NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 49/2019
[2022] NZSC 115

BETWEEN	PETER HUGH MCGREGOR ELLIS Appellant
AND	THE KING Respondent

Hearing:	4–8 October 2021 and 12–14 October 2021
Court:	Winkelmann CJ, Glazebrook, O'Regan, Williams and Arnold JJ
Counsel:	R A Harrison, S J Gray, B L Irvine and K D W Snelgar for Appellant J R Billington KC and A D H Colley for Respondent
Judgment:	7 October 2022

JUDGMENT OF THE COURT

A The applications to adduce further evidence are granted.

B The appeal is allowed.

C The convictions of the appellant are quashed.

SUMMARY OF RESULT

Background

[1] The appellant, Peter Ellis, was convicted after a jury trial in 1993 on 16 counts of sexual offending against seven children who had attended the Christchurch Civic Childcare Centre (the Crèche), where he had been a teacher. He was acquitted or discharged on 12 other charges.

[2] The trial and the investigation that preceded it attracted considerable publicity and controversy. Because of the age and number of the complainants and the setting of the complaints, the case was almost unprecedented in the complexity it presented to those investigating, prosecuting and defending the charges. This complexity called for special care and attention and created unprecedented challenges for those involved. With the benefit of hindsight, we consider that this need for special care and attention was underestimated at the time of the investigation and trial. The case also posed difficult challenges for the parents of the complainants and the judgment should not be read as a criticism of them.

[3] The appellant appealed against his convictions to the Court of Appeal. In 1994, the Court set aside three of the appellant's convictions after one child recanted her evidence but otherwise his appeal was dismissed.[1] A Governor-General's reference to the Court of Appeal led to a further hearing in the Court of Appeal in 1999 but that appeal was also dismissed.[2] The public controversy continued after those decisions. There was a Ministerial Inquiry in 2002, undertaken by a former Chief Justice, Sir Thomas Eichelbaum, who determined that the appellant had not proven that his convictions were unsafe.[3]

[4] In 2019, the appellant was granted an extension of time to apply for leave to appeal to this Court against both the 1994 and 1999 Court of Appeal decisions and was granted leave to appeal. The appellant died before the appeal hearing in this Court, but the Court ruled that the appeal be allowed to continue after his death.[4]

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1 See below at [67].
2 See below at [70].
3 See below at [71].
4 See below at [26].

[5] The Court is unanimous that the appeal should be allowed and the 1993 convictions quashed. In this Summary, we briefly explain the issues that arose in the appeal and how the Court dealt with them in deciding to allow the appeal. But we emphasise this is only a summary. The issues are complex and the Court's analysis is what appears in the Reasons that follow.

Principal issues

[6] The principal foci of the Court's Reasons are the evidence given at the trial under s 23G of the Evidence Act 1908 and the risk that the complainants' evidence was contaminated because of potentially suggestive parental questioning prior to the complainants' evidential interviews and because of other influences on the complainants outside the interview process. Other appeal points were less significant but the Court's treatment of them is briefly summarised below.

Section 23G

[7] Section 23G permitted an expert witness to give evidence in a case involving allegations of sexual offending against children on various matters. The most significant of those was whether evidence at the trial relating to a child complainant's behaviour was consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.[5]

[8] While evidence given under s 23G could assist juries by providing specialist information outside of a juror's ordinary experiences and knowledge, experts were required to keep their evidence within the bounds of the section. The evidence needed to be balanced and, where there were possible alternative explanations for the behaviours exhibited by the complainant, these needed to be stated. Experts were not permitted to suggest that behaviours were diagnostic of sexual abuse or to comment on (or appear to comment on) the credibility of a complainant.[6]

[9] Dr Karen Zelas, a specialist psychiatrist, was a Crown witness at the trial. She gave evidence as an expert witness under s 23G. However, she also had other roles in

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5 Evidence Act 1908, s 23G(2)(c). The section is set out in full below at [101].
6 See below at [118].

the case, including supervising the interviewers who interviewed the complainants and assisting the Police during the investigation of the allegations against the appellant.[7]

[10] Dr Zelas' evidence on child behaviours highlighted 20 behaviours that she said were consistent with the behaviours of sexually abused children. These were behaviours that parents of the complainants reported in relation to their children.[8] They included common childhood behaviours such as problems with sleeping and bedwetting but also included sexualised behaviour. The Crown produced a chart ("the Chart") of these behaviours, indicating which of them was exhibited by each complainant, which was made available to the jury for their deliberations.

