qualifications that she has, the position is that this became all the more egregious in terms of undermining this appellant's right to a fair trial.

The mother then went on and the issue of consent was traversed in re-examination.

ELIAS CJ:

Can I just ask, as you're putting it on the entrenchment of the veracity rules, the veracity rules aren't – the policy behind the veracity rules, if one goes off the Law Commission report, is really to prevent a proliferation of ancillary issues. There's no necessary impact on trial prejudice. One would've thought that really your complaint is more that it's impermissible opinion evidence about veracity.

MR SUTCLIFFE:

I can understand that, that point.

ELIAS CJ:

Well perhaps you need to identify for me what the impact on the trial is of admitting evidence that's not admissible under the veracity rules. What's the issue that you're…

MR SUTCLIFFE:

Well the issue here is, perhaps has a number of strands to it. Firstly in terms of the evidence that was given itself, it is evidence of veracity which goes impermissibly to the question of this complainant's propensity to tell the truth. And so it's veracity, in a sense propensity as well. and that evidence can never be helpful except if it's given some context.

ELIAS CJ:

Well I would've thought that veracity evidence in a he said/she said probably is always helpful if it's otherwise admissible. The problem here is that it's someone's opinion and it's in circumstances where arguably they're not qualified as an expert.

MR SUTCLIFFE:

Well, with respect, the position or the submission I would make in response to that is that the veracity evidence of itself can never be helpful unless there's, unless it's provided with some context. Here the jury are being asked to decide whether or not this woman would consent in circumstances where there's a workplace affair. The mother is giving evidence generally about what she's observed about her daughter, not necessarily with any real context that would assist the jury assess the complainant's denials that she was consenting when faced with a very emotional, potentially confused domestic situation with conflict in the workplace, and –

ELIAS CJ:

It looks though from the discussion in chambers that really this evidence was called to explain the way she presented in the witness box, largely.

WILLIAM YOUNG J:

Can I just – just looking at the passage you rely on at page 174, the theory of the defence case is that she's been put up by the family or encouraged by the family to make the allegation.

MR SUTCLIFFE:

Yes.

WILLIAM YOUNG J:

And that's sort of the point that's being alluded to in the question, albeit a bit softly, "When your daughter was talking to you about these events did you indicate to her that you accepted what she was telling you, that she wouldn't have consented to what had happened?" Now, the answer is responsive to that, she's effectively saying there was no occasion for me to do so because I know she doesn't lie. So it's not an unresponsive answer, is it?

MR SUTCLIFFE:

No.

WILLIAM YOUNG J:

And secondly, it is directly responsive to the question as to whether she put the daughter up to making the allegation.

MR SUTCLIFFE:

Although the – there is then a response further in the evidence where the mother says that, in response to the query whether or not she told the daughter what to say at the police station, she said, "No, I just told her to go and tell the truth." Which then –

WILLIAM YOUNG J:

And I'm –

MR SUTCLIFFE:

Yes.

WILLIAM YOUNG J:

– conscious of that, but this particular answer was actually pretty responsive to the question which was asked. I mean she might've tied it in, "And therefore there was no occasion for me to tell her that I accepted what she said because between us I know she tells the truth and she knows I know that." I mean if she rounded that off then it would've been plainly responsive.

MR SUTCLIFFE:

I'm not sure I agree with that proposition, with great respect.

WILLIAM YOUNG J:

But I mean if counsel is suggesting to someone even softly that they've put someone else to lie, up to lie, they can expect a quite robust response. And this answer must have been within the range of expected responses because presumably defence counsel knew that the mother's position was that the daughter never lied, couldn't lie.

GLAZEBROOK J:

Maybe we do need to see that affidavit –

WILLIAM YOUNG J:

Yes, we better see it.

GLAZEBROOK J:

– because the only way they could know that is –

WILLIAM YOUNG J:

Well there's, it's discussed in chambers, sorry.

GLAZEBROOK J:

Well no, they – what the Crown said is, "Some people have told us that she cannot lie."

WILLIAM YOUNG J

Right, sure, sure.

GLAZEBROOK J:

So it's not clear who had told them.

MR SUTCLIFFE:
It's not in the affidavit.

GLAZEBROOK J:
And in any event does it matter if it's inadmissible who elicit it, elicits it?

WILLIAM YOUNG J:
Well it may be it's admissible by way of response to the suggestion that the mother put her up.

ELIAS CJ:
If that is how one takes the question.

WILLIAM YOUNG J:
Yes. Yes.

MR SUTCLIFFE:
There is, thinking about Your Honour's question about that, and it's not, by the way, in the affidavit that I've seen but it obviously was part of a discussion that had been had, in the cut and thrust of the trial when a witness such as this is being called, not that there's any evidence of this but it would be expected that responsible counsel would advise the witness, "This is the evidence that you've been called to give," and, indeed, that is how Crown counsel opened this cross-examination.

WILLIAM YOUNG J:
But would counsel advise the mother here, "Well you've got to bear in mind that it's going to be suggested to you that you've put the daughter up to making the allegation"?

MR SUTCLIFFE:
I'm not sure that we go that far. But certainly I would've expected responsible counsel to say to the mother, "But you're not going to be able to say that your daughter can't lie." And so defence counsel, in cross-examining the mother, would have less expectation that that is the type of answer that would be given in response to that question.

WILLIAM YOUNG J:

But gee, you know, there must be hundreds of cases where the mother of a complainant responds to a question broadly along these lines saying, "Well look, she's a good little girl, she doesn't lie."

MR SUTCLIFFE:

Yes.

ELIAS CJ:

"And she doesn't do that sort of thing," or whatever.

WILLIAM YOUNG J:

Yeah, or what did you think when she told you that her stepfather had been sexually interfering with her? Did you think she was lying?" "No of course I didn't think she was lying. She's a good little girl who doesn't lie." So these, this is the rough and tumble, the rub of the green that occurs in a criminal trial. Now the slightly awkward thing here is that there may actually be a more solid foundation for the proposition that would normally be the case but does that solid foundation make it worse?

MR SUTCLIFFE:

Well, yes, but I think to respond to that, to be fair, those sorts of questions would rarely be asked directly. Such evidence wouldn't be elicited directly because I would expect either counsel or certainly the Judge to intervene before that question would even –

WILLIAM YOUNG J:

No but it's normally in cross- –

GLAZEBROOK J:

Well I can't recall –

WILLIAM YOUNG J:

I mean I've tried cases –

GLAZEBROOK J:

– many instances where that question and response was elicited because people know very well under the previous law that you weren't allowed to oath-help by saying things like that.

WILLIAM YOUNG J:

No. No, but I'm talking about cross-examination, defence counsel challenging the parents of the complainant and sometimes getting some pretty robust answers.

MR SUTCLIFFE:

Well, certainly it's not my practice to go near those types of questions or to provoke that type of response, and my submission is that it's not something that defence counsel was doing here. It certainly is not that direct provocative perhaps to the concerned mother who is giving the evidence to make a point, but it was entirely unnecessary and otherwise inadmissible, and in the context of the evidence that she had been given, this was yet again another distinct characteristic that was unique to this person in the absence of any expert evidence to confirm that this had any real validity at all, and it imbued her evidence with, frankly, in a sense a complete answer to what the defence case was, that this woman was consenting, and it supported in a impermissible way the Crown claim that the complainant was a witness of the truth.

Now, I want to deal here with how that was dealt with, how that evidence and the subsequent evidence about lack of initiative in sexual matters, otherwise referred to as the propensity aspect of this appeal –

GLAZEBROOK J:

Can you explain why you say that's inadmissible?

MR SUTCLIFFE:

Why it's inadmissible?

GLAZEBROOK J:

Because here the allegations were that there'd been some initiation of sexual behaviour. So why do you say that evidence that she, apart from the issue of prior sexual history, why do you say that that would be inadmissible?

MR SUTCLIFFE:

We're talking propensity –

GLAZEBROOK J:

Yes.

MR SUTCLIFFE:

– evidence now? Really the view that appears to be taken is that when you're dealing with the rationale behind giving propensity evidence, that there needs to be some context to it. Here the mother is talking generally about the daughter's –

GLAZEBROOK J:

Oh no, no, sorry, I thought we were on to the boyfriend's evidence.

MR SUTCLIFFE:

Oh yes, okay. Well I think it's all part and parcel of the same matrix, but I'll deal with the boyfriend's evidence. He's talking about a – initiating sex during the course of a relationship.

GLAZEBROOK J:

Well isn't the defence theory that this was a relationship, it was an illicit affair?

MR SUTCLIFFE:

Yes.

GLAZEBROOK J:

So that was the defence theory wasn't it?

MR SUTCLIFFE:

Well the defence theory was that it was a budding illicit affair. And the position which the appellant takes is that that's a completely different context to what is a very open relationship, whereas I understand it she was living with her partner, and if she wasn't living with him then certainly there was an ongoing sexual relationship. And what is being discussed here is –

GLAZEBROOK J:

Why would that make one more or less likely to initiate matters?

MR SUTCLIFFE:

Well it's – I suggest it's a different environment. It's the context of the environment that I think Your Honour referred in *R v K (CA421/08)* [2009] NZCA 176 to, in terms of the veracity evidence of it being situational…

GLAZEBROOK J:

This isn't veracity though. This is clearly behavioural evidence, isn't it, so it's –

MR SUTCLIFFE:

If the –

GLAZEBROOK J:

– clearly just propensity evidence.

MR SUTCLIFFE:

It is, but certainly – if you recall propensity evidence it has to have some bearing on the circumstances of or the pressures or the – I guess the circumstances in which the actions are undertaken, and what the appellant's proposition is is that in this case we're talking about a workplace affair about which subsequently the defence proposition is she feels guilty. As opposed to something which occurs within a marriage-type of relationship. he's talking there about initiating sexual relations within that environment, which is, with respect, from the appellant's position a different perspective altogether.

ELIAS CJ:

There are two aspects of the propensity. One is what the mother said in re-examination –

MR SUTCLIFFE:

Yes.

ELIAS CJ:

– and the second what the boyfriend said.

MR SUTCLIFFE:

Yes. And again, I mean they are overlapping in the sense that the mother's reference was not – well, it was propensity evidence but it also went to bolster this perception that there were these particularly special characteristics with which this person was imbued.

ELIAS CJ:

Or that the special characteristics bolster the propensity evidence –

MR SUTCLIFFE:

Yes.

ELIAS CJ:

– is probably the right way round.

WILLIAM YOUNG J:

Can I – the second question, the black and white world comment occurs very soon after the can't lie –

MR SUTCLIFFE:

Yes.

WILLIAM YOUNG J:

– evidence, and it's really responsive to the same suggestion, isn't it?

MR SUTCLIFFE:

Well, it's –

WILLIAM YOUNG J:

"Did you put her up to say she didn't consent?" and she's saying on this occasion, "Well there could be no occasion to me because I know perfectly well that she wouldn't. Because she lives in this black and white world where she wouldn't have sex with a married man. So it's, it's responsive to the defence theory of the case as to the interactions between the mother and the daughter.

MR SUTCLIFFE:

But it's also a question that was posed in re-examination by the Crown.

WILLIAM YOUNG J:
Yes, I appreciate that.

MR SUTCLIFFE:
Yes.

WILLIAM YOUNG J:
But it's –

GLAZEBROOK J:
Well actually the – if you look at the question there the response actually does seem to be non-responsive. Well it's not non- – well it's non-responsive because she says, "How did that come into the conversation?"

WILLIAM YOUNG J:
"It didn't come into the conversation because I know she wouldn't consent because she lives in this black and white world." It's responsive to the question at the top of the page I think.

ELIAS CJ:
Well it may be refining a lot of…

ELIAS CJ:
What page? Where is that?

WILLIAM YOUNG J:
174.

GLAZEBROOK J:
174. It says right near the end, "I had a question for you about her not consenting, not wanting things, these things to happen. How did that come into the conversation?" Well it doesn't seem that she lives in a black and white world was in the least bit responsive to that. I mean one can – I'm not criticising the mother because one can understand what the mother might be doing, it's just I don't think it was responsive.

MR SUTCLIFFE:

Well –

GLAZEBROOK J:

Because the mother is just saying what she feels about her daughter and can't criticise that.

MR SUTCLIFFE:

Well no, exactly and it seems that that is exactly in the same vein as the earlier response that the appellant is complaining of.

