**NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html**

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html**

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT AND WITNESS "S" PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 1/2019**
**[2019] NZSC 87**

| | |
|---|---|
| BETWEEN | R (SC 1/2019)<br>Appellant |
| AND | THE QUEEN<br>Respondent |

| | |
|---|---|
| Hearing: | 14 May 2019 |
| Court: | Winkelmann CJ, O'Regan, Ellen France, Williams and Arnold JJ |
| Counsel: | N P Chisnall and N J Manning for Appellant<br>B J Horsley and J E L Carruthers for Respondent |
| Judgment: | 16 August 2019 |

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**JUDGMENT OF THE COURT**

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**The appeal is dismissed.**

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**REASONS**
(Given by Ellen France J)

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## Introduction

[1] Following a trial by jury the appellant was found guilty of six charges of sexual offending against the daughter of his former partner.[1] He was sentenced to a term of imprisonment of three years and six months.[2] His appeal against conviction was dismissed by the Court of Appeal.[3] He now appeals to this Court.[4]

[2] The appeal turns on:

(a) the admissibility of evidence given at trial by the complainant and her mother about the complainant's behaviour, including evidence that she self-harmed and that she attempted to commit suicide; and

(b) the way in which the trial Judge dealt with this evidence in summing up.

[3] To explain how these issues arise we need to first set out the background.

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1 The appellant was also acquitted on one charge of sexual violation.
2 *R v [R]* [2018] NZDC 3878 (Judge Thomas).
3 *R (CA158/2018) v R* [2018] NZCA 529 (Kós P, Woolford and Dunningham JJ) [CA judgment].
4 Leave granted: *R (SC 1/2019) v R* [2019] NZSC 10.

## Background

[4] The appellant had been in a long-term relationship with the complainant's mother although they were not living together by the time of the incidents giving rise to the charges. The complainant, who was 14 years old at the time of those incidents, regarded the appellant as a father figure.

*The offending*

[5] The charges arose out of two separate incidents. The first of these occurred on 27 December 2016. There was no issue that the appellant and the complainant spent some time together that day. However, the appellant contested the complainant's account that, after they had been out for a drive, they were together at the complainant's home. Her mother was at work at the time.

[6] The complainant said the appellant brought their conversation towards sexual topics and then made sexual advances. He rubbed himself against her genitalia and kissed and touched her neck and chest area. She said she became distressed and attempted, without success, to free herself. Eventually the appellant let her go and he left. The complainant told a friend, S, about the incident.

[7] The other charges related to an incident, again at the complainant's home, on 25 January 2017. On this occasion the complainant said the appellant gave her alcohol and she became intoxicated. The appellant began to talk about sexual matters and then, whilst they were on the couch, he kissed and touched her neck and breasts. After removing her tights, her evidence was that he digitally penetrated her and rubbed himself against her genitalia. She also said she tried to scream and he held his hand over her mouth. After he had gone she said she "drunk called" S.

[8] About two weeks later, the complainant told a school counsellor about what had occurred. The police became involved. The appellant declined to be interviewed by police. The matter went to trial.

*The trial*

[9] The bulk of the complainant's evidence in chief was comprised of her evidential video interview. In the course of that interview she was asked about the "first adult" to whom she had talked about what happened. The following exchange took place:

> [A] Um [T] probably.
>
> [Q] So tell me more about telling [T].
>
> [A] Um, I was just in a counselling session and she said what happened over the holidays cause um we were talking about things that triggered cutting and she said what happened and it just came out yeah.
>
> [Q] Tell me the stuff that you told her.
>
> [A] Um I said that he came over and tried to do things and she kind of got what I mean and she said if I had told anyone and yeah I can't remember what else I talked about.

[10] The complainant said in the interview that she had been seeing a counsellor for about two months before the first incident. She talked also of having nightmares and flashbacks and the association she made between the smell of the appellant's cologne and the offending. There was no attempt by the defence prior to trial to have the evidential video interview edited.

[11] At trial the prosecutor asked the complainant some supplementary questions after her evidential video interview was played. Relevantly, the complainant was asked how she felt between the first and second incidents. The answers and follow-up questions were as follows:

> A Ah, kind of like trapped. Like I couldn't do anything about it. I was always scared.
>
> Q Why did you feel trapped? …
>
> A Because he was like a dad to me and I didn't understand.
>
> Q And after that second occasion, how have you been feeling?
>
> A Um … Gone downhill. Um … I've … Stopped going to school, um, have tried to kill myself, self-harm.
>
> Q Before everything happened, how was school?