[11] The Court has found that Dr Zelas' evidence lacked balance,[9] did not inform the jury of other possible causes of the behaviours (or, where she did so, discounted or minimised the other causes)[10] and involved circular reasoning.[11] In several respects, it went outside the scope of evidence permitted under s 23G and in those respects should not have been admitted as evidence at the trial. In particular, s 23G did not permit an expert witness to endorse the credibility of a complainant's evidence or suggest one or more behaviours were diagnostic of sexual abuse, but the jury may well have understood Dr Zelas' evidence as doing both. In addition, the overall effect of Dr Zelas' evidence was to incorrectly suggest to the jury that the presence of clusters of behaviours could support a conclusion that sexual abuse had taken place. The Chart, which was not prepared by Dr Zelas, compounded this because it was an unbalanced and unfair representation of the evidence it purported to summarise and indicated to the jury that the more behaviours attributed to a complainant, the more likely it was there had been sexual abuse.[12]

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7 See below at [127]–[131].
8 See below at [140].
9 See below at [191]–[198].
10 See below at [201].
11 See below at [182]–[188]. The reasoning was circular because it suggested that behaviours that could be explained in a number of ways nevertheless corroborated an allegation of sexual abuse on the basis that they were corroborative because the allegation has been made.
12 See below at [203]–[210].

[12] The problems with the s 23G evidence were not overcome by the cross-examination of Dr Zelas, the evidence given by a defence expert, the submissions of counsel or the trial Judge's summing up.[13]

[13] This Court has concluded that, given the extent of the inadmissible material, the extent to which Dr Zelas' evidence departed from appropriate standards, and its impact on the trial, the s 23G evidence may well have affected the verdicts and thereby caused a miscarriage of justice.[14] It has also concluded that the admission of the evidence that was outside the boundaries of s 23G was an error of law.[15]

[14] However, we acknowledge the point made by counsel for both parties that s 23G was an extremely difficult section for an expert to give evidence under whilst appropriately respecting the boundaries of that section. We also acknowledge that there were other participants in the trial process who had primary responsibility for ensuring that evidence given under s 23G stayed within those boundaries.[16]

Contamination

[15] An important part of the defence case at the appellant's trial was the argument that the complainants' evidence was contaminated by a number of influences, the most significant of which was direct questioning by parents. The contamination issue was pursued in pre-trial applications, at the trial and in appeals to the Court of Appeal. In both appeals, the Court of Appeal concluded that the risk of contamination was a factor that was articulated and addressed in the course of the trial, and that there was therefore no basis to second-guess the jury's verdicts.

[16] In this Court, the appellant relied on fresh evidence from memory experts to the effect that the risks of contamination were not fully recognised at the time of the appellant's trial and that the evidence given by Dr Zelas about the risk of contamination substantially understated the level of risk.

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13 See below at [214]–[228].
14 See below at [229]–[234].
15 See below at [231].
16 See below at [230].

[17] The appellant relied in particular on an extensive affidavit by Professor Harlene Hayne, who identified a number of potential sources of contamination including meetings involving parents of complainants during the investigatory stage, discussions about the allegations between parents and complainants, parent-to-parent discussions and complainant-to-complainant discussions.[17]

[18] An expert witness for the Crown, Professor Gail Goodman, expressed substantial agreement with Professor Hayne on the risk of contamination. She expressed the view that there was a high risk of contamination of the evidence of four of the complainants, while the risk in relation to evidence of the remaining two was moderate or low.[18]

[19] The Court considered it was significant that Dr Zelas had expressed concern about possible contamination of the accounts by two of the complainants before the trial, but expressed no such concern at the trial. While she accepted children can be suggestible, she said it was possible to detect any adult input to children's evidence and, at least implicitly, that she did not detect it in the complainants' evidence.

[20] The Court concluded that while the risk of contamination was canvassed at the trial, the jury was not fairly informed of the level of the risk of contamination of the complainants' evidence.[19] The expert evidence at the trial had given the jury a false sense of reassurance both that the contamination risk was low, and that if the evidence was contaminated the jury would be able to detect that. The evidence now before this Court, taking into account studies that have occurred since the trial, is that the risk of contamination was higher than the jury was led to believe and that contamination of a child's memory, if it had occurred, would not have been readily detectable. Even on the basis of the scientific studies that were available at the time of the trial, the evidence at the trial understated the risk of contamination.