ELIAS CJ:

Can I just – I'm not sure that you did sufficiently answer Justice Glazebrook's question about what is wrong with this evidence as propensity evidence? What makes it inadmissible?

GLAZEBROOK J:

Well there are two strands to it. It's the boyfriend's one and then the mother's reference, which is slightly different I think.

ELIAS CJ:

Although both, both directed at she's not the sort of person to behave like that.

GLAZEBROOK J:

Though I would see the boyfriend's evidence being directly contradictory of something that had been said to have happened, ie, initiation, and therefore a non-initiation is directly counter to that, whereas the more sort of black and white world and married man isn't really responsive except in a generalised sense. And again it's possibly a mix between veracity and propensity but because it's – I mean obviously she hasn't had affairs before, one assumes, so – but that doesn't mean she has a propensity not to have affairs, because there's always a first – there must be a first time for everything.

MR SUTCLIFFE:

Yes. And in a sense that's why on the other side of the margin it's sort of argued that the comments by the boyfriend are the normal behaviour during the course of their relationship can't really speak of what her response would be if placed in a situation

where somebody else makes advances and thereafter something occurs and there is, as was argued, initiation by her. It doesn't follow that that evidence would be otherwise admissible. In fact the Court of Appeal did note, fairly, that had the evidence been the subject of a pre-trial application it most likely would not have been admitted.

WILLIAM YOUNG J:
You'd never lead opinion, veracity, propensity evidence in this way, in this manner. If it was going to be led it would be led very differently and more formally.

MR SUTCLIFFE:
Yes.

WILLIAM YOUNG J:
So it's only come in, in a sense, accidentally and then that's required the, requires the analysis.

MR SUTCLIFFE:
Yes.

Now, the appellant gave evidence, as the Court's aware, and he rejected the prosecutor's position that he had observed that the complainant had an apparent lack of initiative, and he was accused of depicting her as the sort of person who would have an affair with him, and the prosecutor employed the mother's evidence during cross-examination to compare and contrast it with the way the appellant described the complainant's social skills with particular emphasis on the fact that the appellant's description of the complainant initiating sex was something completely out of character. The trial Judge in summarising the appellant's evidence contrasted his description of the complainant's abilities with those provided by the mother, amongst other things, and he observed that all of them, that is the prosecution witnesses, refer to her inability to show initiative, and yet the Crown says that the defence or the accused in his evidence said that she was the one who took initiative on occasions, she was the one who took her pants down, she was the one who masturbated him. Of the defence position the Judge noted that the accused did not know of her disability, that he was not taking advantage of someone who was vulnerable, and that she was otherwise a polite and cheerful co-operative person and it was reasonable to assume that in those circumstances it was a willing participant. Even if

she did not want his attentions the defence say that she took the least part – took the path of least resistance and was unable or unwilling to get her message across to the accused. I'll come to –

ELIAS CJ:
Was this a retrial?

MR SUTCLIFFE:
No.

ELIAS CJ:
No. I just wondered –

WILLIAM YOUNG J:
Something had happened hadn't it? Hadn't counsel been sick at an earlier hearing?

ARNOLD J:
And I think –

ELIAS CJ:
Yes, there was something about what was said at the first hearing.

ARNOLD J:
That's right. didn't the Judge's concern arise initially about the complainant's condition arise as a result of the fact that defence counsel had cross-examined her on the basis of, I thought, earlier evidence before the trial had been aborted, and the witness had become extremely confused. The Judge was concerned about that –

MR SUTCLIFFE:
Oh yes. Sorry, yes.

ARNOLD J:
– and wanted – and that's what –

ELIAS CJ:
Oh yes –

ARNOLD J:
– drove him to say –

ELIAS CJ:
– that's at page 215.

ARNOLD J:
Yes.

MR SUTCLIFFE:
Yes. What I will come to is the – in time, and the purpose of just putting forward those points that I've just raised is that there was a significant shift occasioned by the introduction of this evidence in how the defence case, how the prosecution case followed from the opening to the closing, and more particularly about how the defence then had to adapt from the opening position to what – how the case was closed for the defence. And that's apparent in those passages which I've just referred to but I will come back to that, Your Honours.

Now, the next question is page 11: was the evidence of the complainant's mother and her boyfriend admissible in terms of the veracity or propensity provisions of the Evidence Act? I know that we've had some discussion about that but I'll traverse my submissions in that respect, or paraphrasing.

The first step, it's a two-stage process, with respect, to determine that, some of which we've already gone through, but really it is, the first step is to, in this dispute, is to put in context that evidence about her daughter's condition and why this evidence came to be admitted at trial. We've already dealt with that in some detail already. On the one hand in this appeal the Crown challenges the appellant's reference to the general evidence of the mother but on the other hand says that it was clearly substantially helpful on the basis that it is in a sense expert evidence. But the criticism that the appellant has of that argument is that the Crown doesn't then directly engage with why the evidence was required in the first place. Why was it substantially helpful to introduce this –

ELIAS CJ:
Well it wasn't led evidence so I'm not sure really, well, what the point of putting it that way is.

WILLIAM YOUNG J:

You're talking about the general evidence the mother gave in evidence-in-chief?

MR SUTCLIFFE:

Yes. Yes.

ELIAS CJ:

Ah.

WILLIAM YOUNG J:

But that wasn't – that – was that really the subject of the application for leave to appeal?

MR SUTCLIFFE:

Well no it wasn't. I accept that. And it's not intended in this appeal to actually challenge those findings in the Court of Appeal; it's not (inaudible 10:56:19) leave being given. But –

WILLIAM YOUNG J:

So why are we worrying about it?

MR SUTCLIFFE:

Well I –

WILLIAM YOUNG J:

Just remind me?

MR SUTCLIFFE:

The – yes. I understand the – and we have had –

GLAZEBROOK J:

Well is it because of the, is it because of the link –

MR SUTCLIFFE:

Yes.

GLAZEBROOK J:

– with the later – so it's not that you're challenging that evidence, you're just saying that in the context of that evidence –

MR SUTCLIFFE:

That's right.

GLAZEBROOK J:

– having been given the jury would've understood the inability to lie as being a consequence of the condition?

MR SUTCLIFFE:

Yes.

GLAZEBROOK J:

Is that…

MR SUTCLIFFE:

That is, in a nutshell, Your Honour, which deals with largely the argument that's been made between paragraphs 31 and 37.

GLAZEBROOK J:

Or may've understood the ability to lie.

MR SUTCLIFFE:

Yes.

GLAZEBROOK J:

Inability to lie.

MR SUTCLIFFE:

So it really is again the context in which this evidence was given. And, with respect it sort of – you can look at this, the commencement of how this came about as almost like a rising tide which gradually enveloped the trial because if you look at the procedural history of it, where there is a – there is evidence available potentially if the prosecution wish to go through the appropriate process and obtain an expert to give that evidence. Such an expert would be able to comment on the observational

evidence given by the mother and make, and provide perhaps a jury with a basis on which to draw the conclusion but inevitably will invite it in the way this evidence came. The rising tide, in my argument, is a valid one because there were deliberate decisions made, it was there, it was known to the prosecution, they chose not to do it, but then nevertheless chose to open on it with no intention of calling evidence to support that opening statement.

WILLIAM YOUNG J:
Well, what that she was suffered – but wouldn't that – wasn't that obvious, that she was a bit different?

MR SUTCLIFFE:
Well it would've been obvious that she was struggling. It may well have been obvious to a jury that she's somewhat suggestible. But to then give it a label –

WILLIAM YOUNG J:
It's not suggested the label's wrong, is it?

MR SUTCLIFFE:
Well, the problem is she has never been diagnosed with that.

WILLIAM YOUNG J:
Well that's true, but a parent might know whether someone, a child is on the autism spectrum.

MR SUTCLIFFE:
Well that's the problem then, isn't it, because you have a situation where, and this is the nub of the appellant's case, is that you have a mother giving effectively expert evidence as to what her daughter's medical condition is, and then –

WILLIAM YOUNG J:
So say she had been diagnosed and the mother just came along and gave the evidence, would that have been hearsay?

MR SUTCLIFFE:
It would've been.

WILLIAM YOUNG J:

But would it –

MR SUTCLIFFE:

But in addition to that –

WILLIAM YOUNG J:

Would it have been problematic? I mean I – I mean if I give evidence of my date of birth it's hearsay because I'm really relying on what mum and dad told me. I mean there's a part of it that just really – I suppose you have to be realistic about things that happen on, happen within families and family interactions.

MR SUTCLIFFE:

But the defence have no opportunity to then deal with this in a way that the defence would otherwise be able to, which would be to look for their own expert, to seek their own advice, and indeed this was not expert evidence, when it's all boiled down to it. It was in, almost in the guise of that but it wasn't and –

WILLIAM YOUNG J:

But – it's 12 lines in a transcript of 216 pages, the three bits of evidence.

MR SUTCLIFFE:

But it's the impact of that evidence in the context of this trial.

ARNOLD J:

Well it was useful to the defence, wasn't it, to, in terms of using her condition to bolster the argument that there might be a reasonable belief in consent. In his closing defence counsel drew the jury's attention to the way the witness, the complainant had appeared in the stand and the fact that she'd smiled constantly and so on, and he used that and other material, that she was polite and co-operative and helpful and so on, to say this adds to the argument that my client had a reasonable belief in her consent. So it was actually quite important to the way that the defence presented its case in the end, wasn't it?

MR SUTCLIFFE:

Well my submission to that, Your Honour, is that that became a necessity for the defence to do something. How to deal with it?

ARNOLD J:

Well no, there – it – but if the defence is right about the way the witness presented in giving evidence, isn't it going to be obvious? That's what the defence picked up on.

MR SUTCLIFFE:

Well, I think it's fair to take, go back and look at what the defence proposition was in their opening statement. And it was that this was a straight case of consent, that she did consent, that she gave knowing consent. By the end of the trial – and that she had subsequently lied when faced with the enormity of her infidelity and the situation with her family and her boyfriend, by the end of the trial, as a result of the evidence that had come in, the way the evidence had been introduced, he was having to deal with a situation where the mother had given evidence that – indicating that she couldn't possibly have consented, that she was very suggestible, and that she was a woman that didn't lie. And his submission addresses that. Not out of design but frankly out of necessity. He was put in a no-win situation, he had to deal with it on that basis. And that is not the way the trial started out. That is not what he set out to have to deal with. That was forced upon him. It wasn't something which – I mean that's what – I mean defence counsel do have to move with the waves during the course of a trial and there are ebbs and flows and things happen that are unforeseen. Well, this was more than something unforeseen. This was – to put it bluntly, something of an ambush for him, that he had, then had to deal with it.

WILLIAM YOUNG J:

But this – his theory that – and that she was encouraged to go along with a false story by the reaction of her parents and boyfriend was effectively blown out of the water by this evidence.

MR SUTCLIFFE:

It was severely undermined, there's no doubt about that.

WILLIAM YOUNG J:

Okay, showing, doesn't it, that it was relevant?

MR SUTCLIFFE:

And it may well –

WILLIAM YOUNG J:
Doesn't it show that it was relevant?

MR SUTCLIFFE:
Sorry?

WILLIAM YOUNG J:
Doesn't it show that it was relevant? It was relevant to an aspect of the case that your client had put in issue? It had other impacts. I agree. But it's really that aspect of the case, a significant aspect of the case, which he really had to adjust and move on from.

MR SUTCLIFFE:
Yes. I accept that to an extent that was the case, but what we're discussing here is not just the observational evidence that the mother could legitimately give, notwithstanding it was not intended, but accepting that she could give certain observational evidence, what we're faced with is that this was taken to another level with the evidence that we're now complaining of.

WILLIAM YOUNG J:
Well it did two things at once.

MR SUTCLIFFE:
Sorry?

WILLIAM YOUNG J:
It did two things at once: it explained why the mother and the boyfriend didn't have to put her up to saying anything, because they always believed that she wouldn't have done it anyway, and secondly it incidentally supported the Crown case.

MR SUTCLIFFE:
Yes.

GLAZEBROOK J:
Is the point though that if that had been led in a proper manner in the first place the defence might have thought differently about how it opened but, having been told that

wasn't going to be led and there weren't going to be – and may also have called another expert because one would have expected that to be –

MR SUTCLIFFE:
Yes.

GLAZEBROOK J:
– if there was a link between not lying and Asperger's, which I'm certainly not aware of that being a necessary link, then one would've expected that to be led by expert evidence, the defence to know about it to be able to call expert evidence to say that's not a known link or it's – or else for the defence to realise it is a known link and then tailor the case accordingly.