A 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.

[12] The complainant was cross-examined by defence counsel at some length about matters such as her flashbacks, nightmares and self-harming. To illustrate, in the context of questioning about her nightmares, she was asked whether she would "describe [herself] as a person who reacts emotionally and perhaps irrationally". She said "no". The cross-examination continued:

Q – when serious events happen?

A No.

Q You talked before about since this event you've been self-harming by cutting yourself?

A Yes.

Q In your [evidential video] interview you mentioned, towards the end there, that you were discussing with somebody events that could, "Trigger cutting." I presume you were talking about self-harm then?

A I can't remember.

[13] Counsel also put to the complainant that she had been seeing the school counsellor "well before" the incident for "exactly the same thing". The complainant denied it was "about exactly the same thing". The exchange continued:

Q About cutting yourself?

A It was about cutting but it had nothing to do with this.

Q And you wouldn't call that an emotional and irrational reaction?

A No.

…

Q Would you agree that you're a troubled young woman?

A No. I have problems but I don't make things up.

[14] The complainant's mother also gave evidence of the complainant's behaviour. She was asked in her evidence in chief about what she had known of the incidents before being told about the disclosure by the complainant's school counsellor. She said she had "no idea" about what happened to her daughter "But her behaviour was

very challenging, too, so I was not sure what's going on". The prosecutor asked about when the complainant's behaviour was challenging. She replied:

> It was from, ah, December. Her behaviour was … she was very quiet, she was locked in the room, she will always stay in the room, she will not come out, she will not talk to me, she will not engage with me as … we had a good relationship together, but she was withdrawing herself from everyone and she was not going to school anymore and all that. And one time she did mention, because it was school holidays, she did say, "I can't wait to go to school and see my counsellor."

[15] Defence counsel put to the complainant's mother that the complainant was "a troubled young lady", a theme of both defence opening and closing addresses. The complainant's mother denied this. She was asked about "this cutting thing". The complainant's mother said she was aware "that the cutting thing" began after the December incident. Defence counsel suggested the cutting "was going on a long time before that", to which the witness responded: "No, I'm not aware of that." When asked about the complainant having seen a counsellor "about this as early as October last year", she responded: "I don't know and I can't remember. I don't know".

[16] The complainant's friend gave evidence about the calls from the complainant. In addition, the jury heard evidence from a police officer about location data relating to the appellant's movements on the days in question that had been obtained from the appellant's phone. The officer also referred to a brief conversation with the appellant when the appellant was arrested.

[17] The appellant gave evidence. He denied any sexual conduct with the complainant. His counsel asked him about his knowledge of the complainant self-harming. He said the complainant's mother told him about the cutting. From what she told him, he had known about it since the middle of 2016 (before the first incident) and he stated that he was also aware that the complainant had been seeing the school counsellor about this.

[18] The prosecutor in closing referred to the complainant's emotional problems and to the evidence about her changes in behaviour. She described the evidence about the complainant's change in attitude to schooling from the complainant and from her

mother and referred to the evidence about matters such as flashbacks and nightmares. The relevant passage in the Crown closing address is as follows:

> Before these events you heard the complainant was doing really well in school. She may have been having some emotional problems, as teenagers often do, perhaps more than most, which makes her particularly vulnerable, but it wasn't until the events on the 27th of December and 25th of January that she really took a turn for the worst. She has clearly been affected by these events greatly. And you've heard from her mum how she hasn't really been going to school since this happened. She spoke of flashbacks, panic attacks and nightmares since these events happened. And she recalled how even the smell of his cologne brings her back to when these things happened.
>
> The Crown says that she has experienced these emotional responses because of the sexual assaults that were inflicted upon her by a man she thought of as her father. She isn't lying. She isn't mistaken. She wasn't dreaming. She was honest. She was reliable. It happened.

The prosecutor did not mention the complainant's self-harming or her attempted suicide in her closing address.

