IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 1/2019
[2019] NZSC Trans 9

R

Appellant

v

THE QUEEN

Respondent

Hearing:	14 May 2019
Coram:	Winkelmann CJ O'Regan J Ellen France J Williams J Arnold J
Appearances:	N P Chisnall and N J Manning for the Appellant B J Horsley and J E L Carruthers for the Respondent

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CRIMINAL APPEAL

MR CHISNALL:

If the Court pleases. Counsel's name is Chisnall and I appear along with Ms Manning for the appellant R.

WINKELMANN CJ:

Mr Chisnall, Ms Manning.

MR HORSLEY:

Tēnā koutou, e ngā Kaiwhakawā. Tēnā koe te Punua Kaiwhakawā tēnā koe. Ko Horsley, mō ko Carruthers e tū nei mō te Karauna.

WINKELMANN CJ:

Tēnā korua. Mr Chisnall.

MR CHISNALL:

If the Court pleases. The essential argument on appeal, if the Court pleases, is that a miscarriage of justice resulted because the Crown led evidence that at R's trial that the complainant self-harmed, attempted to commit suicide and suffered flashbacks as a consequence of the alleged offending. We say that the appeal in the Court of Appeal misfired because in essence the Court of Appeal failed to assess the probative value of the evidence against its risk of unfair prejudice to R's trial, and that was because the focus in the Court of Appeal was on whether this was, in fact, a defence strategy that was elected and run.

In our submission the issue here is that the Crown hasn't, in its submissions, attempted to grapple with the inherently prejudicial nature of the evidence that the Crown prosecutor introduced at trial and in considering the relevance of admissibility of behavioural change evidence, or what perhaps alternatively might be called behavioural effect evidence, in our submission, considering it in general terms isn't going to be responsive to what was introduced at this trial.

Perhaps if I can summarise by breaking it down, really what we have, in my submission, are two different categories of evidence that the jury heard. What might be described as, if I can use the term, traditional behavioural change evidence, which was introduced both from the complainant and also her mother about the fact that she was quieter and had stopped going to

school and effectively wasn't enjoying life, if I can put it that way. That, in my submission, perhaps fit comfortably with the type of evidence and what I would describe as relatively anodyne evidence which the Courts both in New Zealand and obviously overseas have grappled with in the context of whether that evidence is admissible, and if so for what purpose. But what overlays that evidence in this case, and what in my submission is crucial, is the additional evidence that the Crown prosecutor introduced, which wasn't briefed, about the fact that the complainant attempted suicide, and the question was one that perhaps a more experienced prosecutor would not have asked, which is what effect has this had on you, and the answer that was provided, one would think perhaps is an open opportunity to say the things which had been alluded to in the evidence-in-chief through the video by the mention of cutting. But what it did is it, in my submission, drew a link between the alleged offending and more acute types of behaviour which, of course, the complainant described the fact that she had attempted suicide, the fact that she had started cutting as a consequence of the behaviour alleged against R.

WINKELMANN CJ:

Wasn't the evidence that she was cutting before the allegation?

MR CHISNALL:

The evidence was that there was cutting before the allegation, and that was dealt with in the evidence-in-chief in the video interview where, if I can just go to my written submissions, paragraph 21 is where I set it out, Your Honour is right. what the complainant said is, "I was just in a counselling session," this obviously post-dates, "and she said what happened over the holidays cause we were talking about things that triggered cutting and she said what happened and it just came out yeah." So, yes it's accepted and the Court of Appeal did, obviously, as part of its decision, its reasoning, point to the fact that this was behaviour that preceded as well. But the point is that in cross-examination the prosecutor did ask that – sorry evidence-in-chief I should say, and the very last question that she asked actually invited the complainant to comment on what effect it had had. So while I accept that it

obviously was already a small feature of the case by virtue of the evidence-in-chief through the evidential interview as a matter preceding, in my submission, it's not right, as the Court of Appeal appeared to do, to say this was simply behaviour that occurred beforehand, and that that somehow, the fact that it also is described as happening afterwards, would nullify the effect because of the fact that it was happening earlier as well. Like I say, perhaps –

ELLEN FRANCE J:
Why do you say it doesn't nullify the effect?

MR CHISNALL:
Well, first of all, the issue has to be how the jury's going to approach that evidence, and my point is that perhaps it's somewhat overlooking the way that the jury would respond to this type of evidence. The fact that what it does is it draws a link between what's the alleged offending and the effect that it's had on you, and so while we can say well yes this is stuff that was happening already, the complainant certainly didn't suggest that she had attempted suicide. She certainly didn't suggest that there was some other event that actually led her to taking an action as drastic as what happened.

WINKELMANN CJ:
Can I just get clear what your position is in relation to the cutting. Are you saying that the evidence of the cutting shouldn't have been admitted?

MR CHISNALL:
It shouldn't have been admitted at all. That's my essential submission.

WINKELMANN CJ:
Yes, that would place defence counsel in the difficult position that that was one of his best lines of defence, that this was a disturbed young woman.

MR CHISNALL:
It is, although I'd make the point that it's still possible to traverse that as a theory of the case, that she was troubled by virtue of the fact that she was

having counselling, for example, without necessarily getting into the minutiae of the way that that manifested. But yes –

WILLIAMS J:
But this isn't minutiae. This is powerful evidence of that problem which appeared to pre-exist and you can understand why the defence would want to pick that up and run with it because it may mean the allegations were irrational and fantasy. In fact that's exactly how she was cross-examined.

MR CHISNALL:
And that was the way that defence counsel put the issue.

WILLIAMS J:
And looking at a few of the other cases, that's usually how the defence responds to that kind of evidence.

MR CHISNALL:
It's often all you have.

WILLIAMS J:
Correct.

MR CHISNALL:
And I accept that –

O'REGAN J:
If it is all you have why are you objecting to having it?

MR CHISNALL:
Well it's not the fact that it's just the cutting, it's the other behavioural evidence.

O'REGAN J:

Yes, but we're talking about cutting. You're saying it shouldn't have been in and the Chief Justice put to you that in fact defence counsel, it was his best point.

MR CHISNALL:

My point Sir is simply that, yes, it is a, the fact that she's troubled is the best point. Whether, in fact, the cutting –

O'REGAN J:

You can't just fillet the evidence, can you. I mean you can't say to the jury we'll tell you this little bit but not that bit. If she's troubled won't they need to know how she's troubled?