MR SUTCLIFFE:
Yes.

GLAZEBROOK J:
And when I say tailor the case, the case would always be on the base that he reasonably and did believe that she was consenting and this was an illicit affair.

MR SUTCLIFFE:
Yes. the argument that was put forward on this issue of suggestibility and the mother's evidence in the Court of Appeal was that it's really the domain of an expert and that it could not address the principal concerns identified by the trial Judge on its own, that the complainant was simply acquiescing to defence counsel's cross-examination as a consequence of her intellectual functioning. It's also noted that the suspicion that she was, the complainant was persuadable in the witness box did clash with the Crown's thesis of the case at the outset, that the complainant had in fact actively resisted his advances, so there was something of a contradiction in the, in that theory in any event.

Now, perhaps if I move on to the section 44 and more particularly, was the mother's evidence about the complainant's truthfulness admissible in terms of the veracity provisions?

Now, the position is that, from the appellant, couched as a bare statement it – the evidence on that point engaged both limbs of section 37(5) and it served the single purpose of bolstering the complainant's veracity.

WILLIAM YOUNG J:

No. it served also the purpose of explaining the conduct of the mother and the boyfriend, as I thought you accepted.

MR SUTCLIFFE:

I think the dominant – well, with respect –

WILLIAM YOUNG J:

Well the single purpose is what?

MR SUTCLIFFE:

– my submission is that the dominant purpose…

WILLIAM YOUNG J:

Okay. The single purpose is wrong.

MR SUTCLIFFE:

The dominant purpose was the veracity of the complainant.

WILLIAM YOUNG J:

Sorry, whose purpose?

MR SUTCLIFFE:

The dominant purpose or the dominant effect of that evidence was to bolster the complainant's veracity, that this was not a consensual relationship. I mean we've had that argument about whether or not it was non-responsive or not. Obviously there's a difference of opinions to an extent on that, but the effect is the same, with respect. And that would've been something which the jury would have, in my submission, picked up on.

ELIAS CJ:

Can I just ask you, the theory of the case that's being put to you, how is that the mother and boyfriend put her up to it, how is that indicated in the, either the opening or the –

WILLIAM YOUNG J:
How is the cross-examination –

ELIAS CJ:
– or the questioning, apart from the question that we've looked at?

MR SUTCLIFFE:
If I can…

ELIAS CJ:
Well, is it? It is –

MR SUTCLIFFE:
Yes.

ELIAS CJ:
– actually just an open-ended question.

MR SUTCLIFFE:
It's just an opening address. Is that what you're – Your Honour's referring to?

ELIAS CJ:
No, was it put to – was it put either to the jury by defence, did it make an opening statement –

MR SUTCLIFFE:
Yes.

ELIAS CJ:
– or in cross-examination that the mother and the boyfriend had put her up to this?

MR SUTCLIFFE:
The –

ARNOLD J:

That was explicitly stated in the opening?

MR SUTCLIFFE:

That was explicitly said.

ELIAS CJ:

In the opening?

MR SUTCLIFFE:

Yes. That –

ARNOLD J:

Yes, 45A.

ELIAS CJ:

Thank you. But it wasn't put to the witnesses except in that rather oblique quote?

WILLIAM YOUNG J:

Well they backed off it.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Well I think the pressure was actually referring to the fact that her boyfriend was pressing her to deal with it, with the –

MR SUTCLIFFE:

Yes.

GLAZEBROOK J:

– employer. So it wasn't a pressing her to lie. It was a – that's my understanding, because t-

MR SUTCLIFFE:

Yes.

GLAZEBROOK J:

– there was quite a lot of evidence about her being told to go along to the employer and trying to set up some kind of resolution of what was seen to be perhaps workplace harassment. Yes. It was, it was – quite right, Your Honour, it was in a sense a this is what's happened and the response of the family and the, the –

GLAZEBROOK J:

So the family assumed it was non-consensual –

MR SUTCLIFFE:

Yes.

GLAZEBROOK J:

– and then put in place a whole lot of place for her to do something with the employer, so I don't think it was a, "You told her to lie."

MR SUTCLIFFE:

That's right.

GLAZEBROOK J:

It was a, "Well, you put a lot of pressure for her to deal with it –

MR SUTCLIFFE:

Yes.

GLAZEBROOK J:

– and this was the easiest way out for her.

MR SUTCLIFFE:

Yes.

GLAZEBROOK J:

Is that fair?

MR SUTCLIFFE:

That's it. That's fair.

WILLIAM YOUNG J:

How was the complainant cross-examined on it? Justice Arnold's pointed out that the passage in the defence opening is at 45A I think. Yes, 45A.

MR SUTCLIFFE:

Page 84, my learned friend's just assisted me.

ELIAS CJ:

Sorry, what page?

MR SUTCLIFFE:

Page 84 of the case on appeal.

ELIAS CJ:

Of the transcript?

MR SUTCLIFFE:

Line 24.

WILLIAM YOUNG J:

"Isn't the position that Mike and your parents told you to say the accused had done these things to you against your will?" So to say they put her up to lie is not right but they did put her up to say that it was non-consensual.

MR SUTCLIFFE:

This was the complaint, yes.

WILLIAM YOUNG J:

So that is a proposition which the Crown was entitled to respond to.

MR SUTCLIFFE:

Yes.

GLAZEBROOK J:

Well it's page 84 where she actually agrees with it and then not, doesn't agree with it.

MR SUTCLIFFE:
Yes.

GLAZEBROOK J:
Page 84 she says, "That's correct." Well I mean it's one of those double negatives where you don't know what the answer is anyway, but…

WILLIAM YOUNG J:
Well then, "They told you to say that, didn't they?" "No they didn't, no. What happened is…"

MR SUTCLIFFE:
Now, I note, interpolating here, Your Honours, that the Crown relies on the case of *Marquard v R* [1994] 4 SCR 223, it's a Supreme Court case in Canada, and *R v VJS* [2006] EWCA Crim 2389 as common law authorities for the principle that it can be substantially helpful for a jury to hear evidence about whether a complainant's underlying intellectual or other personal factors makes it more likely that he or she is telling the truth, but those cases, particularly *Marquard*, undermines the argument that such evidence can be given by someone with observational experience only such as a parent, and in the case of *Marquard* it was an expert witness who commend on the likelihood of child complainant's initial explanation for a burn mark, that it was a lie, that was a paediatrician. And whilst the Supreme Court said that there may be features of a witness' evidence which go beyond the ability of a layperson to understand and hence which may justify expert evidence, in that case it was a case of children.

It then goes on to describe the type of expert evidence that has become common feature, counter-intuitive evidence about the behaviour of children's sexual cases, not directly about the case at hand but to ensure a jury doesn't assume certain behaviours are inconsistent with having been sexually abused, therefore despite what the Crown says at paragraph 48 of his submissions it doesn't really fit into the same category of counter-intuitive evidence because it's – the mother directly commented on the complainant's behavioural traits. And it's submitted that there's a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible expert evidence on conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility is admissible

provided the testimony goes beyond the ordinary experience of the trier of fact. And putting the witness' testimony in its proper context, in that case noted by the Crown in *VJS*, the Crown there called evidence from a vastly experienced paediatrician in the treatment of autism, which is apposite to this case, which was a condition from which the complainant suffered. The complainant in that case was described as having a low level of functioning and was being treated by an expert prior to the date of the sexual offending. The Crown's concern was the jury might misconstrue the way in which the complainant gave her evidence by not appearing to be particularly phased by it, certainly during the course of what I understand was an evidential interview. The doctor in evidence said that her demeanour and behaviour was not unusual for an autistic child. He also gave, or she, gave evidence, general evidence about autism during which the witness said that someone who functioned at the complainant's level would find it difficult to fabricate a story such as the allegation or to recall it. The connection there was the scientific basis for the observation that a person with that level of functioning would find it difficult to fabricate such a complex story and then maintain it following it.

Now, it may well be that that's the sort of observation that was made generally about children but in this case I believe – it was a 13 year old girl I think from recollection, but importantly the Judge ruled inadmissible the oath-helping element to the expert evidence where the witness said that she considered the complainant to be truthful. And in regard to the expert's evidence about ability of complainant, of the complainant to maintain a false account, importantly and significantly for the present case the Judge made it clear to the jury that the expert was not saying that the complainant was incapable of lying and in no way is that evidence intended to usurp the jury's function in assessing her evidence and deciding on its reliability. And the point made there is that oath-helping evidence, as with general evidence about a trait is said to be common to all those with autism.

However, the Court went on to make it clear it is not to be seen as a precedent and so – but there are three significant points which arise out of that case, and given, as in our case, said by the mother to have Asperger's autism-like condition, it bolsters the argument that only an expert ought to comment on how it manifests itself, particularly in terms of a question of veracity.

Second, the mother went further in this case than the expert in *VJS* and provided actual opinion on the daughter's veracity, and thirdly in that case the Judge provided

the type of direction ameliorating the apparent oath-helping evidence which the appellant says should have been avoided in this case and it's the type of direction that should have been given here. Indeed, in *VJS* the evidence that was given here wasn't permitted in that case.

Now, it's submitted that on that basis there can be little doubt that the mother's evidence was wrongly admitted. Simply put, the evidence could not fulfil the substantial helpfulness test in section 37(3).

The appellant agrees with the observations made by the Crown at paragraph 32 of their submissions that there is no reason in principle why positive veracity evidence about a complainant cannot be adduced. Not there suggesting positive evidence of veracity will never be substantially helpful but it requires something more than a bare statement. And that is essentially what we had here.

The mother's opinion about her daughter's veracity was similar to that considered by the Court of Appeal in *R v K* where a police officer opined that his impression was that the complainant was truthful. The appellant respectfully adopts the Court of Appeal's conclusion on the general lack of assistance describing generalised or pervasive traits in that case. and the appellant's submission is that *R v K* represents the reason why general statements about truthfulness are rarely substantially helpful, made in this case more fraught because the jury would have pooled together the strands in the way the Crown asserts in its submissions at paragraph 34 that the mother's evidence on her intellectual functioning would have made her less likely to be able to fabricate, in the very way that happened in *VJS* but without a proper diagnosis and without an evidential foundation.

Now, in relation to the question, "Is the evidence describing the complainant's lack of sexual initiative and moral character that of propensity?" well we seem to have had that discussion already. I note that the Crown doesn't tend to categorise this evidence but merely accepts that it was not admissible at paragraph 36 of their submissions but without accepting that it could have had any illegitimate effect on the proceeding. It's submitted that neither of the witnesses' evidence in that respect had the degree of particularity, and we've had those submissions earlier in terms of the propensity evidence.

WILLIAM YOUNG J:

Well if it's not particular then it's not propensity –

MR SUTCLIFFE:
Mmm.

WILLIAM YOUNG J:
– and the propensity rule doesn't apply. I mean this is the problem with taking the definition of propensity into the admissibility criteria. You take the word "particular" from the definition of what propensity evidence is, don't you?

MR SUTCLIFFE:
Yes.

WILLIAM YOUNG J:
Okay. Well if it's not – insufficiently particular to be propensity then it's not subject to propensity rules. Doesn't that follow?

MR SUTCLIFFE:
But if it's purporting to have that effect on – by its very presence in the evidence, which it does –

GLAZEBROOK J:
Well how does it get into the propensity rules if it's insufficiently particular to be propensity?

MR SUTCLIFFE:
Well the question then becomes one of whether or not – if it's not – if that argument is followed then it becomes whether or not the evidence is admissible at all.

WILLIAM YOUNG J:
General relevance. General relevance.

ELIAS CJ:
I'm sorry, I'm –

MR SUTCLIFFE:
General relevance.

ELIAS CJ:

– getting confused. What's the particularity?

WILLIAM YOUNG J:

There's a definition of propensity which refers to a propensity to act or think in a particular manner.

MR SUTCLIFFE:

That's right.

ELIAS CJ:

Well isn't it, isn't that what is being suggested?

WILLIAM YOUNG J:

Well I think what the suggestion here is it's insufficiently particular, but that's treating particularity as an admissibility criterion rather than a definition. I mean I think it's a silly argument. I think it is particular.

ELIAS CJ:

The statute.

MR SUTCLIFFE:

Well, we've had that argument and I think I should probably move on. Unless you have any further questions on that point.