[19] Defence counsel in closing canvassed at length the complainant's emotional state. The submission was that the complaints to the police had their genesis in difficulties the complainant had at school and in internet relationships. Counsel referred to the cross-examination on this topic and submitted the jury should put what she said in response to questioning in context. He said:

> But have a think about the rest of the evidence you've heard. Prior to Christmas she was seeing the school counsellor, we know that. Why? Well one of the reasons at least was that she was inflicting self-harm on herself by cutting herself, cutting her arms, or hands. Why would she do that? We don't know but I would suggest to you ladies and gentlemen that that sort of behaviour is emotional, and it's irrational. If she's the sort of person that behaves in such an emotional and irrational way can you be sure that this is not an emotional, and irrational response to something?
>
> She spoke about in her evidence that when she was speaking to the counsellor they discussed events that trigger cutting, well again we don't know what they are. But we do know that there are events in her life we can infer, there are events in her life which are emotional and irrational responses to something.
>
> You've heard the evidence about this Internet romance with [C]. Now clearly that was affecting her deeply. Well we've all probably had experience of knowing somebody who gets carried away with these Internet romances, and she was a young lady who perhaps lacked the maturity to be able to cope better with this sort of situation. But she had a deep attachment to this [C], and it was troubling her, troubling her to the extent that she wanted to talk to [the appellant] about it.

[20] Counsel also said the jury should consider whether, "If something is dramatically wrong", the events described were "the cause or are they a symptom?" Further, he said:

> But I would suggest to you if you think about it carefully this [the alleged offending] is unlikely to be the cause.

[21] Counsel then addressed the evidence as to changes in the complainant's behaviour, stating:

> Now it's been emphasised to you that since she's gone back, or since the school year started she's not returned to school, and yet she describes school in her evidence as being the place that she felt safe and happier. If she has had an experience which has caused her troubles why would she avoid the very place where she feels safe and happy, unless the experience she's got, the experience she's had is a symptom of something more deeply underlying.

[22] In summing up, the Judge emphasised the presumption of innocence and that there was no obligation on the appellant to raise "any alternative scenario or explanation". The Judge also explained that if an alternative was suggested, the appellant did not have to "satisfy [the jury] that that is what happened". Rather, the onus was on the Crown. Finally, the Judge gave a standard direction to the jury to reach their decisions "uninfluenced by prejudice or sympathy".

*The Court of Appeal judgment*

[23] In dismissing the appeal, the Court of Appeal considered the evidence of the complainant's behaviour was admissible. The Court said that the evidence was of "ordinary and understandable reactions" which it would be "artificial" to say could not be led.[5] Even if the evidence was not admissible the Court concluded that there was no risk of a miscarriage of justice. That was because of the trial strategy of the defence. The evidence in question "formed an integral part of the defence".[6]

[24] The Court did not consider the prosecutor in closing had linked the complainant's self-harming and attempted suicide to the offending and noted the prosecutor did not refer to self-harming or to attempted suicide.[7] But, the Court

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5 CA judgment, above n 3, at [21].
6 At [20].
7 At [22].

acknowledged, "the evidence implied links between the self-harming behaviour and the offending".[8] Because it was made clear on the evidence that the complainant had been self-harming prior to the first incident, "The strength of any causative implication was … limited".[9] That said, the Court considered that although not sought, "a direction that the jury should not jump to the conclusion that the self-harm by cutting and attempted suicide boosted the complainant's credibility … Ideally" should have been given.[10]

[25] The Court found that the absence of such a direction did not give rise to a risk of a miscarriage of justice for three reasons: first, because of the defence strategy; secondly, because the prosecutor had not sought to use the evidence to make that link; and finally, because the conduct preceded the incidents. The Court emphasised that the prosecutor had "avoided reference to self-harming or suicidal behaviour".[11] Finally, the Court said:

> [27] Any remaining risk of unfair prejudice would have been adequately mitigated by the Judge's prejudice and sympathy directions, and general directions on the presumption of innocence, where he specifically addressed how the defence sought to use the evidence in question.

[26] For completeness, we note the Court also rejected an argument made by the appellant about the admissibility of a comment made by the appellant to the police at the time of his arrest.[12]

**Was the evidence admissible?**

[27] The evidence in issue is as follows: first, evidence which counsel described as fairly "anodyne" evidence about the complainant's behaviour at school and the ways

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8 At [23].
9 At [24].
10 At [25].
11 At [26].
12 At [33]–[34]. The appellant sought to raise this aspect in submissions in this Court. It was not, however, a ground on which leave to appeal was sought and we do not engage with it. In any event, it was accepted this was not a critical point but, rather, was seen as supportive of the appellant's case more generally.

in which that changed; secondly, evidence about self-harming; and finally, evidence about the complainant's attempted suicide.[13]

*The case on appeal*

[28] The appellant accepts that the evidence in the first two groupings was admissible provided appropriate directions were given by the Judge. The appellant initially took a different view on the admissibility of the evidence in relation to self-harming but ultimately accepted that this evidence was admissible because it properly formed the basis of the defence. The appellant maintains, however, that the evidence the complainant attempted suicide was not admissible. As we shall discuss, the appellant also submits that the directions about the evidence in issue given in this case were not sufficient.