[21] If the jury had been correctly informed of the level of risk, that may have created a reasonable doubt about the allegations made, at least in relation to some of

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17 See below at [275]–[284].
18 See below at [287]–[289].
19 See below at [313]–[321].

the complainants. As the evidence of the complainants was mutually supportive as similar fact evidence, the undermining of some of the verdicts necessarily calls into question all of the verdicts.[20]

Interviews

[22] The experts for the appellant said that the interviews of the complainants in 1992 did not meet current best practice and/or did not meet the standards of the time, and were a potential source of contamination of the evidence. The Crown's experts disputed that the interviews failed to meet the standards of the time, or that they could have had a contaminating effect on the complainants' memories.

[23] The issues relating to the interviews were intertwined with those related to contamination. In deciding how to address this issue we took into account the expert evidence we heard that if contamination had already occurred by the time of the interview, it could not be remedied by interviews even of the highest standard. Given that fact, and having reached the conclusion we have on contamination, we decided that we did not need to address this issue further.[21]

Memory evidence

[24] This was another issue on which there was a variation of views by the experts. However, it has not been necessary for us to address this issue, given our conclusions on s 23G and on contamination.[22]

Subsidiary issues

[25] The appellant supported the main points on appeal with some subsidiary points, about which we comment as follows:

(a) *Sanitisation*: The appellant argued that the Crown "sanitised" the charges, by not charging Mr Ellis with offences in respect of which it could have been expected there would be corroborating evidence.

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20 See below at [313]–[321].
21 See below at [345]–[351].
22 See below at [352]–[359].

This Court concluded that the selection of charges by the Crown did not occasion a miscarriage of justice.[23]

(b) *Failure to play all evidential interviews*: The appellant also argued that the trial was unfair because not all of the interviews of the complainants were played to the jury. In many of the interviews that were not played, the complainants made allegations that could be described as fantastical, and the appellant argued this would have assisted the defence at the trial. The Court concluded that the failure to play all interviews at the trial did not add to the risk of a miscarriage of justice.[24] The defence was able to request the playing of certain interviews and, if all of the interviews had been played, there was a potential downside to the defence given the seriousness of some of the allegations made in the unplayed interviews.

(c) *Materials provided to the jury*: The appellant also argued that a miscarriage was occasioned by the fact that the jury was given transcripts of the evidential interviews played by the Crown, but not of the interviews played by the defence and the jury did not receive the notes of evidence. The Court accepted that the lack of balance in the materials provided to the jury was an unsatisfactory aspect of the trial and added weight to its earlier conclusion that the appeal should be allowed. But the Court would not have allowed the appeal on the basis of this issue alone.[25]

(d) *Medical evidence*: Evidence given by a medical expert in the appeal before this Court was that some of the medical evidence given at the trial, which was adverse to the defence case and which would have supported the Crown case, was incorrect. The evidence before us was based on medical developments that have occurred since the time of the trial. It was not challenged by the Crown. The Court concluded that

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23 See below at [367].
24 See below at [382]–[394].
25 See below at [407]–[415].

the medical evidence about two of the complainants was, when assessed against today's standards, incorrect. This was evidence which would have had a significant impact in the context of trial and was another reason for concern about the safety of the verdicts when assessed by today's standards.[26]

[26] See below at [416]–[422].

REASONS
(Given by Winkelmann CJ and O'Regan J)

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A BACKGROUND

Posthumous appeal

[26] In 2019 Peter Ellis sought and was granted leave to appeal against his 1993 convictions on 13 counts of sexual offending against six children.[27] Those convictions were entered after a jury trial in the High Court at Christchurch in 1993.[28] Although Mr Ellis died before his appeal could be heard, in September 2020 this Court ordered that the appeal be allowed to continue.[29]

Investigation and trial

[27] The background to the case is well-known. The 1993 trial was high profile and the convictions have been a matter of controversy ever since. The outline of the background that follows is an adapted and updated version of that appearing in earlier appeal decisions.