ELIAS CJ:

So does that conclude your submissions?

MR SUTCLIFFE:

No it doesn't.

ELIAS CJ:

It doesn't.

GLAZEBROOK J:

Well I think – aren't you – isn't the argument that because it's not – even if it's particular in that definition it's not particular enough to have a probative value –

MR SUTCLIFFE:
Yes.

GLAZEBROOK J:
– that would outweigh the prejudicial value?

MR SUTCLIFFE:
Yes.

GLAZEBROOK J:
So – I mean because it assumes it has to be a particularity about it, just a general moral character doesn't have that –

MR SUTCLIFFE:
That's right.

GLAZEBROOK J:
– particularity and therefore its probative value is lower. I thought –

MR SUTCLIFFE:
Yes.

GLAZEBROOK J:
– that was the argument but…

MR SUTCLIFFE:
Well it is.

GLAZEBROOK J:
And also that the argument was you couldn't fabricate a – you couldn't formulate, sorry, a direction that would actually cover the use to which you could put it.

MR SUTCLIFFE:
Yes. And –

GLAZEBROOK J:
In any sensible way because – and so therefore that again shows that the prejudice outweighs the probative value.

WILLIAM YOUNG J:
Well wouldn't you say – I mean I think this – it's too elaborate because I think that the relevance is different but couldn't the Judge, if he wanted to, have said, "Well, one of the issues that the defence has put in issue, the credibility of the complainant, it's suggested that she's come along here and told lies. In assessing that you will have to make – assess what – you'll have to form a view of her, her personality, whether she's a credible witness or not, and relevant to that may be whether her intellectual capacity is such as to permit her to make fabrication and maintain it in the circumstances in which she has." Now that would be a direction. Now it's probably not a direction that the defence would have liked but a direction that could have possibly been given along those lines.

MR SUTCLIFFE:
Yes, but we're dealing with a propensity issue.

WILLIAM YOUNG J:
But that's just a propensity.

GLAZEBROOK J:
Well –

MR SUTCLIFFE:
Well the propensity –

GLAZEBROOK J:
– that's – the propensity would be, "Does she have the propensity to initiate sex?"

WILLIAM YOUNG J:
Yes.

GLAZEBROOK J:

It is – I mean for myself I can see why that could be admissible, aside from your section –

WILLIAM YOUNG J:
44.

GLAZEBROOK J:
– 44 point. "She's never done this with me, why would she suddenly do this with some total stranger?" And that would be something you could take into account. The lack of moral character I have more difficulty with because it's, well, "She wouldn't enter into an affair." Well, how do you know whether she's –

WILLIAM YOUNG J:
Well I think, "It's she wouldn't have an affair with a married man."

GLAZEBROOK J:
Oh no I understand that but how do you know that? Because there's always a first time in respect of something. But you can see how it could be propensity evidence.

MR SUTCLIFFE:
Yes. If I can come back to this question of particularity because it does have some relevance here and it is the point that the appellant is making. And it is an issue which counsel on both sides of the bar deal with on a regular basis and, and for example, a man who has been in a relationship with a woman for a long period of time who during the course of that relationship doesn't initiate playful sexual behaviour in another subsequent relationship is accused of effectively pushing the boundaries of sexual conduct to the point where there's a lack of consent and there's pushy in the sexual relationship. Now, the fact that he's had a previous relationship and the dynamics of that relationship are just unremarkable, the question is whether or not that without more specificity would give, more particularity would give rise to that being that he has a – that earlier evidence of that earlier relationship and his sexual behaviour is truly propensity evidence about a subsequent relationship in – which may be in different circumstances.

WILLIAM YOUNG J:
It's fair to say the question about this was really involve the most, was of the most frightfully open character. "Did she indicate whether she wanted to have an affair or

not?" There was no way Karen would ever do that. No." "What do you mean by that?" Well, that was so broad that any answer would have been responsive. And then the point's abandoned – they move away.

MR SUTCLIFFE:
Yes.

WILLIAM YOUNG J:
I mean isn't that –

ELIAS CJ:
We will take the adjournment shortly. I'd just like to know what you want to take us to, what's left to cover.

MR SUTCLIFFE:
Would you want me to tell you that now?

ELIAS CJ:
Yes. Just the topics.

MR SUTCLIFFE:
The topic is ground B, should the Judge have – should there have been a direction from the trial Judge to the use that the – could be made of the evidence? And then was the appellant placed at any disadvantage from the fact the evidence arose in the course of the trial? To a large extent we've actually pretty much dealt with that last subject.

ELIAS CJ:
Yes.

GLAZEBROOK J:
I thought we'd dealt with the direction as well, but is there…

ELIAS CJ:
It may be that you –

GLAZEBROOK J:

What about the section 44 point?

MR SUTCLIFFE:
Well…

GLAZEBROOK J:
You don't press that?

MR SUTCLIFFE:
Well it's part of the mix but it's not the overall – it's not the main point. It's a curious point which…

WILLIAM YOUNG J:
Well it often arises, it sometimes arises where the complainant says, "Well I was a virgin. Never had sex before. I'm not gonna have sex with a creep like this on those, in the circumstances postulated." I mean that's not infrequently something along those lines is said. Now no doubt it is a breach of section 44 but you just have to take it on the chin I think don't you?

GLAZEBROOK J:
Well it's a protective section rather than one that doesn't – so protective section in terms of evidence that can be elicited against somebody's will rather than –

WILLIAM YOUNG J:
It explicitly covers, would explicitly cover, I think, and its language would be broad enough to cover –

GLAZEBROOK J:
Yes.

WILLIAM YOUNG J:
– "I was a virgin."

MR SUTCLIFFE:
Well it's not name-blackening evidence and it was in fact led by the Crown.

WILLIAM YOUNG J:

But it can't – I mean it would sort of – yes, well anyway, I – it probably was run of the green.

ELIAS CJ:
I must say I would've thought it cuts both ways –

WILLIAM YOUNG J:
Yes.

ELIAS CJ:
– but anyway, we'll take the morning adjournment now and I'd expect that you won't be much longer Mr Sutcliffe?

MR SUTCLIFFE:
No, I'll reconsider my position.

ELIAS CJ:
Yes, thank you.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.49 AM

MR SUTCLIFFE:
I just want to pick up if I might on the point which we were just discussing before the morning adjournment and that was the question of engaging section 44. The – Your Honour made the observation that it cuts both ways, and it is a provision that applies both to protect in one sense the problem of name blackening, but it also is there to filter what is, goes before the Court is relevant and it has to be directly relevant to the question in issue. And the evidence that is complained of from the boyfriend arose during the course of re-examination and one of the problems there is the bald statement about lack of initiative in sexual matters in the course of their relationship. If that was a matter elicited in evidence-in-chief that would certainly be something which defence counsel would want to cross-examine that person on –

ELIAS CJ:
Or maybe not.

MR SUTCLIFFE:

Well that is a judgement call which defence counsel were not able to make because of the matter in which that evidence came out. It remained unchallenged because it couldn't be challenged by virtue of the point at which it arose.

WILLIAM YOUNG J:

Well it could have challenged but it would have been a very risky challenge. I mean he could've said to the mother, "Well why do you say that? What's the – what factual basis do you have for saying that?" and it could've been investigated or there could've been a voir dire and it could've been examined in front of the Judge.

MR SUTCLIFFE:

Well, without being too flippant about it, it would beg an awful lot of questions as to how he could possibly conclude that the sexual relationship he had with her was a consensual one if it was always him who was the initiator of it. I mean there's any number of ways in which counsel could cross-examine a witness on such a statement but – so

WILLIAM YOUNG J:

But the same would apply.

MR SUTCLIFFE:

Yes.

ELIAS CJ:

Well it's both relevance and it's because – it cuts both ways both because of relevance but also because if you permit this evidence in cases where it's character whitening you are undermining the protection against character blackening because it's not happening –

MR SUTCLIFFE:

Yes.

ELIAS CJ:

– in other cases. That's –

MR SUTCLIFFE:
Yes.

ELIAS CJ:
– why I think it's got to be both ways.

MR SUTCLIFFE:
Yes.

Now, if I can perhaps conclude on, in part on an observation which I made earlier and which I addressed earlier in another question, but it is something which is relevant to this question as to how the introduction of this evidence and the way that it came in affected the fairness of the trial process for the defence.

As has been observed the defence opened on the basis that due to pressure by the boyfriend and family that the complainant had an attack of the guilts and she decided to say that she was an unwilling participant. Whether that is she decided to adopt it as a suggestion made to somebody else to her is in a sense loaded into that opening statement by the defence but it was on the point that she was a willing participant in the sexual conduct. By the conclusion of the trial the defence position had completely changed, and that's at page 279 of the case on appeal. And this is the point that I was making earlier – it's a particularly, in my submission, significant point. Unavoidably, and having been faced with the change in the direction of the evidence, this is the, in a sense, the nub of the closing, which completely – would not have been lost on the jury as to the difference in approach, counsel for the defence closed, "I realise her mother said she can't lie but people can either deliberately or otherwise unintentionally twist things to conform with what they genuinely believed happened."

Now, that was done, in my submission, as a result of the defence having to deal with a hospital pass, in effect. It had to make the best out of what was, had become a very difficult situation.

Defence counsel then goes on, further down the page…

WILLIAM YOUNG J:
Sorry, where's the bit about the mother saying she doesn't – I'm sorry –

MR SUTCLIFFE:

At the top of page 279.

GLAZEBROOK J:

Top of page 279. Second line.

WILLIAM YOUNG J:

Oh right. Thank you. Sorry. When the appellant gave evidence he – his evidence, if true, pointed to actual consent?

MR SUTCLIFFE:

Yes. It did. And –

WILLIAM YOUNG J:

So he didn't change his –

MR SUTCLIFFE:

No he didn't.

WILLIAM YOUNG J:

– stance.

MR SUTCLIFFE:

But under cross- – the cross-examination relied not insignificantly on the contrast between, well, you say she consented but we've heard from other witnesses as to basically how she is, that that simply wasn't the case, the inference being it couldn't be the case. And the – so the position that the defence was faced with at the end of the trial was significantly different to that at the beginning, and it is not something that can fairly have been anticipated would be the case. It's not the usual type of change of position that could have been foreseen.

Now, there has been comment made in my submissions on the use to which the Crown put the evidence which was then led and it was put on the basis that the jury were simply told, well, with no specific reliance on particular passages but the jury were simply told, well, contrasting what the accused or the defence will say or have said, you have seen how she rolls, the inference been, well you've heard how she is, how she acts, what her personality is like, and which would by inference include

reference to those impermissible statements which we've addressed here. But what I would like to point out, that in fact it went further than that, and that's something which I've overlooked, and if I can refer Your Honours to page 262 of the case on appeal?

WILLIAM YOUNG J:
So where's the passage – see how you – "you've seen how she rolls", what page is that?

MR SUTCLIFFE:
I'll just have to find that. 273.

WILLIAM YOUNG J:
273.

MR SUTCLIFFE:
But at page 262 perhaps is more detailed in terms of how the –

ELIAS CJ:
Sorry…

MR SUTCLIFFE:
262, case on appeal 262.

Page 262, second paragraph, "Second, and probably logically, you can dismiss the accused's evidence outright and in brief you can do that because it's inconsistent. It's inconsistent with what the complainant had to say, classic he said/she said, you might think, but it's inconsistent with what her mother had to say about the nature of the complainant. You had this idea that she was initiator of some conduct, that she was an eager participant, that she was into this. Well that's inconsistent with what her boyfriend had to say about the nature of the woman. So the Crown relied not insignificantly in contrasting both positions by reference, albeit in general terms, but to this evidence which was not intended to be led at the beginning of the trial but ended up being led – that is, that it is untenable that she would have consented because of the very nature of this woman.

It's submitted that the risk of unfair prejudice from the credibility-bolstering evidence of the mother and the boyfriend was that it would have swayed the jury is frankly a significant risk.

In *R v A (CA664/2008)* [2009] NZCA 250, the Court of Appeal – this Court concluded the evidence was inadmissible and should not have been led and that the prosecutor erred by reverting to the evidence in closing. In that case, however, the matter was saved by the fact that the Judge's very strong direction ameliorated that error. But that's not the case here.

ELIAS CJ:
Did the Judge – I'm just looking at the – I seem to have about three different bits of the summing up. Did he make any directions on evidence? Because there was discussion in chambers about directions. Did he in the end…

MR SUTCLIFFE:
Well certainly he didn't make any directions on this evidence in particular and the manner in which it could be used. There was no attempt to make any direction.