MR CHISNALL:

Yes, although of course we didn't get to the bottom at the trial as to why it was that she was cutting, and that's an interesting point that didn't seem to be explored in cross-examination or evidence-in-chief.

WINKELMANN CJ:

As you can see we're having some difficulty understanding the cutting point, but you have other points too, don't you?

MR CHISNALL:

I do Your Honour. I have to say if it was just the cutting issue by itself I don't think I'd have a leg to stand on because I take the Court's point. As Your Honour Justice O'Regan says it would be difficult to fillet the evidence and extract that from the theme which is advanced in defence which is that she was a troubled young woman and like I say, to point out, it is a tactic which probably requires a warts and all approach in the sense of having to really not hold back. But my submission is that it went further of that because of course the Crown then chose to ask what effect the behaviour, the alleged offending has had, and so as the Chief Justice says, it's a question of the other evidence as well.

WINKELMANN CJ:

So, is it really the suicide attempt?

MR CHISNALL:

Yes, the suicide and the fact that it the prosecutor has chosen to draw that link to the offending, and so it goes from being troubled young woman who already has issues, to being these are the things which have been exacerbated or which I've suffered as a consequence of this offending, and I don't, the point is a simple one, that when we're talking about things like cutting, and more fundamentally attempted suicide, in my submission it comes down to the impact that that has on the jury in terms of sympathy and prejudice for the complainant and prejudice against the appellant, and this Court hasn't directly engaged with this issue but the Court of Appeal has fairly recently in *R (CA129/2017) v R* [2018] NZCA 235 about the fact that this evidence does have an inherent prejudicial impact on an appellant's trial. So that's the reason that the issue was raised in the Court of Appeal. Just to be very clear, we have to look at it in terms of the impact as a whole of the evidence, which is why I would include the cutting with the attempted suicide as a point that needs to be considered. If it had been a mere tactical decision, and had been left on the basis of what was led, or what was anticipated would be led based on what was in the evidential interview of the complainant, then in my submission I'd have a much more difficult task in terms of saying that this shouldn't be seen as anything more than a mere tactical decision. It's the fact that the prosecutor has then drawn that linkage which, in my submission, is what really raises the concern here.

WINKELMANN CJ:

So if we look at the evidence the cutting really it pre-dates it and it was used by the defence and it seemed to reasonable effect in cross-examination et cetera.

MR CHISNALL:

Yes. I'd agree with that Your Honour.

WINKELMANN CJ:

The evidence that she becomes, hates school and life gets worse for her afterwards, what do you say about the admissibility of that?

MR CHISNALL:

That's actually the one that probably raises the issue of general importance. If it was, because like I say, if you look at the authorities that the Crown has helpfully cited from overseas, but also if we look at *R v A (CA664/2008)* [2009] NZCA 250 and *R v Henderson* [2007] NZCA 524, for example, that actually is the type of evidence which seems to be often led in these situations, to say that a complainant has had, to use the language in *Henderson*, something going on in his or her life.

WINKELMANN CJ:

And what do you say is its legitimate probative value?

MR CHISNALL:

I don't want to say that it has none because I think clearly there is a tension and as the Crown says in its submissions, there's two sides to the coin, often defence counsel will use the lack of emotional response or distress to make the argument that this indicates that there hasn't been anything out of the ordinary that's gone on in that complainant's life, and so the flip side has to be that that evidence may serve a, serve utility to argue the opposite. So, if I can make clear, I'm not wishing to advance the argument that this type of evidence is never admissible. I would suggest that that would be too simplistic.

ELLEN FRANCE J:

Could I just ask you about *Henderson*. It seems to me that at least in terms of what the complainant says in the present case there's quite a difference between that and what the Court was concerned about in *Henderson*, where what they're focusing on there is other people, teacher so on, observing what was going on in the life of a complainant. Here you have the complainant

herself, who's obviously a fairly articulate 14-year-old girl, saying how she felt. Do you accept that there's a difference?

MR CHISNALL:

There's also the mother, the complainant's mother.

ELLEN FRANCE J:

No, that's why I was deliberately putting to one side, I was focusing on the complainant, what the complainant said.

MR CHISNALL:

Yes, I certainly consider that there has to be some constraint in terms of how much of that evidence or who from is led at the trial, and so in *Henderson* there was evidence from, as Your Honour said, teacher and others, and in fact that was a similar position in *R v G* (CA414/03), 26 October 2004 where not only evidence from a psychologist but also from a teacher as well about the young complainant in that case. But nonetheless evidence from the complainant herself, I wouldn't have an issue with that coming out. That seems to be fairly orthodox and I just say that because obviously –

WILLIAMS J:

You're referring only to what you call the anodyne effect?

MR CHISNALL:

Yes, the anodyne, extracting out the attempted suicide and the cutting. The fact that she no longer enjoyed going to school and was unhappy. That's often evidence which ought to be given, has to be given by a complainant his or herself, as a starting point.

ELLEN FRANCE J:

Well I suppose that's part of my reason for the question. It seems to me in terms of admissibility there is potentially at least a difference between the prejudicial probative balance for the sort of evidence in issue in *Henderson*

and what we're talking about here in terms of what the complainant herself says.

WINKELMANN CJ:
And that's because of a direct causal link that is drawn by the complainant?

MR CHISNALL:
Yes.

WINKELMANN CJ:
Whereas that might, which makes it more clearly probative whereas when you're having to patch together what other people's observations are, there's not necessarily that causal, that doesn't necessarily cause the link.

MR CHISNALL:
No, that's a fair point, and in fact often what seems to be missing, and looking at the overseas authorities, often what was missing is the complainant actually drawing that link between the alleged offending and his or her behaviour afterwards, and so it talks about remoteness in terms of time but also ultimately asking a jury to speculate about in fact whether it's relevant at all, without any exploration of the possible reasons why that complainant might have behaved in that particular way, although often it's a feature, isn't it, that we see in these cases where the defence wants to use the evidence to say that this is a person who was already troubled anyway. So that's a feature which is in common with this case.

WILLIAMS J:
What the complainant here says very explicitly though is, "I attempted suicide because of this."

MR CHISNALL:
Yes, yes.