The Crèche

[28] At the time at which the conduct that led to the charges was said to have happened, the appellant worked at the Christchurch Civic Childcare Centre (which we will call "the Crèche"). The Crèche was established in the Arts Centre at Montreal Street, Christchurch but in 1989 it moved to the former Christchurch Girls High School building in Armagh Street. There were an estimated 70 to 75 families using the Crèche weekly over the years from 1989 to 1991 with a daily average of about 40 children, of whom 12, with ages ranging from about 12 months through to two and a half years, would be in the nursery part of the building, and 28 would be in the larger preschool room. The ratio of staff to children was 1:4 for the nursery and 1:8 for the preschool room, including a supervisor and an assistant. That meant that it

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27 *Ellis v R* [2019] NZSC 83 [SC leave judgment]. The approved ground was "whether a miscarriage of justice occurred in this case". With the consent of the parties, this judgment was recalled and reissued on 7 October 2022 to clarify that the leave to appeal encompassed the Court of Appeal decisions of 1994 and 1999.

28 Mr Ellis went to trial on 28 counts involving 13 complainants and was convicted on 16 counts involving seven complainants. He was acquitted on nine charges and discharged on three charges under s 347 of the Crimes Act 1961 at trial. One child (referred to in this judgment as "complainant 1") recanted her evidence and the three convictions relating to her were quashed on appeal in 1994.

29 *Ellis v R* [2020] NZSC 89. This was a results judgment. Reasons for the decision were delivered contemporaneously with the delivery of this judgment: *Ellis v R* [2022] NZSC 114.

could normally be expected there would be between six and seven staff members present in the Crèche during work hours.[30]

[29] The appellant commenced employment at the Crèche in September 1986 as a reliever. He was given a permanent position in February 1987 and commenced a three year course towards a "childcare certificate", which he completed and passed in 1990.

The investigation

[30] In November 1991 a mother (whom we will call "mother A") reported something her son had said about the appellant.[31] A complaint was made to the Police. The Police liaised with the Specialist Services Unit of the Department of Social Welfare (the SSU) to formulate a method for investigation. On 25 November 1991, the son of mother A was interviewed by the SSU.[32] Mother A's son did not report any abuse in his two interviews with the SSU. However, his parents discussed their concerns with Christchurch City Council officials and other parents.

[31] The complaint by mother A's child led to the commencement of an investigation. Mr Ellis was placed on temporary leave and suspended soon after the SSU began interviewing Crèche children.

[32] Before going further, we explain the terminology used in this judgment to refer to the children who made complaints against the appellant in order to ensure the children's anonymity is maintained. We will refer to the complainants collectively as "the complainants". We will refer to individual complainants in respect of whom the appellant was convicted as "complainant 1", "complainant 2" and so on. Where we refer to a parent of a complainant, we will use the code corresponding to their child, so "mother 1" or "father 1", "mother 2"or "father 2" and so on. Different codes were used in the Court of Appeal and High Court. A key identifying these different codes is set out in Appendix A to this judgment. We will refer to complainants who gave evidence at the trial but in respect of whom no conviction resulted by the code names

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30 This was potentially significant in relation to the offending said to have occurred in the Crèche toilets, which was not observed by any other staff member.

31 The child was said to have told his parents on more than one occasion that he did not like "Peter's black penis".

32 Mother A made a deposition statement but was not called to give evidence at the trial.

given to them in the High Court trial and adopt the same convention in relation to their parents, so "complainant T", "mother T" or "father T" and so on.

[33] Resuming the chronology of the investigation, the Parent Management Committee called a meeting of parents at the Crèche on 2 December 1991.[33] (We will call this "the December 1991 meeting"). The meeting was attended by members of the Parent Management Committee, representatives of the Christchurch City Council, Detective Eade of the Christchurch Child Abuse Unit and Ms Sue Sidey, a psychologist with the SSU. Not all parents attended, but mother A and the mothers of some of the children who became complainants (complainants 3, 6 and 7) were present. The parents were asked to look for any significant behavioural changes in their children occurring (particularly where there were a number of such changes, referred to as a "cluster") and any events which might explain them. The parents were encouraged to ask their children only general questions in order to avoid affecting the reliability of any subsequent allegations made during the interview process.