[29] The respondent's case is that all of this evidence was admissible and specific directions as to its use were not required.

*The applicable principles*

[30] It initially appeared that this appeal provided an opportunity for the Court to deal more generally with the approach to evidence of behavioural change and to the role of expert evidence in relation to that evidence. However, as the case has developed we do not consider this is an appropriate vehicle for that more general consideration.

[31] This is not a case giving rise to the sorts of issues that were the cause of concern in a number of the cases relied on by the appellant. Those cases dealt with evidence where others, such as teachers or other family members, as well as the complainant identified behavioural change in the complainant generally of a type outside of the ordinary experience of the jury and/or suggested that complainant behaviours were indicative of sexual abuse although those behaviours occur for many reasons. In the latter category were complainant responses of the sort that might have been the subject

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[13] The issue of whether the evidence of nightmares and flashbacks was properly given was considered by the Court of Appeal: CA judgment, above n 3, at [21]. This aspect was not developed in oral argument before this Court and we need say nothing further about it.

of expert evidence under s 23G of the Evidence Act 1908.[14] Two examples will suffice.

[32] In *R v G (CA414/03)*, the appellant was convicted of sexual offending in relation to his daughter (aged between six and seven at the time of the alleged offending).[15] The appellant and the complainant's mother separated prior to the alleged offending. The appellant's trial took a different turn from the outset in that the complainant was not called to give her evidence first. Instead, her mother gave evidence followed by evidence from witnesses including other family members and three of her teachers. All of these witnesses described features of the complainant's behaviour including nightmares, bed-wetting, sexualised and disruptive behaviour and difficulties sleeping. The complainant's mother in her evidence also said that the complainant's behaviour would improve in between periods of access by the appellant but that problematic behaviours would resume when access resumed. The Court of Appeal said that the Crown "relied heavily" on the evidence of the complainant's sexualised behaviour in its closing.[16] The defence case was that the complainant was "a reluctant peddler of her mother's obsession".[17]

[33] The Court in *R v G (CA414/03)* did not rule out the possibility that evidence of this type could be admissible but considered "its cogency in terms of time, place and circumstance must be clearly demonstrated".[18] The Court took the view that where the type of behaviour was likely outside of the "ordinary experience of lay people", expert evidence may be required but, at that time, the admissibility of such evidence was constrained under s 23G of the Evidence Act 1908.[19]

[34] On the facts of that case, the Court did not consider the probative value of the evidence outweighed the prejudicial effect of its admission. A variety of factors led

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14 Section 23G(2)(c) provided for expert evidence to be given on various matters including "whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is, from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant".

15 *R v G (CA414/03)* CA414/03, 26 October 2004. A delay in complaint meant the complainant was aged 10 at the time of her evidential video interview.

16 At [25].

17 At [26].

18 At [39].

19 At [39].

the Court to that view including the fact the inferences properly to be drawn from the behaviour were outside ordinary experience and knowledge and the prejudicial effect of the evidence was high especially given the "sheer volume and extent" of the evidence which covered a period of some eight years.[20] The circumstances of the case were such that the jury could not have safely inferred the complainant's behaviour was consistent or inconsistent with sexual abuse having occurred (the evidence covered a period both before and after the alleged offending and there were a number of other possible explanations for her behaviour).[21]

[35] In *R v A (CA664/2008)* the appellant appealed against a conviction for unlawful sexual connection in relation to his step-grandson who was aged seven years old at the time of the offending.[22] The relevant evidence in that case related to the complainant bed-wetting and to general bad behaviour including fighting. The evidence was that the bed-wetting stopped at about the time the complainant disclosed the alleged offending, a point emphasised by the prosecutor in closing. Some of this evidence came from other witnesses (the complainant's mother, his father and his grandmother). His mother was re-examined about this evidence although it had not been the subject of cross-examination and, after a question from the jury as to when the bed-wetting stopped, the mother was recalled to give further evidence on the topic. The complainant in his evidence responded to a question in cross-examination saying that he had "started feeling [angry to withdrawn after the incident] and that's how [he] felt for years to come".[23]