WILLIAMS J:

And it might be said that she's an expert in her own motivations.

MR CHISNALL:

Yes, I agree Sir.

WILLIAMS J:

So that, too, increases its probative value, doesn't it?

MR CHISNALL:

It does but it also increases the potential risk because of the nature and that's a different issue.

WILLIAMS J:

Of course.

MR CHISNALL:

Which is why I don't wish to take an inflexible approach that says that this evidence can never come in. What is necessary, just to go back to Your Honour's question, is in my submission there needs to be a link in the sense that there has to be something which actually creates the temporal connection between the alleged offending and what the complainant describes. That best comes from the complainant him or herself, and that's often what's missing in these other cases.

WINKELMANN CJ:

And your point about the suicide is simply that yes that link is there but the suicide brings a considerable prejudicial wallop?

MR CHISNALL:

Exactly. And that's the concern and that's why I say if what we were dealing with is more anodyne examples, the type that the mother gave in combination with the complainant, absent that other evidence, then I imagine it wouldn't be troubling the Court, although we have that additional issue about the need for

a direction, even in the more anodyne examples, which in my submission is still the point that really needs to carry the day. But –

WINKELMANN CJ:

Can we just explore the direction because if you accept it's probative what direction is – in relation to the suicide. That's just a simply, don't, yes, what directions are necessary?

MR CHISNALL:

Well there's two. I'd say counsel of perfection would say there's two. In this case. The first has to be in relation to the additional evidence that was heard about suicide and the cutting, which is a direction similar, I suppose, to that described by the Court of Appeal in *R v R* that the trial Judge gave in that case, which is I suppose a bolstered sympathy and prejudice direction. It's a recognition that in this type of case that type of evidence carries a risk.

ELLEN FRANCE J:

Well then what additional was required in the present case?

MR CHISNALL:

Well, in my submission, it needed to probably to say again counsel of perfection would actually bring together the sympathy and prejudice aspect to the suicide and the cutting issue. But also, as the Crown has suggested in its submissions, probably at the very least a direction which matches that that was given in *R v A*, which is the talk about, the fact that you can take into account this evidence to show that something that's consistent with the offending alleged but …

ARNOLD J:

In this particular case, because the defence used this evidence, the troubled nature of the complainant before the alleged events and the troubled nature afterwards, and built a theory around that, which the Judge set out fully in the summing up, wasn't it clearly identified that the issue of the explanation for the

complainant's behaviour was heavily challenged. I mean the jury must have understood that?

MR CHISNALL:

Yes, I accept that, but it also, in my submission, if you're going to hear this evidence and there's that potential for that link to be drawn, there must be a way of actually, because *R v A* is the same kind of case, where the defence actually did, and the direction was still seen to have been necessary in that case. In my submission the case here is no different. What you do is you do need to first of all explain to the jury about how they can't jump to the conclusion this shows that the offending has occurred, which was considered adequate in *R v A*. It's not enough, in my submission, to say well, you can rely upon the way the defence has used it and the fact it's challenged. The jury still needs some assistance about what the relevance is, and what it seems to be, the theme that seems to have come out of both New Zealand and the overseas cases, is that the direction to be adequate requires there to be recognition that you can't jump to the conclusion that this shows that the offending has occurred, that you need to actually exclude other possibilities. I appreciate Your Honour's point that you're saying, well, if the defence is saying that this is in dispute, isn't that doing as good as a direction, but in my submission it doesn't answer the issue if it doesn't come from the Judge.

ARNOLD J:

The difficulty I'm having is seeing that the risk you identify exists in this particular case. Your argument is there's a risk that the jury will jump to a conclusion because of this and, at the moment anyway, I'm having a bit of difficulty seeing that because the case was put so fully to the jury by the Judge in the competing versions.

MR CHISNALL:

But it doesn't address the post-defence behaviour in the sense that actually the way that the Crown closed on it. I appreciate the Crown's point and what the Court of Appeal said that there was on express reference to the more difficult aspects of the complainant's behaviour, but the prosecutor

nonetheless drew the linkage, and so in my submission that is an additional feature that was missing in *R v A* where notwithstanding that feature being missing this direction was still considered necessary. So, in my submission, if you're going to get into behavioural change or behavioural effect evidence I endorse the Crown's point, there needs to be a direction, and the thing that seems to be consistent throughout the authorities, such as they are from overseas, is that a direction is what tends to save it, and that there needs to be that additional imprimatur of the Judge about the use to which it can be used legitimately versus the illegitimate use, which is to speculate about what this shows. So, the directions tend to be about narrowing it down to being satisfied that, in fact, it shows that the reason the complainant's behaving this way is because he or she was offended against. Can I say I don't consider that there's any way that you can avoid there being that nexus in link, it being consistent with or corroborative of this type of behaviour, between the offending and the behavioural change. I know that in *R v A* and *Henderson* talked about that being the diagnostic step that ought not to be taken by the Crown. Whether that's realistic or not, in my submission, is a really important point here because there's an inherent tension between saying that something out of the ordinary is happening in the complainant's life, and assuming the jury won't, for itself, draw that link, and that's the problem here in my submission.

WINKELMANN CJ:

Well it's only probative because it tends to show that the offending occurred.

MR CHISNALL:

Yes, if that's the reason for it, that ought to be the reason the jury's told it's come in.

ELLEN FRANCE J:

I can't see, can you show me in *A* what is the additional direction you're talking about? Am I looking at the right *A*?

MR CHISNALL:

Let me just… no it was one where the Judge gave a direction.

ELLEN FRANCE J:

Yes, I know, but what I'm asking you is where is the direction going beyond the direction in this case? I mean I accept it's a bolstered sympathy and prejudice direction, but it is essentially a prejudice and sympathy direction, isn't it, that's my question?

MR CHISNALL:

It's actually a proper use direction.

WINKELMANN CJ:

Where is that?

MR CHISNALL:

Paragraph 40 of my written submissions, paragraph 30 of *R v A*, what the Court of Appeal said, "The jury were entitled to consider the behaviour change evidence provided that appropriate directions were given on the way the evidence could be used. This would include directions – "

ELLEN FRANCE J:

I know that but what I'm looking for is in terms of the actual direction the Judge gave that would seem to be sufficient in that case?