[34] After that meeting, the SSU began a process of conducting evidential interviews with children referred to the SSU.[34] None of the children who were interviewed between 2 December 1991 and 20 December 1991 reported any sexual abuse initially. For that reason, the Police wrote to the Christchurch City Council on 20 December 1991 to advise that no allegations against Mr Ellis had been made. However, the SSU continued to progress the investigation through further interviews. On 30 January 1992, an allegation of sexual abuse was made for the first time by one of the Crèche children during an interview.[35] From that point, the Child Abuse Unit of the Police became actively involved in coordinating interviews and conducting investigations into any allegations raised.

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33 The Parent Management Committee was said to be comprised of between four and five parents whose children attended the Crèche, a representative from the Christchurch City Council, supervisor-level staff from the Crèche and other members from time to time. It existed before the allegations relating to the appellant came to light.

34 Most of the evidential interviews were conducted by Ms Sue Sidey, but two other Department of Social Welfare specialist interviewers conducted some of the interviews.

35 That interview resulted in charges being laid but those charges were not ultimately pursued at trial.

[35] The interviews were conducted under the overall supervision of Dr Karen Zelas, a specialist child psychiatrist who ultimately was to be a significant witness for the Crown at the appellant's trial.

[36] Overall, there were interviews of 118 children, most of them disclosing no abuse. In some cases, there was mention of abuse but the parents did not wish to put their child through the court process. The interviews continued throughout 1992 with most of the children who gave evidence at the appellant's trial being interviewed a number of times. As the interviews progressed some of the children who disclosed abuse by the appellant implicated other adults — the appellant's Crèche co-workers, his mother and strangers. And as the interviews progressed the children began to make bizarre allegations of abuse including being hurt with needles and burning paper, hung from the Crèche roof in cages and taken through trapdoors.[36]

[37] As noted earlier, the first allegation of sexual abuse was made during an interview in late January 1992 and the interviews continued throughout 1992. Each of the charges against the appellant in the indictment specified a date range within which the alleged offence was said to have occurred. In almost all cases the date range began with a date in 1988 or 1989 (that is, between three and four years before the date of the relevant interview and between four and five years before the trial).[37]

[38] The appellant was arrested on 30 March 1992. He was interviewed by Detective Eade and consistently denied any misconduct. Initially he was charged in relation to allegations that had been made by complainant 6, complainant 7 and complainant T but later charges were laid in respect of other complainants. Three female Crèche workers were also arrested and charged with sexual offending against complainant 5. A fourth was charged, along with the appellant, with indecent assault on another child.

[39] On 31 March 1992, the day after the appellant was arrested, there was a meeting of Crèche parents at Knox Hall, Christchurch, addressed by Ms Sidey,

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36 We discuss examples of these types of bizarre or fantastical allegations (and the jury's knowledge of the same) below at [370]–[373] and [385].

37 There were three exceptions: the earliest date in relation to complainant 1 was in 1986 and the earliest date in relation to complainants T and W was in 1991.

Dr Zelas and Police representatives.[38] (This was referred to in submissions as "the Knox Hall meeting" and we will do the same.) Some social workers from the Department of Social Welfare were also present. One or both of the parents of all of complainants 1–7 were present. As they had been at the December 1991 meeting, parents were advised to look for behavioural changes in their children and were warned about questioning the children and other conduct which might interfere with the evidential interview disclosure process.[39] Parents were provided with the opportunity to communicate with each other.

[40] A support group of parents met regularly.[40] Of most significance is a meeting in early August 1992 ("the August 1992 meeting"). The meeting was hosted by the parents of complainant Y and appears to have been attended by one or both parents of complainants 4–6 and by mother A. Detective Eade and a Detective Nicholl also attended. A list compiled by mother A, setting out the allegations that some of the complainants had made, was made available for parents to take home.[41]

Depositions

[41] In accordance with the criminal procedure that applied at the time, there was a depositions hearing, which commenced on 2 November 1992 and concluded on 4 February 1993. The transcript of the oral evidence and cross-examination ran to more than 1,000 pages. The appellant and four other Crèche workers were committed for trial on a total of 42 charges involving 20 children.

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38 Dr Zelas said she had no formal role in the investigation when she attended the Knox Hall meeting. Rather, she said she was invited to attend the meeting as an observer with specialist expertise who could be called upon to respond to questions arising during that meeting. She said she gave no formal presentation but did contribute to answering questions from parents.

39 Dr Zelas had given a similar warning when she appeared on the national television programme "Holmes" on 23 March 1992.