[36] The Court in that case was not troubled by the admissibility of the evidence of general bad behaviour which was seen as evidence within the ordinary knowledge and experience.[24] Relying on *R v Henderson*,[25] which we will come to shortly, the Court said that "evidence of how an alleged victim behaves after an alleged assault will,

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20 At [46] and [48]–[49]. In allowing the appeal against conviction in *R v W (CA473/97)* CA473/97, 19 March 1998, the Court of Appeal was similarly influenced by the volume of evidence about behavioural change. That case involved a short (one and a half days) single issue (credibility) trial, with evidence as to bad behaviour and problems at school being led from both the complainant's mother and grandmother. There was no cross-examination about this evidence and the Judge made no reference to it in summing up.

21 At [49].

22 *R v A (CA664/2008)* [2009] NZCA 250.

23 At [19].

24 At [26].

25 *R v Henderson* [2007] NZCA 524.

prima facie, be relevant".[26] The Court in *R v A (CA664/2008)* indicated that there "may be times when [such] evidence will be inadmissible as more prejudicial than probative, or too remote in time and place to be relevant".[27] The Court was satisfied that although the directions in summing up on this evidence "could have been stronger", they were adequate in relation to the evidence of bad behaviour generally.[28]

[37] However, the Court concluded the evidence as to bed-wetting was within a different category, especially given the use made by the prosecutor of the evidence, the lack of any expert evidence and the absence of a strong direction from the Judge on the point.[29] In combination with other appeal grounds, the Court concluded the admission of the evidence as to bed-wetting had given rise to a miscarriage of justice.[30]

[38] These two cases feature problematic aspects of evidence of behavioural change. They are nonetheless consistent with the proposition that evidence of behavioural change of the type in issue in the present case may be admissible where its probative value outweighs the prejudicial effect.[31] The approach to admissibility is as seen in *Henderson* and in *R (CA129/2017) v R* as we now briefly discuss.[32]

[39] The evidence in issue in *Henderson* was described by the Court of Appeal as follows:[33]

> … [from] the complainant's mother noting the complainant was not sleeping well and referred to sleeping pills. Mr S gave evidence that in his opinion the complainant was unhappy. The stepfather gave general evidence about the complainant's personality. The teacher gave evidence the complainant was indulging in attention seeking behaviour and later gave evidence of behavioural change. She was also asked to describe the complainant's demeanour after she had disclosed. Mrs C, the guidance counsellor, was asked questions concerning the complainant's personality.

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26 *R v A (CA664/2008)*, above n 22, at [27].
27 At [29].
28 At [31].
29 At [37]–[39].
30 At [72].
31 Evidence Act 2006, ss 7 (relevant evidence is admissible) and 8 (evidence to be excluded where its probative value is relevantly outweighed by the risk it will have an unfairly prejudicial effect on the trial).
32 *R (CA129/2017) v R* [2018] NZCA 235.
33 *Henderson*, above n 25, at [55].

[40] The Court considered the complainant's behaviour had been "put in issue" by the appellant's statement to the police.[34] That statement included reference to attempted suicide and other matters in an attempt "to portray the complainant as a sexually promiscuous 14-year-old with behavioural and, perhaps, mental [health] issues".[35] The Court also said the evidence "was not led as an indicator of sexual abuse".[36] Rather, it was led "as evidence that something out of the ordinary was happening in the complainant's life".[37] The evidence gave support to the prosecution case that when the complainant "gave evidence of the incidents that took place with the appellant her observable behaviour was consistent with something happening in her life".[38]

[41] In *R (CA129/2017) v R*, evidence was led of self-harm and of a suicide attempt between the time of a complaint to the police in 2009 and a subsequent retraction of that complaint.[39] The evidence of the suicide attempt encompassed evidence of reviving the complainant.

[42] The Court of Appeal found this evidence was relevant. The evidence rebutted the "inevitable" challenge to the complainant based on what she had said in her earlier complaints, her subsequent retraction and ongoing contact with the appellant.[40] In addition, the Court noted:

> [32] In closing, the Crown pointed out the evidence of [the complainant] that she felt unable to leave the home she shared with [the appellant] and her sister and that this was supported by evidence that she self-harmed and attempted to take her own life at that point. It placed the latter evidence in the context of her being jobless, having few friends, being a mother to a young son while not wanting to be in a relationship with the child's father, and the difficult relationship she had with her sister.