MR CHISNALL:

It's paragraph 30. What he said in that case was that don't jump to the conclusion that it will bolster her credibility. Sorry, that's paraphrasing it, just let me find it. Paragraph 31.

WILLIAMS J:

They don't quote it but did say it was a little confused.

MR CHISNALL:

Sorry Sir?

WILLIAMS J:

They don't quote it.

MR CHISNALL:

No they didn't quote the direction as far as I'm aware.

WILLIAMS J:

But they say it was a little confused, it was good enough though.

MR CHISNALL:

Yes.

WINKELMANN CJ:

So just caution. So in other words consider the possibility rather than estimations.

MR CHISNALL:

Yes, and that's consistent with the type of directions that have been given in the overseas authorities that are cited by the Crown.

WINKELMANN CJ:

It's interesting it's not actually a direction that they should not jump from the fact that this occurred to the fact that the conclusion's proven. It's actually saying that you should exercise caution for seeing it as bolstering her credibility, which is one step removed.

MR CHISNALL:

It is, it doesn't go far enough, in my submission, but it was adequate –

ELLEN FRANCE J:

Well that was my point because in the present case the jury would have been well aware, which is the point Justice Arnold's put to you, that there were other explanations. So if that was sufficient in *R v A* well we're not really any different here is the point I'm trying to understand quite what you –

MR CHISNALL:

Well we are because there wasn't that additional direction about – yes, there were, the competing cases were put, and that was also the case in *R v A*. Part of the reason the direction was considered adequate was because the Judge did fully put forward against the propositions for the change in behaviour, but here what we're missing is that additional direction that *R v A* describes as adequate, but I would say needed to go further, and actually explain that the jury needed to be satisfied that the other reasons given weren't an explanation for it. That's why I say overseas some of the directions have gone to the point where they actually leave the evidence with no utility at all. For example, having to be sure beyond reasonable doubt that this is the explanation. The reason their behaviour changed is because the offending happened, and only after the offending has actually been proved to the jury's satisfaction, which obviously will take you nowhere. So the direction needs to be realistic by in my submission where *R v A* was going was in the right direction, which is to actually explain to the jury that you've heard the explanations and as part of the direction it would be helpful to actually put the cases for and against and for them to be satisfied that the defence has excluded those other possibilities before placing weight on it as a piece of circumstantial evidence. So, I don't take issue with what the Crown proposes in its written submissions is what may be a model direction in this context.

O'REGAN J:

So where are we are in terms of your submissions because my understanding was when you started you were saying the evidence shouldn't have been allowed in at all. Are you saying it should have been allowed in but it needed a direction?

MR CHISNALL:

Yes, in terms of the anodyne behavioural evidence. I'm saying that that, I don't take issue that that may well be admissible, based on just …

O'REGAN J:

Is cutting anodyne or not?

MR CHISNALL:

No, no it's not. What I'm saying in relation –

O'REGAN J:

How could you have possibly run this trial without cutting –

MR CHISNALL:

No, I accept that, but what I'm saying is that the cutting and the suicide element required a direction in relation to prejudice and sympathy and so in my submission that's where the real issue in relation to those two pieces of evidence lies.

WILLIAMS J:

So admissible subject to direction?

MR CHISNALL:

Yes.

WINKELMANN CJ:

The suicide –

MR CHISNALL:

Well, no, I say absolutely not on the suicide. I just –

WINKELMANN CJ:

So you're saying there's three categories of evidence, oh no, no, you put the cutting in the first, it just needs a direction.

MR CHISNALL:

Yes, yes, but the suicide –

O'REGAN J:

Anodyne is always admissible but needs a direction. Cutting in this case you'd accept is admissible but needed a direction –

MR CHISNALL:

Yes, in the context of the way the case was worked, I can't argue against that, but the suicide was introduced by the Crown without any prior notice and my submission is that type of evidence, unless there's a strong contextual requirement for it, which was the case in *R v R* from the Court of Appeal at the end of last year, that would perhaps save it, but the point there was even when it had that contextual relevance to an issue in dispute, it still required a direction. A bolstered sympathy and prejudice direction. So, yes, we can place it, to do fairness to it, it is really in three categories.

WILLIAMS J:

So what do you say then is the unfair prejudice of the suicide evidence given that the complainant says this affected me so badly I attempted suicide.

MR CHISNALL:

Well as matter of course you don't tend to talk in trials about the effect that something has had on someone, we look at the evidence of facts.

WILLIAMS J:

But that's true of the anodyne evidence, too.

MR CHISNALL:

It is, but the anodyne I suppose is, as we often say, is within the jury's common experience. It just comes down to the point that what impact may it have on the jury in the context of a he said/she said sexual case where the appellant has given evidence. Where it really isn't bad conduct behaviour, which is often the reason that defence counsel likes, if I can put it that way, behaviour change evidence, because it actually tends to depict a complainant in an unsympathetic light. Quite the opposite here. In my submission it directly engages the concerns about the jury feeling sympathetic towards the complainant and unkind towards the appellant. Isn't that the issue that –

WILLIAMS J:

Well then why wouldn't a direction be sufficient? It seems to me there are two parts of the direction. One is to say, you need to be satisfied that there is a link, firstly, you've said that. The second thing is, you mustn't by hearing about the suicide feel such sympathy to her that you need a perpetrator, right?

WINKELMANN CJ:

That's the first part really, isn't it?

WILLIAMS J:

Well, it's where you create the link because of the prejudice, because of the sympathy, right?

MR CHISNALL:

Yes, and that surely is the issue in a case such as this.

WILLIAMS J:

So those two dimensions, but they can be dealt with by directions?

MR CHISNALL:

I really feel reluctant to concede that the issue around – the intentional introduction of evidence of attempted suicide is something that ought to come in as a matter of course, so I do wish to hold the line in relation to whether that's admissible, and the reason for that is we go back to the first principles discussed in *R v G* and *Henderson* and *R v A* which is a theme about the need for real caution before introducing behavioural change evidence of any type and so in my submission that's a feature, as I said when I opened, which is missing in this case because there wasn't that assessment either at first instance in the District Court of the probative value versus the risk of unfairness, or in the Court of Appeal, and so I would take it back to the point that that type of evidence carries a special risk.