40 It is not clear exactly when this group was formed: mother A said it was formed around the time of the December 1991 meeting (she could not recall if it was before or after), but it may have been formed later. Formal meetings did not begin until mid-1992. From mid-1992 until the trial, it was said that the support group met fortnightly. Before mid-1992, the frequency of informal support group meetings appears to have been less regular. Mother A said parents freely discussed disclosures by their children at the meetings, but this was denied by other parents who attended support group meetings. Some of the parents did, however, discuss specific allegations outside the confines of the support group meetings.

41 As well as compiling the list of allegations, mother A also provided parents with literature about child sex abuse, discussed "symptoms" of abuse, phoned parents with information about allegations of other children, notified parents if their child had been named by another child and conducted her own investigation.

[42] Before the trial started, three Crèche workers were discharged under s 347 of the Crimes Act 1961.[42] They had been charged as parties to alleged offending against complainant 5 by an unknown party. The appellant was also charged as a party to this alleged offending. Although his application for a discharge was dismissed prior to the trial,[43] he was ultimately acquitted on the count relating to that allegation.[44] The fourth Crèche worker was discharged because the complainant in question was unavailable to give evidence at trial.[45]

Trial

[43] The appellant stood trial alone on 28 charges relating to 13 children.[46]

Crown case at trial

[44] The testimony of the complainants was central to the Crown case at the trial. Their evidence-in-chief was the recordings of their evidential interviews.[47]

The complainants and their evidential interviews

[45] In relation to the seven complainants in respect of whom the appellant was convicted of at least one offence (we will refer to them as "the seven complainants"), there were a total of 24 interviews undertaken, of which 14 were played to the jury as part of the Crown case.[48] Another four full interviews (and portions of three others) with complainants in respect of whom the appellant was either acquitted on all charges or discharged part way through the trial were also played to the jury as part of the

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42 *R v [K]* HC Christchurch T9/93, 6 April 1993 (Williamson J, Oral Judgment (No 3)) [Ruling 3] at 15–16.

43 *R v Ellis* HC Christchurch T9/93, 20 April 1993 (Williamson J, Oral Judgment (No 4)) [Ruling 4] at 9–10.

44 See below at [46](e).

45 *R v Ellis* HC Christchurch T10/93, 5 March 1993 (Williamson J, Oral Judgment). The appellant's discharge application in relation to this charge therefore also succeeded.

46 After the depositions hearing, the Crown laid 36 charges against the appellant. But before the trial started, the Crown elected not to proceed with some of the charges (involving younger complainants).

47 Pursuant to an order made under s 23E(1)(a) of the Evidence Act 1908: *R v Ellis* HC Christchurch T9/93, 22 March 1993 (Williamson J, Oral Judgment (No 1)) [Ruling 1] at 10.

48 In one instance, only a portion of the relevant interview was played to the jury as part of the Crown case. The jury also saw selected portions of one other interview (involving complainant 5) at the request of the defence.

Crown case.[49] We viewed the video recordings of all of the interviews that were played to the jury at the trial in relation to the seven complainants.

[46] The breakdown in relation to individual complainants in respect of whom the appellant was convicted of at least one offence is set out in tabular form in Appendix B to this judgment. The details are as follows:

(a) *Complainant 1*: there were three interviews with complainant 1 (a girl), of which two (the second and third) were played to the jury. The appellant was convicted on three counts in relation to complainant 1: two counts of indecent assault (touching her vagina with his hand and touching her vagina and anus with his hand) and one count of inducing a girl under 12 years of age to do an indecent act (inducing her to touch his penis). The last two counts were said to have happened at the Crèche. These convictions were quashed by the Court of Appeal in 1994 after complainant 1 recanted her evidence.[50]

(b) *Complainant 2*: there was one interview with complainant 2 (a girl), which was played to the jury. The appellant was convicted on one count of indecent assault (touching her vagina with his hand) in relation to complainant 2. This was said to have happened at the Crèche.

(c) *Complainant 3*: there were three interviews with complainant 3 (a boy), of which two (the first and third) were played to the jury. The appellant was convicted on one count of doing an indecent act on a boy under 12 years of age (urinating on the boy's face and putting his penis in the boy's mouth) in relation to complainant 3 and acquitted on one count of indecent assault (touching his anal area with a stick). The former was said to have happened at the Crèche.