[43] The Court then assessed whether the probative value of the evidence was outweighed by the risk it would have an unfairly prejudicial effect on the trial. The Court was satisfied the directions, particularly those given immediately after the

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34 At [56].
35 At [56].
36 At [58].
37 At [58].
38 At [58].
39 *R (CA129/2017) v R*, above n 32.
40 At [31].

evidence was led by the Crown, addressed the risk of prejudice.[41] Those directions explained why the evidence was led (as relevant to what was happening in the complainant's life) and said that the jury was to "put aside all feelings" of prejudice against the appellant or sympathy for the complainant flowing from the evidence of the suicide attempt.

[44] The admissibility of this type of evidence has also been considered in other jurisdictions. It suffices for these purposes to note that the Australian,[42] Canadian[43] and the United Kingdom[44] authorities, helpfully assembled by the respondent, indicate some caution towards the admissibility of this type of evidence but do not adopt a blanket rule against admissibility. Some of these cases are not easily reconciled, indicating the assessments made were fairly case-specific.

*Summary of the position*

[45] To summarise, it is helpful to confirm that the admissibility of the evidence in issue is governed by the application of ss 7 and 8 of the Evidence Act 2006. In other

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41 At [33]. The Court also took into account there was a great deal of other relevant evidence which was prejudicial to the appellant: at [34].

42 For example, *R v Ambury* [2012] QCA 178 (evidence of behavioural change led as demonstrating distress corroborative of complainant's evidence as to the offences). The Court said it was questionable whether the evidence was admissible but in any event the evidence led was not capable of corroborating the complainant's account: at [38]–[39]. See also *MWL v R* [2016] NTCCA 6 (evidence admissible only to explain delay in complaint and absence of direction as to that limited use was fatal: at [144]–[146]). Compare *MCA v The State of Western Australia* [2019] WASCA 22 (the evidence of contemporaneous distress was admissible to show consistency of behaviour and as corroborative evidence if the jury was satisfied the offending was the only reasonable explanation for the behaviour: at [59]).

43 For example, *R v Fair* (1993) 16 OR (3d) 1 (ONCA) (evidence of emotional distress not admissible absent expert evidence: at 22–23). Compare *R v GRV* (1996) 125 WAC 72 (BCCA) (evidence of complainant's rebellious streak admissible as evidence of context of family dynamics, appropriate to leave question of whether this behaviour was a consequence of abuse to the jury); *R v RAN* 2001 ABCA 68, (2001) 277 AR 288 (no error in admission of complainant's mother's evidence of behavioural change including bed-wetting without expert evidence: at [22], [29] and [31]); *R v RO* 2015 ONCA 814, (2015) 333 CCC (3d) 367 (evidence of complainant's "out of control" behaviour admissible: at [36]); and see also *R v ARD* 2017 ABCA 237, 422 DLR (4th) 471 at [57]–[58] per Paperny and Schultz JJA and [96]–[100] per Slattery JA (dissenting). The majority's reasons were subsequently affirmed by the Supreme Court: *R v ARJD* 2018 SCC 6, [2018] 1 SCR 218 at [2].

44 The respondent refers to *R v Keast* [1998] Crim LR 748 (CA) (necessary to have "some concrete basis for regarding the demeanour and states of mind described" as confirming or otherwise that sexual abuse occurred: at 748); *R v Venn* [2003] EWCA Crim 236; and *R v James* [2018] EWCA Crim 285, [2018] 1 WLR 2749 (evidence of demeanour admissible applying the *Keast* test and absence of specific direction not fatal: at [101]–[105]). The correct approach has been subject to debate as is discussed in Peter Rook and Robert Ward *Rook and Ward on Sexual Offences: Law & Practice* (5th ed, Sweet & Maxwell, London, 2016) at [19.119]–[19.122]. See also, for example, *R v Miah* [2014] EWCA Crim 938, (2014) 178 JP 297 at [16]–[19]; and compare *R v Townsend* [2003] EWCA Crim 3173 at [15].

words, the evidence will be admissible if it is relevant and its probative value is not outweighed by its unfairly prejudicial effect.

[46] As was said in *Henderson* and by the Court of Appeal in this case, evidence of the sort in issue in this case is admissible where sufficiently proximate in time to the offending "as evidence that something out of the ordinary was happening in the complainant's life".[45] Evidence of this nature may also provide the other side of the coin to reliance by the defence on aspects of the complainant's behaviour, for example, as a response to reliance on the absence of any apparent change in the complainant's behaviour. This evidence may also be admissible as part of the context.[46] For example, it may, as was said in *R (CA129/2017) v R*, anticipate "the inevitable attack" on the content of earlier complaints made by a complainant, or arising from the retraction of a complaint, or from continued contact with the defendant after alleged offending.[47] Further, it may provide a response to reliance on delay in complaint.