WINKELMANN CJ:

In *R v R* it was a separate situation I think from this because in fact the accepted facts were such that a jury could see that the offender's behaviour caused, they could be satisfied way back from being satisfied the offence had committed the behaviour the offender's behaviour caused the suicide because of the intensity of the emotional involvement of these twin girls with this one man? So it was a kind of a, it was a different case to this.

MR CHISNALL:

I certainly accept that Your Honour, but I also emphasise the point, which obviously the Court of Appeal made, that there was contextual relevance to it. it came in because it explained the delay or the recantation and the reason she continued to live there and the other, in a very unusual case which I have to say having read it again this morning has some additional features in terms of it being a case where everything came in and it probably was a very small component of what was a very prejudicial picture for that appellant. In my submission that can't be said here because one, we're missing the contextual relevance in the sense of it being led to counterpoint. It was led, for whatever reason, probably the looseness of the question asked by the prosecutor.

ELLEN FRANCE J:

Well in relation to that we don't, as in other cases like *R v A*, have anything further said about this aspect, do we. She simply says, "Tried to kill myself, self-harm." So we don't have, for example, the suggestion of hanging and so on as there was in the other case, it's…

MR CHISNALL:

But we do start to speculate about whether having those additional features is going to make it somehow, push it from being prejudicial to unfairly prejudicial. All I would say is in a case such as this, and I know it's trite to say it, but when you're talking about a relatively short trial and a single issue where both the complainant and the appellant give evidence on the key points, in my submission it's not an answer to say that this wouldn't have had an impact. It's a short trial. It was, in my submission, an eventful piece of evidence to –

when you take it in combination with the other features of the case, and certainly as I've made clear in my written submissions, the way that the prosecutor cross-examined was, in my submission, to go to the aspects which engage with prejudice and sympathy, both in context of this evidence about its, asking R to comment on why her behaviour might have changed but also obviously commenting on demeanour, and then of course the additional feature, which I've addressed in the second ground, about him smiling and describing the allegations as "lame" when he was spoken to by police, and that was, I know the Court of Appeal said, well, that was ineffectual and it was modestly –

O'REGAN J:
This wasn't a point –

MR CHISNALL:
No, and I simply put it – but I simply make the point because in my submission it can't be extracted from the question of what impact this other evidence might have had on the jury's impression of the complainant versus the appellant, when you take a particular line of cross-examination which focuses on those character blackening aspects to the complainant's behaviour, and his response to them and what he, himself, has done.

WINKELMANN CJ:
Yes, but you didn't seek leave on it, and so we're not interested Mr Chisnall.

MR CHISNALL:
No, I appreciate that. It's a small component, I can make it clear I'm not hanging my hat on it. I simply make the point about the, in terms of the tactical advantage to which the prosecutor produced the evidence, in my submission, it's a relevant consideration that when answering Your Honour Justice France's question about whether this was just a small aspect to it, it can't be seen just in isolation. In my submission you also have to look at the way that it was used. I know that the answer the Crown will say is, as was said in the Court of Appeal, is well the prosecutor didn't actually expressly

refer to it in closing or when cross-examining but the point I make in response is did she need to when the way that the question was asked was so manifest it would have, in my submission, drawn that linkage and raised those particular concerns.

So coming back to it, in my submission, this is one where I hold the line on the suicide point. In my submission to be admissible required probably some careful consideration which wasn't given in this case because it probably wasn't anticipated, and there really isn't any direct consideration of that in the Court of Appeal. In terms of the other evidence I hopefully have made it clear that the appreciate the tactical advantages to the cutting evidence but in my submission again using that evidence doesn't excuse the need for a direction and the same really can be said in relation to the more anodyne behavioural change evidence. In my submission it's one where the theme that appears to come through, the decisions both in New Zealand and other cases, is that a direction is a prerequisite if that evidence comes in and in my submission there's nothing contentious about the fact that because that was missing we say that's a fundamental error.

Perhaps just finally I want to address the point that I've made about section 9 Evidence Act 2006 where there's a tactical advantage and where evidence hasn't been challenged. I hope my written submissions have made the point relatively clear in terms of *Marsich v R* [2012] NZCA 470 and *Wilson v R* [2015] NZCA 531. In my submission it's a point that probably needs to be directly grappled with because it's often said by Crown in response as well, it wasn't challenged by the defence and therefore that's a complete answer to whether there's been a miscarriage. I simply make the point that we need to be more careful than that about it. Our starting point is that admissibility is a question of law for the Judge in terms of *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 and in my submission what that requires is an assessment of the probative value of the evidence as opposed to its risk of unfair prejudice. The point that comes out of *Wilson* and *Marsich* in my submission is simply that the Judge as gatekeeper needs to have the final say on these things. The risk associated with the approach proposed by the Crown is to simply say that the

Crown can sit on its hands and if it isn't challenged therefore it's somehow deemed to be admissible and that's the end of the enquiry. Surely part of the process has to be the Crown carefully assessing the risks associated with particular types of evidence and in my submission there's a red flag in a case such as this where you're talking about both behavioural change evidence in the anodyne sense. You'd expect there to be a conversation about that. But also about the more troubling aspects to this case. As I say it probably is somewhat academic because of the fact that the most prejudicial piece of evidence obviously came in without any expectation I'd say from the defence. But in my submission the answer can't simply be, well it appears that the defence has used the evidence, that's the end of the enquiry. As we know from *R v A* that isn't the end of the enquiry in terms of assessing whether there's a risk of a miscarriage. Taking it back to *R v Sungsuwan* [2006] NZSC 57, [2006] 1 NZLR 730, and obviously the Crown talks about tactical decisions made by defence counsel and whether it's a reasonable decision, or whether it fits into that third category, the rare case where even if deemed reasonable it still, nonetheless, caused a miscarriage. In my submission part of that enquiry must focus on whether the evidence would be admissible as challenged and rather than making a decision in a vacuum in terms of what the tactical advantages and disadvantages of evidence might be, in my submission, part of that enquiry has to actually be on whether, in fact, if I was to challenge this evidence, would there be a reasonable prospect that it would be excluded, and in my submission that actually neatly summarises the issues here. Even though it's been used to tactical advantage, pieces of this evidence, in my submission, would have been excluded by the Judge if he'd been asked to rule on it. So that's why, in my submission, it's not a complete answer, as the Crown suggest, to simply say defence acquiesce and that's the end of the enquiry.