ELIAS CJ:
But did he give any evidential directions at all? I couldn't see any but there had been some discussion about it.

MR SUTCLIFFE:
Excuse me I want to just confer with counsel.

ELIAS CJ:
It doesn't matter if…

MR SUTCLIFFE:
My recollection, Your Honour, is that there's simply the general directions on credibility and reliability.

ELIAS CJ:
Well where do we find those? Oh there is – I see there is at 307 some directions about the inconsistent statements. That's what was being discussed.

GLAZEBROOK J:
Paragraph 10 on page 306, maybe.

MR SUTCLIFFE:
There's just general directions, Your Honour. There's nothing particular about the matters that we're referring to here.

The submission of course is that given the reliance placed by the Crown on the witness' evidence of the –

WILLIAM YOUNG J:
The Crown didn't – I mean there's a reference to, "You've seen how she rolls," and a general reference to initiative and a passing reference to the boyfriend but then mainly focused on what Mr Pattison said. Is that right?

MR SUTCLIFFE:
Yes. Well, yes. That's – I mean it's abundantly clear that the Crown were inviting the jury to consider the evidence that was given by the mother and the boyfriend –

WILLIAM YOUNG J:
Well there's reliance on can't lie. Little bit about moral character. Is that right? I mean that's a question. I –

MR SUTCLIFFE:
Yes.

WILLIAM YOUNG J:
I think I remember seeing something about moral character.

MR SUTCLIFFE:
There was no – what was referred to, page 260 on, was the nature of the complainant.

WILLIAM YOUNG J:
Right.

MR SUTCLIFFE:

In a general –

WILLIAM YOUNG J:
Well there's no disavowal of it, although you wouldn't –

MR SUTCLIFFE:
No.

WILLIAM YOUNG J:
– probably expect that.

MR SUTCLIFFE:
No. And it was clearly before the jury and the Crown is inviting the jury to contrasts what the accused had to say about how she acted towards him in that relationship as opposed to how her nature was described by her mother and her boyfriend. And that clearly invites the jury to consider all of that evidence which comes under that heading, including, I would submit, the inadmissible portions of that evidence which have been referred to.

ARNOLD J:
You're reading quite a lot into it because in fact that paragraph and the following one are really about the initiative element, aren't they? I mean that's what the whole thrust of this is about.

ELIAS CJ:
What page is that sorry?

ARNOLD J:
That's at 262. Those two paragraphs, the second one to which we've referred and the next one. I mean they're all about initiative and then the manager talks about both the complainant and the accused.

MR SUTCLIFFE:
Well if I can perhaps address that. Because it's my submission that that flow is not necessarily clear. Because if you look at the passage what I, which I have read to the Court about what her mother and boyfriend had to say about her nature, the nature of the woman, it then goes on to say, "and this idea of her showing initiative is

completely inconsistent," whether that's a separate, talking about a separate subject of the same subject's perhaps not necessarily clear. Either way, the jury's attention would clearly have been drawn to the evidence of the mother.

I mean – I know that the Court of Appeal seemed to suggest that, well, you can – in a sense it can be ignored, it really wasn't something which was – it was said but nobody made much of it and we can just move on. But that frankly doesn't give juries due credit for the fact that they hear the evidence, they have to make a judgement, and simply ignoring the elephant in the room frankly is no answer. And in my submission –

WILLIAM YOUNG J:
But well, yes, but it was a strong case. Not least so by, (a), the appellant's shifting account of events and (b), an apology he made.

MR SUTCLIFFE:
Although, to be fair in respect of that letter of apology, there was an employment situation and the fact that a person apologises for engaging in a –

WILLIAM YOUNG J:
For inappropriate behaviour.

MR SUTCLIFFE:
Inappropriate behaviour in a workplace doesn't mean he's guilty of – it points to guilt in terms of, of what is seen here.

WILLIAM YOUNG J:
It suggests it wasn't consensual. But I mean I agree that it's not –

MR SUTCLIFFE:
Yes.

WILLIAM YOUNG J:
– probably it's not conclusive.

ELIAS CJ:
Do we have that?

WILLIAM YOUNG J:

It's referred to from time to – but I don't think –

ELIAS CJ:

I know it's referred to but do we have its terms if its –

MR SUTCLIFFE:

I believe you do actually.

ELIAS CJ:

If it's important.

MR SUTCLIFFE:

Actually I don't know. I –

WILLIAM YOUNG J:

I don't think we – we don't normally have exhibits.

MR SUTCLIFFE:

No, I'm thinking of another matter. no we don't have it.

ELIAS CJ:

Well I had thought that it wasn't going to be significant but if it's – all right. Well we can't assume that it is inculpatory.

WILLIAM YOUNG J:

Well we know that he – well provisions from it are put to him in cross-examination.

ELIAS CJ:

Yes.

GLAZEBROOK J:

But we're not talking about the proviso so I'm not sure that it's –

ELIAS CJ:

No.

WILLIAM YOUNG J:

Well, the strength of the case may be material to whether there's a miscarriage. Otherwise the proviso – but anyway. It's just that what – you're saying it's the elephant in the room, you say – suggesting it's a very big factor in an otherwise empty room but there was actually a lot of evidence apart from the I think the 12 lines that you complain about.

MR SUTCLIFFE:

Well it's – it is when – and that's why I've been at pains to put into context – I mean, as we've accepted, perhaps isolated and on its own there could be an argument that maybe it wasn't that significant and a jury would simply have brushed this off as being just a mother's way of defending her daughter. But this is not the context in which this evidence arose. It arose in a specific context of a woman with a purported medical condition, undiagnosed, which her mother was then able to give evidence of unique characteristics which may or may not be akin to a particular medical condition with which some members of the jury may have had some general knowledge, and oh, by the way, she has these unique characteristics, one of which is that she can't lie. And she has this unique moral compass which prevents her from even entertaining the thought of an extramarital affair. Now those, with respect, are not insignificant points in a case where there's a great deal of evidence against this man. They went – they were, in context with everything else, significant, and would have swayed a jury who did not then have the benefit of having an appropriate direction to deal with what the appellant says is otherwise inadmissible evidence.

Thank you. Any further questions?

ELIAS CJ:

No thank you Mr Sutcliffe.

Yes Mr Downs.

MR DOWNS:

Yes, may it please the Court, the case gives rise to issues of admissibility of evidence under the Evidence Act 2006. I must commence with a confession and that is that the analysis or analyses are rendered difficult by the way in which the evidence emerged, because of course the first passage of the mother arose in the

context of cross-examination, the second passage in relation to which this Court has granted leave arose in the context of re-examination and the same is true in relation to the third passage in issue, which came from the boyfriend.

And the difficulty, I respectfully suggest, in the admissibility is perhaps one of taxonomy: namely, what is this evidence? To what issue does it go? And that assumes some significance because if the evidence was, for example, of a propensity nature then it was governed by section 40 of the Evidence Act and there's no barrier as such to its admission because it's not propensity evidence about the defendant. Its exclusion would reside in section 8, if at all, on the basis that it was unfairly prejudicial to him.

However, if the evidence ought to be understood as either expert opinion evidence or as veracity evidence under sections 25 and 37 respectively of the Act, then of course the substantial helpfulness criterion looms large and the question becomes whether the evidence could meet that particular hurdle.

ELIAS CJ:
Yes. Although it is right that they are differently expressed so that under the veracity rules it's about offering evidence whereas there is a prohibition on opinion evidence except in the circumstances outlined.

MR DOWNS:
Yes, although that said, section 25(1) does refer to expert evidence offered in a proceeding is admissible.

ELIAS CJ:
Yes. I'm sure that nothing much can – it's more that – it's more the policy of these provisions –

MR DOWNS:
Mmm.

ELIAS CJ:
– because it does seem to me that it is correct that section 8 must be the governing provision in terms of propensity, but I would have thought that the, that veracity is less clearly implicated as matter of an appeal point.

MR DOWNS:

I respectfully endorse that proposition. Perhaps it's useful to commence then with the first passage given by the mother, namely to the effect that her daughter was incapable of fabrication.

Now, in terms of section 37 of the Evidence Act –

WILLIAM YOUNG J:

Sorry, you'll have to remind me of the page again.

MR DOWNS:

Yes. So this is page 174, line 4. 174, line 4, and to recapitulate it's an answer in response to a question in cross-examination, "When your daughter was talking to you about these events did you indicate to her that you accepted what she was telling you, that she wouldn't have consented to what had happened?"

Answer, "You see, um, Kerryn has, she hasn't got the ability to fabricate things. Um, she just tells the truth, she just tells it as it is and I've known, you know, that's, that's just the way she is." That's the question and answer.

Now, it is possible, it is possible to analyse that as veracity evidence and it seems the most logical starting-point because section 37(5) says, "For the purposes of this Act veracity means the disposition of a person to refrain from lying whether generally or in the proceedings." Disposition is not defined in the enactment but on the fact of the mothers' evidence it appears that she was saying that her daughter is a person who doesn't lie because she can't lie. That's how the Crown understands and interprets her testimony. And as such it would appear to be veracity evidence.

Now, I note, if there were doubt about that on the basis that this could otherwise be understood as propensity evidence, which is a possibility, we acknowledge, section 40(4) of the Act says this, and of course the Court will recall it, "Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind." So the shepherding, in my respectful submission, is back to section 37 when the evidence is solely or mainly relevant to veracity.

The question logically then becomes, was this material substantially helpful? Now as to that, as to that the Crown offers the following, we acknowledge, modest, analysis. The witness, it is the mother, whilst not independent, plainly, was, on any assessment, particularly familiar with her daughter, and I don't just mean in the sense of a mother but with her condition. It is clear from the evidence that for understandable reasons she had taken a particular interest in her daughter's condition because she was the person, along with her husband, that was dealing with it.

Secondly, the mother's testimony appears to be directed to the proposition that the complainant doesn't lie because she can't lie, in other words that the complainant's difficulties, whatever they were, and we acknowledge they weren't diagnosed, affected her capacity to fabricate. I respectfully suggest that's an important feature of the case because it marks it off from many potential cases in which a party would seek to adduce evidence of veracity, potentially opening the floodgates. The point is that the complainant had a particular difficulty or series of difficulties that marked her off from the rest of the general population.

And the third point –

GLAZEBROOK J:
Can I just indicate that that's the point that I'm having –

MR DOWNS:
Mmm.

GLAZEBROOK J:
– difficulty with in the sense that the mother was not saying, as an expert would, "I – this person has these particular characteristics which are characteristics of –

MR DOWNS:
Mmm.

GLAZEBROOK J:
– a diagnosed illness. People with that diagnosed illness at that level of capacity would not be able to," –

MR DOWNS:

Mmm. Mmm.

GLAZEBROOK J:

– whatever it happens to be. So that you're not looking at the particular, you're looking at the general and then applying it to the particular and giving evidence based on that. and presumably based, one would hope, on, what do they call it now, an evidential base of – so that you're actually – you're not just giving an opinion evidence on that, you're actually doing an opinion evidence that's based on a looking at the characteristics of those particular people and having an evidence-based means and actually saying, because that's the whole basis now of…

MR DOWNS:

We're duty-bound to acknowledge that's a shortcoming of the Crown's analysis. Because this isn't a situation in which an independent person with the requisite qualifications has undertaken an examination and proffered testimony as to that.

WILLIAM YOUNG J:

Can I just say, veracity evidence addressed to a disposition to lie is likely to be referable to instance where lies have been told.

MR DOWNS:

Yes.

WILLIAM YOUNG J:

Veracity addressed to a disposition to tell the truth is likely to be in the nature of an opinion. I mean the common law rule was the evidence was, "Have you known this person?" "Yes." "Is that a person on the basis of your experience a person who you would trust to tell the truth?"

MR DOWNS:

Yes.

WILLIAM YOUNG J:

"Yes." So that's the standard evidence of veracity that was available at common law, that's positive veracity, would be in the nature of an opinion.

MR DOWNS:

It was, and as we recollect the common law position, which with great respect was somewhat Byzantine, the witness couldn't then elaborate as to the basis or bases for that opinion. They could be challenged on it but they couldn't elaborate upon it, at least in evidence-in-chief.

WILLIAM YOUNG J:

So the evidence would but a bit like this, but probably less detailed.