[47] We agree, as Mr Chisnall submits, that there is an inherent tension in the use of the evidence in issue here. That tension arises from the fact that this evidence inevitably has an element of self-boosting. As the respondent says, one of the reasons for leading the evidence is to show the something going on in the complainant's life on the Crown case is the alleged offending. It is accordingly necessary to be cautious about claiming too much in reliance upon the evidence. For this reason also, the judge should consider the need to direct in relation to the proper use of the evidence and it will generally be important for the judge to direct the jury not to jump from the evidence of behavioural change to the conclusion that the offending must have occurred. That is particularly so in those cases where this type of evidence will be front and centre in the trial. In addition, the judge should also consider whether any tailored direction not to be influenced by matters of prejudice and sympathy should be given. We add that, as is implicit in our approach, evidence as to behavioural change within the ordinary experience and knowledge of lay people will not generally require expert evidence.

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45 *Henderson*, above n 25, at [58]; and CA judgment, above n 3, at [18(a)].
46 See *R v Walker* CA417/03, 15 June 2004 at [25].
47 *R (CA129/2017) v R*, above n 32, at [31].

*Application of the principles to this case*

[48] We consider the evidence in issue was admissible as evidence which was proximate in time to the offending that something out of the ordinary was occurring in the complainant's life. It was, largely, evidence sourced in her own account which she presented in an articulate manner. The Court of Appeal was correct to say it would be "artificial" to exclude this evidence.[48] The evidence of the complainant's mother was in a similar category albeit it ultimately added little to that of the complainant in this respect. In the present case the evidence was also admissible as part of the context and was relevant to the complainant's credibility, particularly given the defence case. As we shall discuss when considering the prejudicial effect of the evidence, there was sufficient evidence before the jury as to the competing explanations as to why the complainant may have self-harmed or attempted suicide.

[49] There is no dispute in any event that the anodyne evidence about the complainant's behaviour at school was admissible. The issue there is as to the adequacy of the directions in summing up.

[50] In terms of the evidence as to self-harming which, again, it is accepted was admissible, we add these observations. First, as Mr Chisnall accepted, trial counsel for the appellant did not object to its admissibility for good reason.[49] It was inevitable in the present case where the evidence formed the basis of the defence case that evidence of self-harming would be admitted. As we have seen, the defence actively embraced the evidence of behavioural difficulties to bolster the defence case. As the Judge put it, the defence said the complainant:

> … was troubled and self-harming even before any of these incidents were alleged to have happened, and that perhaps [the complaint of sexual offending] is another emotional and irrational response to whatever it was that was driving her to self-harm before any of this happened.

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48 CA judgment, above n 3, at [21].

49 Mr Chisnall asked us to confirm the observation in *Marsich v R* [2012] NZCA 470 that s 9 of the Evidence Act which allows evidence to be admitted by agreement "does not relieve the Judge from ensuring that the trial is fair": at [20]. As Mr Horsley accepted, the Judge does retain ultimate control over whether evidence is admitted: s 9(1). We need say no more than that.

[51] Secondly, the evidence of self-harming was relevant to the context in which the complainant disclosed her complaint. She did so to a counsellor she was seeing in relation to her self-harming.

[52] As to the evidence of attempted suicide, we consider Mr Horsley for the respondent was correct to submit the questions of the complainant by the prosecutor about how she was feeling were put to her to rebut potential questions as to why she was willing to engage with the appellant at the time of the second incident. The evidence of the attempted suicide which emerged in response was relevant also as part of that context.

[53] Turning then to the assessment of the prejudicial effect of the evidence, the appellant contends that the evidence of the attempted suicide is in a different category. Mr Chisnall described this as "an eventful piece of evidence" to which the Court of Appeal gave insufficient attention. Further, it is said that in assessing the probative value as against the prejudicial effect, the Court of Appeal generally gave too much weight to the defence strategy.