WINKELMANN CJ:

Yes, but you can agree under section 9 to admit evidence which is not otherwise admissible, for instance, it's hearsay et cetera.

MR CHISNALL:

Yes.

WINKELMANN CJ:

For good, sound tactical reasons. The issue, I suppose it arises under *Marsich* and *Wilson*, is that the Court says that it reserves the right to say that the *Sungsuwan* situation applied, it wasn't properly admissible then without getting into the issues of trial counsel competence the Court can still say it may have been admitted under section 9, but a miscarriage has resulted and this wasn't properly admissible.

MR CHISNALL:

So it puts the, it front ends it and puts that enquiry before the *Sungsuwan* one, and that may well be right because of course what we're looking at is, going back to first principles of admissibility being a question of law, that, in my submission, ought to be the starting point in any enquiry by an appellate court.

O'REGAN J:

But once you've got the section 9 haven't you accepted it's not admissible?

MR CHISNALL:

In terms of it being …

O'REGAN J:

That you've let it in even though it's not admissible. So you've already decided it's not admissible, now you're applying section 9.

MR CHISNALL:

The issue is that it takes the gatekeeper function out of the process.

WINKELMANN CJ:

It also takes away the need to formally prove something which might be – it could be a mixture, couldn't it, of admissible and non-admissible.

MR CHISNALL:

Could be. Yes, and often, I mean more often than not, and I apologise this is evidence from the Bar, it is often to lead evidence that would otherwise be admissible, but to circumvent the way in which it has to occur. So section 9 as a process is a good one. It's one that, in my submission, is called in aid in many trials by the parties and on issues that aren't really in contention. But when we're talking about something as fundamental as this, in my submission, there's a need for caution before simply saying that section 9 provides a complete answer to the issue.

O'REGAN J:

But it was a pretty big part of the defence case. I mean there is a slight flavour of the defence having adopted this approach, it's failed and now on appeal saying, let's have another go, where we adopt a different approach.

MR CHISNALL:

I'd certainly agree with Your Honour if I was the one who'd run the tactic at trial and then I was standing here saying that, I know that hindsight is a wonderful thing but, yes, and that's why I've attempted to directly engage with the point that the Court's made about in fact we can't extract the defence tactic from the enquiry into whether there's been a miscarriage of justice. But, in my submission, it doesn't answer what actually came in. It's one thing to talk about it in general terms, and as Your Honour said, well look even if we look at the cutting as being something that was used, it doesn't provide an answer to the other evidence, to the attempted suicide, and it doesn't actually provide an answer in terms of the legal requirement for a direction, and I suppose that's the point I'm making here really, is that even if you get to the point where you say, well, we accept as a general proposition this type of evidence can come in. The larger question really, and where guidance would be of real utility, is what kind of direction's required and was this a case where one was, and my end point really is that if you look at the authorities, both from the Court of Appeal and overseas, there's a consistency about the need for a direction, where behavioural change or behavioural effect evidence comes in. That's what makes this case, in my submission, unusual is

because the Court of Appeal said, ideally a direction would have been given, which appears to be recognition of the fact that that is the theme.

WINKELMANN CJ:
And the direction would be that this is evidence adduced to show that the behaviour of the complainant was consistent with something major having occurred in his or her life at the relevant time, and on the Crown case that major event was the offending.

MR CHISNALL:
Mmm.

WINKELMANN CJ:
But you should exercise caution in taking that evidence into account as corroborative and consider the possibility of other explanations.

MR CHISNALL:
Yes, and that's probably a more complete version of what saved the appeal in *R v A* on that first ground, and by doing so we don't shy away from what it's real utility is, which is why I don't try to say that we can't pretend any longer that it's going to be seen as consistent or corroborative, if the jury hears it, and that's really the point when you get back to, going to be good common sense, and surely where a jury has heard evidence of this nature and where there are real elements that don't so much depict her in a bad light as a sympathetic light, given she is trouble, in my submission, there is a need for a direction and that's what has caused the miscarriage in this case.

WILLIAMS J:
You would say that there ought to be a sympathy element to that as well as the circumstantial –

MR CHISNALL:
In this case, yes, because of that type of evidence.

WILLIAMS J:

Well, yes, I guess any evidence in which the complainant is for a collateral purpose also injured or a victim.

MR CHISNALL:

Yes, and that's why I say I don't see them as mutually exclusive. They need to, probably the ideal direction in a case such as this does incorporate that prejudice and sympathy aspect to it, and just fairly and squarely tells the jury why it's heard it and how it can use it.

Unless the Court has any questions, those are my submissions.

WINKELMANN CJ:

Thank you Mr Chisnall. Mr Horsley.

MR HORSLEY:

Thank you. I think it's fair to say my learned friend raises some interesting points but, and here's the but, it's somewhat abstract. It's divorced from the facts of this case, and I think that is where the problem lies here, because this was never a case about post-defence behavioural changes being diagnostic of sexual offending or, quite frankly, even emphasised as being corroborative of sexual offending having occurred. What this case was about was a legitimate defence tactic which was to show that this young lady was troubled, but more than troubled, she'd engaged in what was described as irrational and emotive behaviour, self-harm, the cutting was clearly a big part of the case, it was a big part of the evidence-in-chief, from the defendant himself, the fact that he knew about this, he knew she was troubled, and that was one of the reasons why he helped her. There's just no question that that evidence was probative, relevant and critical, in fact, to the defence case. Equally though, the Crown had to deal with it, and the explanation from this young girl was, there are things that trigger me self-harming in my life. I actually don't consider that to be irrational and, in fact, something bad happened to me again with this man and yes I self-harmed. If she had not self-harmed quite frankly that would have been another aspect of the defence case. The fact

that purportedly when bad things happen in her life, she does these irrational acts. If she had not done it in this case, that would have been a submission from the defence, what's going on here. There's no evidence of a change in her conduct or even a continuation of her existing conduct that she has.