MR DOWNS:

At common law yes.

ELIAS CJ:

But the elaboration is in. the elaboration –

WILLIAM YOUNG J:

There's a little bit of elaboration.

ELIAS CJ:

– is – yes.

MR DOWNS:

It is in.

ELIAS CJ:

Well it's a pretty –

WILLIAM YOUNG J:

She doesn't have the capacity.

ELIAS CJ:

Pretty important elaboration.

MR DOWNS:

It is. To which we can only respond that the mother obviously and understandably took a keen interest –

WILLIAM YOUNG J:

Sorry, can I just go back a little bit?

MR DOWNS:

I'm sorry.

WILLIAM YOUNG J:

The veracity witness would not be an expert. At common law.

MR DOWNS:

No.

WILLIAM YOUNG J:

Wouldn't be a –

GLAZEBROOK J:

I thought it was more reputation rather than opinion as to –

WILLIAM YOUNG J:

I'll just –

GLAZEBROOK J:

But I might be wrong. I thought you could say, "This person has a reputation for being this way," because the idea was in a village people would know who were liars and who weren't. But I might be wrong because it's a while since I've looked at this.

MR DOWNS:

I'm not sure that there was ever a clear demarcation.

GLAZEBROOK J:

And you certainly couldn't say, "I think they're telling the truth on this point," because that was oath-helping.

ELIAS CJ:

I think that is right, it was only ever admissible to give evidence of reputation, wasn't it?

GLAZEBROOK J:

That's what I –

ELIAS CJ:

What you couldn't do is give evidence that for some particular reason this is a, you know, is objectively a truthful person.

MR DOWNS:

That much we respectfully do accept.

ELIAS CJ:

Yes.

MR DOWNS:

However, the Court will recall that the Law Commission included the possibility of reputational veracity evidence, I stand to be corrected but I think it was clause 39.4. That fell foul of the select committee, which considered such evidence to be irrelevant and of no assistance whatsoever and we respectfully suggest there is much to support that proposition. So although the Evidence Act doesn't deal with as such there is force in the proposition that reputable evidence is of little value. After all, if it's not an opinion it must be hearsay. It's one or the other, and either species seems to be rather questionable, particularly when one at common law couldn't go on to say, at least in evidence-in-chief, the basis or bases for that opinion. It was just an ungarnished statement. "I know X or I know of X and essentially he's a person or she's a person that is to be trusted and truthful."

McGRATH J:

Mr Downs, could I just ask you this? To what extent can it be inferred from the question and in particular the answer that the witness has expressed an opinion on the inability to lie but has also stated what that opinion is based on in a way that the jury could assess. In other words she's saying that, when she says, "She just tells the truth, she just tells it as it is," she's referring to observations and it's only those observations that give rise to her opinion. Rather than any claim of greater expertise.

MR DOWNS:

Mmm. Well, it may be that I've read too much into the passage but we had interpreted it as essentially a contention by the mother that the daughter's situation,

to use a neutral phrase, impacts on her ability to fabricate. And indeed it's that particular aspect of the case that we respectfully submit may be of significance in the assessment of substantial helpfulness.

ELIAS CJ:
It's –

McGRATH J:
That's just the way she is?

MR DOWNS:
Mmm.

ELIAS CJ:
Yes.

McGRATH J:
Yes, we've been to that, yes.

MR DOWNS:
It's just that if I can stand back from the case for a moment, if we imagine a complainant without any difficulties, let's say another 30 year old, and a mother saying, "My daughter doesn't lie, she's not that sort of person," I suspect that the respondent would be hard pushed to identify a characteristic of the case that made such testimony substantially helpful, if it was as ungarnished as that, and hence the respondent places some significance in this case on the constellation of difficulties suffered by the complainant, which appear to be encapsulated in the mother's observation at page 174.

And hence the overarching submission is that this evidence was potentially admissible as being of substantial help as to the complainant's veracity.

ELIAS CJ:
And then it's a question of whether she was competent to give it.

WILLIAM YOUNG J:
But that's only if it required that she had to be an expert to give it.

ELIAS CJ:

Yes.

MR DOWNS:

Yes. As to that…

ELIAS CJ:

It's opinion evidence.

MR DOWNS:

Mmm.

WILLIAM YOUNG J:

It often – positive veracity evidence almost, unless confined to reputation, almost always will be an opinion.

MR DOWNS:

It's – perhaps the best phraseology is that it's a lay opinion as opposed to expert opinion.

ELIAS CJ:

But the Act doesn't – severely circumscribes lay opinions. There's only the section 24 leeway.

GLAZEBROOK J:

And there is a difference, probably, saying, "I think this person is a truthful person based on my experience," as against saying, "This person is incapable, because of her condition, of lying."

MR DOWNS:

Mmm.

GLAZEBROOK J:

Because one would expect incapable because of condition, first of all to have a diagnosis of that and then expert evidence to say that is a characteristic of that

condition as against a characteristic of the particular person having that condition. If you can –

MR DOWNS:
Mmm, Mmm.

GLAZEBROOK J:
If the distinction's clear. Because you might have a condition and you might have all of the characteristics of that condition and another characteristic that isn't a characteristic of that condition but is just what you are like.

MR DOWNS:
The difficulty, I respectfully suggest, for everyone is that we're dealing with a very compressed passage and I suspect, with respect, everyone is to some extent bringing their own interpretation as to what –

GLAZEBROOK J:
Yes.

MR DOWNS:
– the mother meant and –

GLAZEBROOK J:
I'm sure that's right.

MR DOWNS:
– why she meant it, and hence I commenced these submissions by saying that's a difficulty that really underlies this case in terms of the admissibility analysis. I mean if we had a clinician saying, "I've examined this person, I'm expert in this particular area," there may very well not be an issue as to admissibility whatsoever.

GLAZEBROOK J:
Mmm. Just an issue that perhaps the defence might have got a counter-witness to say, "Well, no it's not a characteristic of this condition."

MR DOWNS:
Mmm. Mmm.

WILLIAM YOUNG J:
But it wouldn't matter if in fact – in a sense the question is, "Does she tell lies?" and the mother is saying she doesn't and she's assuming it's because she can't because she's on the autism spectrum. So – I mean it's – the whole thing's pretty enigmatic as to what it means.

MR DOWNS:
Yes, there is a Delphic quality to this particular passage and to the associated legal issue.

ELIAS CJ:
Well that's why the Judge took the initiative in having the mother re-called, isn't it? Because he wanted an explanation of why she was performing as she did in the witness box.

MR DOWNS:
Indeed. Your Honour is, with respect, perfectly correct. Very early on in the proceedings the Judge remarked to counsel that the complainant, as the Judge put it, was labouring under a clear disability and he was anxious that the jury have the benefit of testimony in order so that the jury could understand, essentially, her responses. It's apparent from the closing address of the appellant that, most unusually, the complainant smiled throughout her testimony, which lasted for the better part of an entire day, began at noon on the Monday, went through to almost noon on the Tuesday, and was polite and pleasant throughout, notwithstanding what was presumably a gruelling experience. So there was a very real fair trial concern on the part of the Judge.

Now, that may bring us to the mother's second passage, which again suffers from the same somewhat enigmatic quality, and this is that her daughter wasn't in essence the sort of person to involve herself in this way. So the relevant passage, if it pleases the Court, is at page 174 of the notes of evidence, line 17. 174, line 17. As we've discussed, it's an answer that emerges in re-examination.

"Kerryn – you know the fact that the appellant was married. You know, she lives in a very black and white world, what, what is right and what is wrong, and doing anything with a married man is, is just not, not what, not what she would do, you know? It's,

it's just against all her morals. She lives in a black and white world, what is right is right and what is wrong is wrong."

Now again different analyses are available with this particular passage. It could be understood to be propensity evidence because of that definition but again subsection (4) of section 40 arguably brings it within the ambit of section 37, that is veracity evidence, and I say that because at least to the respondent's eye it does appear that her daughter essentially has a morally absolute worldview and hence because of that she's a person that ought to be believed. Which would place within the realm of veracity evidence.

ELIAS CJ:
It's probably not the most obvious way to take it though.

MR DOWNS:
Well even if I've got an awkward route, let me acknowledge it's not self-evidently substantially helpful.

ELIAS CJ:
It's also an opinion.

McGRATH J:
If it's equally seen as propensity or veracity of course the evidence is propensity isn't it? As I understand the provision.

ELIAS CJ:
No.

WILLIAM YOUNG J:
No, other way round.

GLAZEBROOK J:
No, veracity. Oh, well –

McGRATH J:
Section 44.

GLAZEBROOK J:

Oh, equally, possibly. Well it does look as though she wouldn't have an affair with a married man so it looks more like propensity to me.

McGRATH J:

How do you read it, Mr Downs?

MR DOWNS:

The respondent had taken the veracity route, and of course that doesn't mean to say that it's correct in so doing. It's just that it appeared to be a claim that the mother, a claim by the mother that the daughter operated in a morally absolute world, presumably because of her condition, and hence that was something that would reflect on her disposition to refrain from lying.

GLAZEBROOK J:

I thought it was more her disposition to refrain from –

MR DOWNS:

Mmm.

GLAZEBROOK J:

– having an affair with a married man –

MR DOWNS:

Mmm.

GLAZEBROOK J:

– but that was just…

McGRATH J:

Yes.

MR DOWNS:

Mmm. Well, if that is the case then we would be within, in my respectful submission, section 40 and it wouldn't be solely or mainly relevant to veracity, so we would remain within section 40.

McGRATH J:

Indeed. I put that the wrong way round.

MR DOWNS:

I've taken a most circuitous route, with respect. And so the basis for exclusion would then only be, I suggest, section 8, essentially, an unfairly prejudicial effect on the proceeding.

ELIAS CJ:

Well ultimately it probably does come to that but it is, as you say, she lives in a black and white world, you say presumably because of her condition. So that's an opinion –

MR DOWNS:

Mmm.

ELIAS CJ:

– that this woman is giving.

MR DOWNS:

I – Your Honour is correct but it may very well be that the propensity and veracity provisions do permit of some form of lay opinion. Because it's difficult to comprehend how any form of opinion could be avoided in relation to those sections. It's not to say that it's impossible but it's not immediately obvious what the example would be of evidence of this nature that wasn't in the form of a lay opinion.

ELIAS CJ:

Well it might not be opinion. It might simply be information from which the jury could draw the inference of propensity or veracity.

GLAZEBROOK J:

Every time she goes to a movie with this type of thing happens she comes home and says how shocking it is. She turns the TV off every time there's a – she goes to church every Sunday. Well I don't know.

MR DOWNS:

And I mean – and there were some examples somewhat analogous. I don't wish to detain us needlessly but, for example, the mother talked at page 165 that the daughter could only receive three instructions at any one time and if she got more than that she essentially couldn't function. She went on to say at 165, line 10, “She’s always very reserved. She’s never been terribly trusting of people. She’s never really gone out. She’s very guarded,” the mother goes on.

Now, all of those things, I respectfully suggest, could support at least a submission by counsel that she’s not the sort of person who would engage in sexual congress with a married man, or indeed anyone that she doesn’t know particularly well. So – which is a long way of really saying, yes the mother’s second passage might well have been inadmissible but there was a substantial basis for the Crown to mount a similar argument having regard to admissible testimony.

And that then brings us, I believe, to the final passage in issue, and that was the impugned passage in relation to the boyfriend. You’ll have to forgive me, technology isn't being as helpful as it might be. I’ll revert to more conventional means. So that appears at page 161 of the case on appeal at the top of the page.

ELIAS CJ:
Mr Downs, just before you read that, the mother had already given evidence, had she?

MR DOWNS:
Before the boyfriend, Your Honour?

ELIAS CJ:
No, no, before the, before she was recalled? Or had she not given evidence at all?

MR DOWNS:
No. What happened was that the prospect of the mother testifying was raised initially by the Judge.

ELIAS CJ:
Yes. So she hadn’t given evidence first?

MR DOWNS:

No. So the Judge raised the prospect of the mother testifying in the course of cross-examination of the complainant.

ELIAS CJ:
Of the complainant.

MR DOWNS:
– obviously away from the jury.

ELIAS CJ:
Yes, yes.

MR DOWNS:
And that was, well, there were a series of discussions –

ELIAS CJ:
Yes, yes, I was –

MR DOWNS:
– and it was at the conclusion of the complainant's evidence that the prosecutor made a formal application to call the mother. He had foreshadowed the point earlier. That application was posed, opposed by the appellant and granted.