[54] The reference to the attempted suicide appears to have been inadvertent. It was not referred to again by the parties or by the Judge and did not take centre stage at any point. There was no embellishment or further detail given about the incident. In any event, it was relevant to assess whether any prejudicial effect was unfair in the light of the defence strategy, which was to show the complainant as an irrational and overly-emotional young woman. For these reasons, in the context of the trial, we do not consider the admission of the evidence of attempted suicide would have had an unfairly prejudicial effect.

**The directions to the jury**

[55] The appellant says that the directions given by the Judge in summing up were insufficient because the evidence of behavioural change was used to draw a causative link between the alleged offending and that behaviour. It is also said that the Court of Appeal was wrong to downplay the strength of any implications of a causative link because the most serious evidence, that is, the reference to the attempted suicide, was directly linked by the complainant to the offending. Again, the submission is that in

considering the impact of the omission of a direction not to draw that causal link the Court of Appeal has focused unduly on the defence strategy.

[56] The respondent submits the prosecutor's closing submission did not suggest the behavioural change evidence established a causal link to the offending. It is also submitted that the absence of any specific direction to the jury about the use of this evidence has not caused a miscarriage of justice in this case. In this respect, it is said that it is not necessary for the judge to provide tailored directions as to the use of such evidence in every case. In some cases, like this one, the summary of competing arguments as to the evidence will adequately explain why the evidence is admitted and its limits. In other cases, a direction may in fact only serve to highlight the importance of the evidence for the jury although that evidence had little focus during the trial.

[57] We accept that evidence of this nature can be emotive but that is addressed by the direction not to be influenced by matters of prejudice and sympathy. The Judge directed the jury accordingly in this case.

[58] We accept also that there is some force in the submission that too much was made by the prosecutor in closing as to the use of the evidence albeit to some extent at least what was said was in anticipation of a defence submission. That said, for the reasons which follow, we do not consider the absence of a specific direction as to the use that could be made of the evidence in the present case has given rise to a miscarriage of justice.

[59] Importantly, it was apparent from the evidence that there were other possible explanations why the complainant may have self-harmed or attempted suicide. The evidence was also clear that the self-harming behaviour was not new and the evidence the complainant suffered from nightmares was in the same category. Further, the case was put fully to the jury by the Judge in setting out the competing contentions. In this way it was clear that the explanation for the complainant's behaviour was highly contested.

[60] That the competing contentions were well ventilated is emphasised by the example the Judge gave to the jury in the context of his direction on the presumption of innocence. The Judge said this:

> Both counsel spoke a lot about [the complainant's] possible motives to lie or simply make totally mistaken allegations. We've heard a number of possible theories that have been advanced by the defence. That she has confused dreams with reality. That she has a selective memory. That she might have been influenced by the various professionals she's been in contact with such as counsellors or therapists or police officers. That she was troubled and self-harming even before any of these incidents were alleged to have happened, and that perhaps this is another emotional and irrational response to whatever it was that was driving her to self-harm before any of this happened. That her mother was upset that the defendant had married someone else. These sorts of suggestions are perfectly legitimate. They are designed to demonstrate that there may be other possible scenarios that the Crown has to exclude as a reasonable possibility.

[61] As we have noted, the Judge then reiterated the appellant had no obligation to satisfy the jury any alternative advanced by the defence was what happened. The onus remained on the Crown.

[62] Further, in the submission to the jury that they could find the Crown case proved, the prosecutor did not rely on the evidence in issue nor did the Judge repeat this material in his summary of the Crown case. By contrast, the defence, as we have said, made a great deal of this aspect (though counsel did not mention the attempted suicide) and this was a matter reflected in the summing up.

[63] In this context, it was also not critical that the Judge's direction that the jury should avoid being swayed by prejudice or sympathy was not specifically linked to a direction as to the use that could be made of the evidence about self-harming or of the attempted suicide.[50] As we have also noted, the reference to attempted suicide was inadvertent and given no mention was made of it subsequently, any direction on that may simply have attracted more attention to it.

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[50] As was the case in *R (CA129/2017) v R*, above n 32, which is relied on by the appellant in this respect. In that case, the evidence of the attempted suicide was more explicit and included greater detail than was the position here.

[64] We add for completeness that the Judge addressed concerns about demeanour sufficiently in the opening remarks he made to the jury and in summing up.[51]

[65] For these reasons, we consider the evidence in issue was admissible and the Judge's directions have not given rise to a miscarriage of justice.

**Result**

[66] The appeal is accordingly dismissed.

Solicitors:
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[51] *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116 at [57]. In this case, no emphasis was placed on the complainant's demeanour in closing.