The Crown didn't emphasise this by way of corroboration and can I just come back to my learned friend's point that there was a mention of attempted suicide, and that seems to be the case that, from his point of view at least, has changed the dynamic completely in this case. Let's just look at that. That happened I think at the conclusion of some 15 pages of further evidence-in-chief, over and above the 61-odd pages of the transcript of the EVI, and that's at page 17 of the, I think it's volume 3 of the case on appeal. My learned friend is right, it did take the prosecutor by surprise when she asked about the first occasion, and this is logical because what you've got here is, and I'm sorry to jump around, is this girl being questioned about why is it that she was alone with this man in the first place, then, given that you don't have to be alone with this man, why on earth, after him sexually assaulting you the first time, were you sometime, about a month later, alone with him again in the house, with your mother not present, when she was away at work and you knew there was no possibility that you would be rescued if a further assault took place. So this was all a part of that. It was a part of her explaining why, after the first offending, she acted in the way she did. How she felt, how she felt about this man being a father figure to her, how she felt trapped, but also how she felt despondent, and it was a logical question about how she felt after the first time. She said, "I felt kind of trapped, like I couldn't do anything about it. Because he was like a dad to me and I didn't understand." And then she was asked, "And after that second occasion, how have you been feeling?" And we have the piece of evidence that assumes some importance here. "Um, gone downhill. Um, I've stopped going to school, um, have tried to kill myself, self-harm." The immediate follow-up question to that is not, what do you mean by attempted suicide, what happened, it's as it nothing was said about the attempted suicide. The prosecutor, in my submission, quickly brushed over that and said, "Before everything happened how was school?" So she focused on school, not the

harm, not the suicide, and she got the answer, “It was like my happy place. I just loved going to school. Always there, always in meetings, always leadership, always getting everything done, best grades. But now it’s just gone down I guess.” And that’s where she stopped. She didn’t run the risk of leading anything else and in this entire trial that is the only mention of the words “attempted suicide” and that is the only mention of it.

Every other focus from the Crown solicitor was in the closing address was only on some of the emotive effects of the offending on her, which was to talk about the flashbacks and the smell of the cologne and how that set her off, and nobody suggested that there was any problem with the attempted suicide, and one can imagine that given the case was so clear from both sides, that is she’s either an existing troubled girl who has made up all of this because of her pre-existing problems, and this is just a continuation of that, an extrapolation of that, or in the Crown case, yes she has some troubles, but she’s reliable, and this is what happened to her afterwards, but more importantly the Crown in its closing focused on the three aspects of the actual evidence that they said meant she was reliable. That was their focus on reliability.

WINKELMANN CJ:

The Crown did say though, “She’s a troubled girl who’s got more troubled.” That was effectively what …

MR HORSLEY:

Yes, it was, and that was mainly around the fact that her schooling had gone, and it certainly was not a suggestion that she’d attempted suicide. Now my learned friend would like to draw that inference but that’s just not there. If this had been a part of the case, like it was in *R v R*, it would have been a much more explicit thing. In *R v R* it was drawn out, she was asked about exactly what the suicide attempt was, which was a hanging. There was a degree of prejudice because she needed to be revived by I think her father and her abuser, and it was clear that that needed directions. Here, quite frankly, just as in many trials where something unfortunate might come out, or something

that you don't quite know how to deal with, and I don't put it in this category actually, both the parties, the two counsel involved and the Judge clearly decided the best course of action was to completely ignore that reference and I am quite sure the jury understood that if anything it was just an extrapolation but not a significant one on her evidence of self-harm anyway. So, the submission that my learned friend makes that this was so highly prejudicial I would submit just does not bear scrutiny and any direction by the Judge on that would have only drawn attention to something that nobody used in this trial, and that quite frankly is a very common way of dealing with evidence that is a little bit uncertain in a way.

My learned friend has suggested that the Crown thinks that directions need to be used when behavioural evidence comes in and this is why I suggest that this case is not a vehicle for that discussion, because in our broad discussion of the cases, and the international case law around this, we have really been looking at those cases where either the evidence was said to be diagnostic of the sexual abuse, and *R v G* is a good example of that where effectively the entire case was run on the basis of the behaviour exhibited by the complainant must mean that they were sexually abused.

ARNOLD J:
So when you say diagnostic you're meaning what?

MR HORSLEY:
That evidence, for instance, of bedwetting stopping immediately after making a complaint, must mean that you were, in fact, sexually abused. So rather than even being used as corroborative of credibility, for instance when there's a challenge to recent invention and you can say, but this behaviour I was exhibiting actually is symptomatic of something traumatic having happened. Not necessarily that I was sexually abused, but at least it's corroborative of credibility. Where the evidence has been led though in a diagnostic way, and it's very difficult to see how that would happen, but I think with some of the younger, when we've seen it with younger child complainants for instance, the five year old who was exhibiting highly sexualised behaviour including

insertion of implements into other children, when that was led, absent expert evidence as to that sort of behaviour being either normal or abnormal and then if abnormal whether it can be linked to sexual abuse, the jury is left in, quite frankly, an incredibly speculative position, and would perhaps naturally draw to a conclusion that if a five year old is exhibiting highly sexualised behaviour, they must have been exposed to it themselves. Those sorts of things, even if expert evidence can be led, they are incredibly risky and require direction.

WINKELMANN CJ:
So it's a matter of potency?

MR HORSLEY:
Absolute, well, potency and misuse I think, yes.

WINKELMANN CJ:
But the difference between it being corroborative of a complainant and being diagnostic of a fact of abuse is really to do with potency. Both are, or is there a different, because bedwetting and sexualised behaviour it's almost as if they're, it's suggests, impliedly suggests that there is a consensus, a scientific thought that this is proof of sexual abuse, is it somehow different or is it simply just a matter of degree?

MR HORSLEY:
No, I think those ones are ones that have been used in the past in the cases by prosecutors as showing that these are symptomatic of sexual abuse, and quite frankly that was wrong because they didn't have the experts to say that that was the case, and it required very strong directions around the use of that evidence in any event.

The second category where directions have been said to be important, albeit not fatal, is where there is just general evidence of misbehaviour, misconduct, sometimes going on over a period of years, and it's said that this conduct started when the allegations are alleged to have occurred. So it post-dates

the alleged offending, and it is said to be conduct that, albeit is not diagnostic, supports the fact that something traumatic had happened, and when it is just general evidence of observations made by third parties, then you can see that best practice would suggest a direction to the jury as to how to use that evidence, and even the fact that it can't be proof of the actual offending. It's maybe something that you can take into account as to whether something has occurred, but whether it is actual sexual offending or something else in that person's life, is going to be a matter for you. So it's just to use that evidence in the right way.