ELIAS CJ:
And opposed and in part on the basis that there was no brief or that was, that was raised that there was no brief.

MR DOWNS:
Yes, that was, that was an aspect and the appellant pointed to the various processes through callover and how the Crown hadn't identified an expert or rendered a brief from an expert, but the clear understanding was ultimately that the Crown would adduce the evidence of the mother as it appeared in the affidavit which was tendered in support of the mode of evidence application and, but for the impugned passengers with respect, there is a clear – the evidence has adduced, clearly mirrors that the mother's affidavit.

ELIAS CJ:

But it was specifically called in order to provide the explanation of her deficiency.

MR DOWNS:
That was one basis. There was a second as well –

ELIAS CJ:
Yes.

MR DOWNS:
– and that was because between pages 83 and 93, the complainant was taxed extensively about what her boyfriend and mother and father –

ELIAS CJ:
Oh yes.

MR DOWNS:
– had said and done in order to promote a complaint and prosecute a complaint because, of course, the appellant's case as opened was that whatever had happened, the boyfriend and the family of the complainant had pressured the complainant to give an account of non-consensual sexual activity and the Judge considered it was only proper that the mother be called in order to deal with that allegation.

ELIAS CJ:
I'm just wondering about this affidavit whether we, whether we don't need it if that was the basis on which the – I mean, what's the Crown's position on that?

MR DOWNS:
The Crown respectively endorses that proposition that the Court should have it if only to satisfy itself that the departures as are an issue mirror, mirror the record.

ELIAS CJ:
So do you have that available or we can –

GLAZEBROOK J:
And unsworn copy I think –

MR DOWNS:

We have an unsworn copy. We can, of course, undercover of memorandum identify a sworn copy and file it subsequently if the Courts –

ELIAS CJ:

Yes, perhaps you should do that, thank you.

MR DOWNS:

As the Court pleases.

ELIAS CJ:

Sorry, you were going to take us to the boyfriend.

MR DOWNS:

Yes, I turn to the boyfriend's evidence. As to this, it will be apparent from the Crown's written submissions or one hopes apparent that little contest is offered by the Crown in relation to this particular passage. It's difficult at best to contend that this is admissible veracity evidence, but the overarching submission is that it's material that has not given rise to a miscarriage of justice. It suffers some of the difficulties and perhaps more of the point identified by my learned friend and the Court –

GLAZEBROOK J:

It was specifically referred to by the Crown in closing though as to the initiation of sex point. I think it's at 262, yes.

MR DOWNS:

Forgive me I may just have to revert to a paper version of the case.

ELIAS CJ:

Is that …

MR DOWNS:

Yes, I'm obliged. Well, more than one witness spoke about the inability of the complainant to show initiative. That was really –

GLAZEBROOK J:

Well, it was specifically sexual initiative though wasn't it?

MR DOWNS:

Well, I acknowledge the boyfriend did say that in his evidence. It's just that –

WILLIAM YOUNG J:

There's a lot of evidence that she's not, that she didn't take the initiative in anything –

MR DOWNS:

Yes.

GLAZEBROOK J:

No, I can understand that but, mhm.

WILLIAM YOUNG J:

– but it wasn't compassed, that encompassed what the boyfriend said. Did he say anything about her lack of initiative generally?

MR DOWNS:

The boyfriend?

WILLIAM YOUNG J:

Yes.

MR DOWNS:

He referred to her being flustered under pressure. No, no, so the mother, mother as we've discussed referred to the complainant as being very reserved and not trusting and so on and guarded and the employer, the employer said that she had no ability to innovate.

WILLIAM YOUNG J:

Didn't have any initiative?

MR DOWNS:

Indeed and the appellant, I should observe, was inclined to accept that. He accepted when he gave evidence that she did appear to suffer a difficulty in that respect.

ELIAS CJ:

Mr Downs just in – you say that the, this evidence was inadmissible under the veracity rules, but so what. Doesn't – I'm just trying to feel for the materiality of things because it's only inadmissible if it's substantially, well, it's admissible if it's substantially helpful. It, on one view, this was substantially helpful so that's not the reason why it should be excluded presumably and that's not the reason why it might be material, on material ground for the appeal. Is the Crown's position that you go straight to the proviso or is there an intermediate point?

WILLIAM YOUNG J:

No, it will be there's no miscarriage –

GLAZEBROOK J:

No miscarriage, but I think, I think it's accepted as propen – this is propensity evidence rather than veracity, isn't it?

MR DOWNS:

That seems to be the more –

ELIAS CJ:

Oh, yes, sorry, sorry –

MR DOWNS:

– the more obvious –

ELIAS CJ:

– but even, even more so then because propensity evidence –

WILLIAM YOUNG J:

It's not precluded, propensity evidence is –

ELIAS CJ:

Is not precluded. That's that's –

WILLIAM YOUNG J:

– there's no, there's no restriction of it.

ELIAS CJ:

– that's really what I mean so, so why are you saying –

GLAZEBROOK J:

Well, apart from section 44.

ELIAS CJ:

– it was admissible or –

MR DOWNS:

Well, the reason I've expressed that is because there's no, there's no real particularisation as to why the boyfriend says that. He just, he just makes that –

WILLIAM YOUNG J:

Well, he's asked, he makes a proposition, he's then asked an extremely stupid question which is entirely open –

MR DOWNS:

Mhm.

WILLIAM YOUNG J:

– and he gives an answer that is within the scope of that question and then counsel backs off.

MR DOWNS:

Well, it's just that if all of this had emerged as part of the Crown's case in chief –

WILLIAM YOUNG J:

Wouldn't have come out that way.

MR DOWNS:

– following a brief we would, I anticipate, see a much more logical sequence, a much more logical explanation of events as opposed to us having to really discern the tealeaves as to exactly what was intended.

ELIAS CJ:

But what's the miscarriage?

MR DOWNS:
Well, as to that –

ELIAS CJ:
I know you say that there isn't a miscarriage, but what's the possible miscarriage in the submission? It would have to be that it's prejudicial, more prejudicial than probative, isn't it?

MR DOWNS:
Yes –

GLAZEBROOK J:
Or section 44.

MR DOWNS:
Well –

GLAZEBROOK J:
Inadmissibility.

ELIAS CJ:
Or section 44, yes.

MR DOWNS:
Except that section 44 is perhaps no more than a procedural hurdle because if everyone had gone off and seen the Judge and the prosecutor had said, "It's now become important to know whether she initiates sexual activity or how she –

GLAZEBROOK J:
Well, may be it's a section 10 anyway if everybody accepted it went it, it might – is section 10, isn't it?

MR DOWNS:
Section 9, Your Honour, section 9.

GLAZEBROOK J:

Section 9.

MR DOWNS:

Mhm, well, save that – I think there's still no definitive determination as to whether acquiescence in the face of potentially inadmissible evidence constitutes admission by agreement.

GLAZEBROOK J:

Oh no, no. No I'm not suggesting in this case that it could – it's possible that that –

MR DOWNS:

Possibly. Possibly. But it is difficult to contend really that any of this evidence has given rise to a miscarriage, and I say that for a number of reasons. The appellant hasn't identified, as he could have or might have, any evidence that he would have wanted to have adduced had he known about this. now, he could have, for example, have invited the Court's leave or the leave of the Court of Appeal to adduce evidence that would have been fresh from an expert to say, "Look, this analysis on the part of the mother is unavailable and unsustainable."

GLAZEBROOK J:

Well one of the difficulties with that of course in the Court of Appeal was that it was accepted by the Crown that it was inadmissible. And so if you – the only way you're going to call countering evidence is if it's admissible.

MR DOWNS:

Well I've –

GLAZEBROOK J:

If you see the – because you're not going to call countering evidence for something that's agreed is inadmissible and therefore on any retrial would not be there. If it is admissible then you would be calling countering evidence or at least you'd want to find out whether there was evidence that could counter it.

MR DOWNS:

Say that I'm not sure that there was a concession, formal or otherwise, on the part of the Crown.

GLAZEBROOK J:

That's how I've read the –

MR DOWNS:

Well I've –

GLAZEBROOK J:

– Court of Appeal – they didn't deal with admissibility.

MR DOWNS:

I've obviously reviewed the Crown's written submissions which don't directly grapple with admissibility.

GLAZEBROOK J:

Yes. Well that's what –

ELIAS CJ:

Well you say it wasn't admissible.

MR DOWNS:

The –

WILLIAM YOUNG J:

No you say it is admissible, don't you?

MR DOWNS:

In relation to the mother's –

ELIAS CJ:

No, no, the boyfriend we're talking about.

WILLIAM YOUNG J:

No but we're talking about – no I think she's talking about the mother.

GLAZEBROOK J:

Yes, I'm talking about –

ELIAS CJ:
Oh sorry.

GLAZEBROOK J:
– the mother because that is the only – so as far – as I understood it it was not at issue in the Court of Appeal that the mother was an expert and therefore it could be admissible. It certainly wasn't dealt with by them on that basis.

WILLIAM YOUNG J:
I think they dealt with it on the assumption it was inadmissible, didn't they? That was my impression at the time –

MR DOWNS:
Indeed.

WILLIAM YOUNG J:
– that it wasn't a determination or a ruling that it was inadmissible.

MR DOWNS:
So…

GLAZEBROOK J:
Well I understand that but it's just that the only way you're going to call countering evidence is if it's held to be admissible, held to be expert evidence, and in that case I would've thought anyone would want to have her examined or have countering expert evidence.

WILLIAM YOUNG J:
But at any stage – so there's nothing from – do I take it from what you're saying there's nothing on the Crown file to suggest that at any time before the hearing it was accepted to have been inadmissible?

MR DOWNS:
Well the Crown submissions don't directly deal with – they don't directly deal with admissibility.

WILLIAM YOUNG J:

When were they made available before the Court of Appeal do you remember? A week or so?

MR DOWNS:
In the usual way. There's

WILLIAM YOUNG J:
Sorry, I should know but I've forgotten. It would be –

GLAZEBROOK J:
Well it was actually brought up at trial though because at trial the defence said they would have wanted to call an expert because the Judge said, "Well you could have called one."

MR DOWNS:
Perhaps I can deal with things in this way. The appellant has said, "I've suffered a miscarriage," but with great respect he hasn't –

WILLIAM YOUNG J:
Not much flesh on the bone.

MR DOWNS:
– he hasn't particularised that contention. He's identified correctly that the defence opening had a different emphasis from the defence closing, the defence opening was very much on the basis of the primary issue is consent. The defence closing primarily focused on the issue of a reasonably grounded belief in consent. So to that extent there has been a difference in approach.

ELIAS CJ:
But why is it necessary to show that? If we're going back to talking about the mother's evidence now, which I must say I find more troubling, but on that why isn't it sufficient that the jury has been given a steer which is highly damaging and is not substantiated? Why is it necessary for the defence to say what evidence they might have put forward?

MR DOWNS:

Because in this particular case I contend it was employed to the appellant's advantage. There was no – it is –

GLAZEBROOK J:
Well not the particular passage we're looking at. Nobody's suggesting the rest of the mother's evidence wasn't employed but the incapable of telling a lie wasn't employed.

MR DOWNS:
Correct.

GLAZEBROOK J:
Well couldn't have been employed, to be (inaudible 12:54:45).

MR DOWNS:
And that's the point I'm trying to make, that the – albeit clumsily – the Crown didn't rely on the impugned passage when it closed its case. As it happens the appellant's counsel did. He expressly dealt with that proposition.

GLAZEBROOK J:
Well that is, I would suggest, because his concern was, and one can understand it, that the jury, despite the Crown not relying on it, may well have taken that as being an expert opinion from a nurse who knew what she was talking about.

MR DOWNS:
I acknowledge the force of the point, but one response is to say that his counsel never requested the Judge, so far as I can discern from the record, to issue any instruction or direction in relation to that testimony, still less that they should put it out of their mind. And if we read the closing address of the appellant, it does appear that it was employed to the advantage to the extent that we now know much more about the complainant, she's been smiling and happy throughout, she's the sort of person that takes the path of least resistance. Isn't it entirely possible that that's how she behaved when she was acting with the appellant? He reasonably believed that she was consenting. Yes, the mother says she can't lie. Well she's not deliberately lying but in the process of her mind she's made a mistake as to how the events unfolded which has been lent weight by the actions of the family. That was, that was in essence the closing address. And with respect it was a powerful piece of advocacy.

WILLIAM YOUNG J:
It wasn't actually that different from the opening address because he's still saying there's pressure on her to say she didn't consent.

MR DOWNS:
And I respectfully suggest that whenever one alleges actual consent it's almost always a fallback position that there's a reasonably grounded belief in consent. I mean I can't think of a case that doesn't normally have that as a fallback position. So I suggest that the case didn't change to the detriment of the appellant. And that leaves, I suspect, simply the issue as to what if anything should the Judge say about such things?

Now, if all of the evidence was inadmissible of course there's a question as to whether the Judge is better to say something or not. With respect there's no great issue of law as to that. But if the evidence was admissible either in whole or part the question arises of some importance as to how a Judge directs in these circumstances. Now, it's the Crown position that veracity evidence of this nature, if that's what it was, doesn't require a particular direction on the part of the trial Judge. And we make that submission really for a number of reasons.

ELIAS CJ:
Mr Downs, I'm sorry, I have a meeting –

MR DOWNS:
Yes of course.

ELIAS CJ:
– at lunch-time. Is it convenient to take the adjournment or do you want to press on?

MR DOWNS:
It's entirely convenient to the Crown.

ELIAS CJ:
All right. Thank you. All right we'll take the adjournment now. Thank you.

COURT ADJOURNS:12.58 PM

COURT RESUMES: 2.16 PM

MR DOWNS:

Yes, may I please the Court, just prior to the luncheon adjournment we'd reached the point of the case where we were discussing the directions and these blessedly brief submissions are directed to the proposition that the evidence in dispute was admissible and either veracity and/or propensity evidence. It's the respondent's submission that in such a situation there is no need for direction on the part of a trial Judge. We note that the suite of directions identified in the Evidence Act as being mandatory is modest. They include, of course, directions in relation to identification evidence, section 126, possible directions in relation to lies by a defendant, section 124 and, of course, the obligation on the part of a Judge to consider a direction under section 122 in relation to certain types of evidence that may be unreliable, for example, confessional testimony, evidence that's potentially stale by being in relation to an event more than 10 years old and I suggest that there's no obvious analogy between this type of evidence and those instances identified by Parliament as warranting direction. Secondly, we place weight on this Court's decision in *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 and, in particular, a paragraph 41 of that judgment in which the Court concluded that directions in a criminal case should be limited to those which were necessary for a fair trial and, of course, in *Wi* the issue was the absence of convictions on the part of the defendant and this Court concluded that that was best left for the discretion of the trial Judge. We respectfully submit there's an obvious parallel to the type or types of evidence before this Court and the final proposition is that it is difficult to see how evidence of this nature could be misused. It's unlike, for example, evidence that effects the defendant directly such as prejudicial propensity evidence of past criminality or lies by him or her, those are situations in which there are obvious risks that because a person has engaged in disreputable or rather criminal conduct that they may have acted in the same way again and we respectfully suggest this is not such a situation, but beyond those brief submissions that is the case for the Crown.

ELIAS CJ:

Yes, thank you, Mr Downs.

MR DOWNS:

May it please the Court.

MR SUTCLIFFE:

Just a number of matters I'd like to respond to. The issue of the opinion evidence was raised on and in any reading whether it is the veracity or this is the evidence of the mother about the daughter's moral compass. On any assessment whether it be veracity or propensity, it's opinion evidence and sections 23 and 24 of the Evidence Act are engaged in that respect. In terms of section 24, it provides that a witness may state an opinion in evidence in a proceeding if that opinion is necessary to enable the witness to communicate or the fact finder to understand what the witness saw, heard or otherwise perceived. My submission is that the evidence that we're talking about there would not have qualified under section 23 so therefore was truly inadmissible.

My learned friend also in his submissions raised the question as to details of any miscarriage. Putting aside for a moment whether or not the appellant's obliged to even establish the details of that in light of the effect of the evidence that is being improperly admitted, these factors are perhaps relevant to that assessment. Firstly, the opportunity to prepare and to deal with that evidence in a proper order was deprived of the appellant. That opportunity was removed in part because the Crown made a deliberate decision not to call or brief that evidence before the trial, notwithstanding they had clearly turned their minds to the issue and therefore the appellant was entitled to prepare and proceed to deal with this case on the basis that it would not become relevant and admissible in the course of the trial.

ELIAS CJ:

What?

MR SUTCLIFFE:

That is the, that is the evidence which was led from the complainant's mother both about her various predispositions and more significantly the overlay, the gloss in a sense that was put on that evidence by the inadmissible portions or statements that was made by both the mother and to a lesser extent the boyfriend.

Had the Crown elected to brief that evidence before the trial, then it's clear as the Court of Appeal have acknowledged that evidence would not have been admissible and so there would've been pre-trial rulings and discussions about that.

ARNOLD J:

The mother's evidence given in chief is not, as I understand it, challenged.

MR SUTCLIFFE:

No, it's not. That is evidence that would have been admissible in part.

ARNOLD J:

And when you read the evidence of the appellant and, in particular, the cross-examination, various features of her description of her daughter were put to him and he said, well, he didn't agree –

MR SUTCLIFFE:

Well, that's right.

ARNOLD J:

– and it was put to him explicitly, "Well, you don't accept the mother's description," –

MR SUTCLIFFE:

Yes.

ARNOLD J:

– so wasn't he always facing this problem? I mean what I'm saying I guess is are there particular items of evidence that you're concerned about really the major cause of the problem from the appellant's point of view? Wasn't the difficulty more fundamental and it was backed up to some extent by the way the witness performed in the witness box?

MR SUTCLIFFE:

Well, this perhaps – I understand what Your Honour's direction that question to. The position is this that and, again, it all has to be taken in and around in terms of the context. It may well be, and at this point I'm not in a position to, obviously, point that out. I've not taken any instructions in terms of what would have happened. I'll, but I'll come to that shortly. But there may well have been a decision on behalf of the defendant's counsel to approach things in a very different way and which may have included potentially even briefing evidence that may have perhaps independent of the appellant provided some basis to challenge some of the observations which were made, particularly in terms of the lack of initiative and so forth.

WILLIAM YOUNG J:

But to the extent to which your complaint is that the course of events was unfair and deprived the appellant of an opportunity which he might have had to do things differently, wouldn't that have been rather more cogent if the Court of Appeal had had access to evidence which might have been called on a new basis?

MR SUTCLIFFE:

Well, yes, and that raises the other matter which my learned friend raised in submissions and which was, I think, commented on by the Court here, and that is, well, what did – the defendant or the, sorry, the appellant had the opportunity to do something about this between conviction and the appeal. But – and I wasn't privy to the appeal at first instance. But what appears to be reasonably clear is that it was not really – the question of admissibility was not really significantly argued.

WILLIAM YOUNG J:

But how do you know that? Because the Crown submissions wouldn't have come in until just before the hearing. So how –

GLAZEBROOK J:

The Crown accepted at trial though that they would have to have had expert evidence if they'd wanted to introduce evidence –

WILLIAM YOUNG J:

But did they –

GLAZEBROOK J:

– evidence of incapability of lying due to a condition.

WILLIAM YOUNG J:

Well that's –

GLAZEBROOK J:

So unless they'd changed that stance…

WILLIAM YOUNG J:

Well was it admitted, accepted at trial that the evidence given was inadmissible? Because I would have thought if it had been then something more would have been said about it. I accept the Crown – no one would have set out to prove what they in the end proved in the manner they adopted.

MR SUTCLIFFE:

Yes. my understanding is, and again I wasn't privy to the appeal but the appeal proceeded on a much broader basis than that in which the – the argument proceeded on a much broader basis than that which the Court of Appeal finally determined. But what was clear from the Court of Appeal decision is they made very short work of the issue of admissibility.

WILLIAM YOUNG J:

Didn't they sort of assume it was inadmissible?

MR SUTCLIFFE:

They assumed that – the Court of Appeal made the observation that had this been the subject of a pre-trial ruling –

WILLIAM YOUNG J:

Yes but that's quite a –

MR SUTCLIFFE:

– it would not have been admissible.

WILLIAM YOUNG J:

Would not have been admitted.

MR SUTCLIFFE:

Would not have been – yes.

WILLIAM YOUNG J:

That's a slightly different question though. It is to my way of thinking.

GLAZEBROOK J:

Well nevertheless the Crown had accepted at trial that it couldn't lead that evidence. that's why it didn't come in in evidence-in-chief, it came in by mistake in cross-

examination, so it would be unlikely for the Crown to change that stance on appeal without actually indicating to that effect, I would have thought.

MR SUTCLIFFE:

The real focus in the Court of Appeal was whether or not there had been a miscarriage, and as a result of that evidence being introduced, and of course that's the reason why we're here, because the Court of Appeal decided that it couldn't have been a miscarriage.

WILLIAM YOUNG J:

But even that argument, that there was a miscarriage, would have been much beefed up if it could be shown that the evidence given was wrong.

MR SUTCLIFFE:

I guess. I don't – could you please repeat that?

WILLIAM YOUNG J:

I means this is a very unusual case because some evidence comes in essentially proffered by the witnesses rather than led by the Crown. May or may not be admissible. And it – one has to think fairly carefully about the reasons why it was said. Now, if you're going to say on appeal, well, you know, "I've suffered a miscarriage of justice," you're invoking a concept that involves substance as well as process –

MR SUTCLIFFE:

Yes.

WILLIAM YOUNG J:

– can involve both. And it might be, and I mean I might be wrong on this, but it might be that the appellant's argument would have been stronger if it could be suggested that the evidence given actually was wrong, that there was something wrong with it, that there was something the defence could have done about it –

MR SUTCLIFFE:

Okay.

WILLIAM YOUNG J:

– if the process had been different.

MR SUTCLIFFE:

Okay, and that raises, that triggers the matter that my learned friend raised about, well, again, nothing was done between then and the Court of Appeal to point out that this, this is what the problem is with this evidence in the sense that it's somehow wrong. But the difficulty with that of course is, putting aside the observation that it hadn't been accepted that it was admissible, even at the trial level, what practically is an appellant going to do to tackle this issue when it's really a non-issue? It's about – when in fact what we have here is we have –

WILLIAM YOUNG J:

You couldn't do anything about what the boyfriend said. I mean that's clear.

MR SUTCLIFFE:

No.

WILLIAM YOUNG J:

Might have said, well, here's someone – here's a person who would appear to be on the autism spectrum and this is the evidence that there is and this is what the mother said about her general development and apparent behaviour and based on that what do you think about the comment that she couldn't fabricate a story?

MR SUTCLIFFE:

Well, the difficulty with that is that she's not been diagnosed as being –

WILLIAM YOUNG J:

Yes I know that but – all right. Well I'm just going round in a circle I suspect.

MR SUTCLIFFE:

I mean – yes.

WILLIAM YOUNG J:

It might be legal aid might have something to say with you actually on wanting to engage someone on that basis and the person may also say, "I can't make any comment about that without examining the person," which I would have thought was a fairly typical response from anybody that you might want to get an opinion from.

WILLIAM YOUNG J:
Well you could always apply for examination.

MR SUTCLIFFE:
Sorry?

WILLIAM YOUNG J:
I mean we're going along – I agree there are practical considerations, but –

MR SUTCLIFFE:
Yes. I mean those – getting that sort of evidence or that sort of instruction can't exist in a vacuum. There has to be some substance and there was no real basis for the evidence to be given or commented on in the way it was in the first place, and certainly – that's essentially all I have to say is that, in response to that, that's – it's not fair to say, "Well the defence hasn't done anything between now and the trial to prove this otherwise wrong," because what – there's nothing really that the defence can do.

WILLIAM YOUNG J:
I mean, crikey, say we allow the appeal and there's a new trial and at the new trial there's a psychiatrist or psychologist who gives evidence along the lines of that in the English case. It's going to be a pretty wasteful exercise and stressful.

MR SUTCLIFFE:
Well not necessarily. I mean it may well be that this quasi-diagnosis is not a diagnosis that's reached at all. And that's not really speculation, frankly.

WILLIAM YOUNG J:
One can be intellectually disabled without having Asperger's.

MR SUTCLIFFE:
Yes.

Nothing further to add.

ELIAS CJ:

No more questions? Thank you. Thank you Mr Sutcliffe.

Thank you counsel for your submissions. We will take time to consider our decision in this matter. Thank you.