WILLIAMS J:
I struggle with that division I must say because in the end if that evidence is relevant it's always going to be diagnostic in the general sense of that term. It's always going to be evidence that this happened, otherwise it's not relevant.

MR HORSLEY:
Not necessarily Sir because it does come in, in the context of things like an attack on the person's credibility because of, say, recent invention, and it will be a peripheral part of supporting the credibility of that person by saying –

WILLIAMS J:
But it's still diagnostic even in that context because it speaks to the truth of the complaint by saying, this circumstantial evidence shows that what I say happened did happen.

MR HORSLEY:
It may be, and I think where it becomes diagnostic more so in that case is where the complainant themselves has said, I did this conduct because I was abused. Then obviously if they are believed, yes, it is kind of diagnostic. What I'm talking more about here is third party observations of people, which can't be diagnostic. What they can do is provide the jury with a context to say this person seemed to be exhibiting some form of abnormal conduct for them.

WINKELMANN CJ:

But aren't there different categories of third party observations.

MR HORSLEY:

Yes.

WINKELMANN CJ:

And is the use of the word "diagnostic" possibly misleading? The point about third party observations I think that Justice France made, which is a good one, is you need to be much more cautious about it, as to its probative value because of the lack of the evidential link.

MR HORSLEY:

Yes.

WINKELMANN CJ:

Diagnostic, is it really rather what we're talking about, where we're talking about the type of conduct which is beyond the normal experience of a jury. So, for instance, what significance do you attach to the fact the child bed wets, what significance do you attach to the fact that someone is showing highly sexualised conduct, and for a submission to be built on either of those, is problematic in the absence of expert evidence. So it wouldn't matter if you said, for instance, that proves that the sexual offending happened, or you took a much more cautious kind of approach and said, well, it's part of what you can take into account, it's general background. It wouldn't matter for either if actually outside the general experience and it's probative value without the supporting framework of expert evidence therefore is slight.

MR HORSLEY:

Yes, and that's exactly right, so when I'm using the word "diagnostic" I tend to be emphasising evidence that you would need experts to actually have given evidence on the effect of it.

WINKELMANN CJ:

I think it's a bad word. It may be –

MR HORSLEY:

I'll stop it.

WINKELMANN CJ:

No, but it comes from the case law, and I think it may be that it's because what the Court has been trying to get at is the notion that it is actually almost clinical. It's the sort of thing you need expert, clinical kind of evidence about the significance of it.

MR HORSLEY:

Yes Your Honour. So perhaps, and I don't think we're at cross-purposes at all on that, maybe some of my language is a bit loose on that, but I think if you bring it back to this case, the answer is that the evidence about both her pre-offending conduct and the post-offending conduct, was not used in that way. It wasn't used to bolster credibility in that sense or to be diagnostic, if I can use the word once more. What it was used for was actually as an attack on this woman, or this teenager as she was then, for her troubledness and providing a reason why she might have invented this, or as she had gone down those steps, and the Crown had to, in some way, shape or form, rebut that, and what they did was they asked the complainant directly why she did things or what she did after the offending, and it was all part and parcel of that. No different, quite frankly, from the evidence that she called her friend immediately and gave recent complaint evidence. No different from that. So in the context of this trial that is the importance that this assumed. It was used by the defence to attack her credibility, and there was shoring up of it by the Crown, but it was never used in an improper fashion or, quite frankly, in a fashion that required some special direction by the Judge because it was so obvious what both the Crown and defence cases were in relation to this offending.

Now at paragraph 54 of our submissions, because I don't want it to be left as said that the Crown suggests that there should be a direction in all cases. We make it very clear that not all cases that involve some behavioural evidence will require direction. It is really only those ones where there is confusion about use. There is expert evidence and there needs to be some discussion around that, and sometimes I think in the case of general behaviour there maybe the requirement. But where the complainant has clearly said, "I did this as a result of this," well the jury know exactly what the issue is and it's the same issue they had all along. Do we believe her or not, and that's all this case was about.

Your Honours I don't think I can assist you much further in terms of, you have my submissions and I think those are the points I wish to make, but is there any aspects of this that I could perhaps provide further assistance on?

WINKELMANN CJ:
No, thank you Mr Horsley.

MR CHISNALL:
Just briefly. In my submission it's artificial to say that this is simply the Crown responding to the evidence and to explain the effect that it had on the complainant by doing so it brought into play the issue about whether there was a nexus between the alleged offending and the behavioural change, and in my submission you simply go back to what it is that the Crown said in closing in the prosecutor's penultimate paragraph in submission, that it happened, she suffered these emotional responses because of the offending. She is honest, she is reliable. And so my submission is that's what closed the loop and that's what required a direction in this case and why it would be artificial to conclude that this case somehow stands apart from the early authorities from the Court of Appeal, where the point was made that even where there isn't that link drawn by the prosecutor, a direction nonetheless may be required because of the way the jury may use it, and what we're focusing on here is the way the lawyers used it, but in my submission, you

have to go back to the impression that the jury would have been left with, given this evidence.

Just briefly on the point about what's diagnostic. A troubling area when it comes to expert evidence and obviously section 23G and the consistency versus inconsistency point is not just one that's troubled our courts, but clearly looking at the international authorities that the Crown cited, an issue there about where the line is drawn in terms of what a jury can see as ordinary behaviours that can be dealt with through its own common sense and knowledge of the world, versus what it needs assistance on, and the bedwetting example is given. To be clear in this case, in my submission, really we're not talking about whether expert evidence was required. What we are talking about in most part is behaviour that is in the ordinary provenance of the jury in terms of what was led from, let's just use an example, the complainant's mother. That, in my submission, perhaps is the most useful point to focus on in this appeal when considering the Crown submission that there wasn't any focus by the Crown on whether there was post-offence changes. That begs the question why the mother's evidence was led at all. in my submission, that is what raises the concern about the approach that's been taken by the Crown here. It's simply put, in my submission, this is a case where on the authorities and in terms of the risks associated with the evidence a direction was required.

Unless the Court has any questions those are my submissions in response.

WINKELMANN CJ:
No thank you Mr Chisnall. Thank you counsel for your very helpful submissions. We'll take some time to consider them and we will release the judgment in accordance with the usual procedure.

COURT ADJOURNS: 11.15 AM