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49 Six tapes involving complainants who were the subject of charges on which the appellant was acquitted or discharged part way through the trial were also played to the jury at the request of the defence. For some tapes, only a portion was played.

50 *R v Ellis* (1994) 12 CRNZ 172 (CA) (Cooke P, Casey and Gault JJ) [1994 CA judgment] at 190.

(d) *Complainant 4*: there were three interviews with complainant 4 (a girl), of which two (the first and third) were played to the jury. The appellant was convicted on two counts in relation to complainant 4: one count of doing an indecent act on a girl under 12 years of age (urinating on her face) and one count of inducing a girl under 12 years of age to do an indecent act (inducing her to take a bath with him). The former was said to have happened at the Crèche. He was acquitted on two other counts: one count of attempted sexual intercourse and one count of indecent assault (touching her bottom with a needle).[51] The latter was said to have happened at the Crèche.

(e) *Complainant 5*: there were five interviews with complainant 5 (a boy), of which two (the fourth and a portion of the second) were played to the jury.[52] The appellant was convicted on three counts in relation to complainant 5: one count of inducing a boy under 12 years of age to do an indecent act (to bathe with the appellant and touch the appellant's penis), one count of indecent assault (placing his penis against the boy's anus) and one count of sexual violation by unlawful connection (connection of the appellant's penis with the boy's mouth). He was acquitted on one count of doing an indecent act on a boy under 12 years of age (being party to another, unknown person kicking and hitting the boy's genital area and placing a needle in his penis).[53] None of the conduct leading to these counts was said to have happened at the Crèche.

(f) *Complainant 6*: there were six interviews with complainant 6 (a girl), of which four (the first to fourth) were played to the jury. The appellant was convicted on all four counts in relation to complainant 6: one count of sexual violation by unlawful sexual connection (connection of the

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51 Before trial, the appellant applied for discharge in respect of all of the counts relating to complainant 4. That application was unsuccessful: Ruling 4, above n 43, at 8.

52 Portions of the first interview were also played to the jury at the request of the defence.

53 As mentioned above at [42], three female Crèche workers were discharged under s 347 of the Crimes Act in relation to the allegation that they were parties to this alleged offending. The appellant's application for a discharge in relation to all of the counts relating to complainant 5 was also dismissed prior to the trial: Ruling 4, above n 43, at 10.

girl's mouth with the appellant's penis) and three counts of indecent assault of a girl under the age of 12 years (touching her vaginal area with his penis, touching her anal area with his penis and being party to another, unknown person putting his penis on the girl's vagina).[54] The sexual violation and the first two indecent assaults were said to have happened at the Crèche.

(g) *Complainant 7*: there were three interviews with complainant 7 (a girl), of which one (the first) was played to the jury. The appellant was convicted on two counts in relation to complainant 7: one count of sexual violation by unlawful connection (connection of her mouth with the appellant's penis) and one count of indecent assault of a girl under the age of 12 years (touching her vaginal and anal area with his hand).[55] Both of these offences were said to have happened at the Crèche.

[47] As mentioned earlier, there were six other complainants who gave evidence at the trial, with their evidence-in-chief consisting of one or more evidential interviews. No convictions resulted in relation to these complainants. This is set out in tabular form in Appendix C to this judgment. The details are as follows:

(a) *Complainant P*: there were two interviews with complainant P (a boy), of which a portion of one (the second) was played to the jury. The appellant was acquitted on one count of doing an indecent act on a boy under the age of 12 years (urinating into a cup and having him drink from it) in relation to complainant P.[56] This was said to have happened at the Crèche.

(b) *Complainant T*: there were three interviews with complainant T (a girl), of which one (the first) was played to the jury (portions of the other two were also played, one by the Crown and one at the request of the

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54 The appellant's application for discharge on these counts was dismissed prior to the trial: Ruling 4, above n 43, at 11.

55 The appellant's application for discharge on these counts was dismissed prior to the trial: Ruling 4, above n 43, at 9.

56 The appellant's application for discharge on this count was dismissed prior to the trial: Ruling 4, above n 43, at 9.

defence). The appellant was acquitted on one count of indecent assault (placing food against her anus with his finger) and one count of doing an indecent act on a girl under 12 years of age (urinating into a container and having her drink from it) in relation to complainant T.[57] Both were said to have happened at her home when the appellant was baby-sitting.

(c) *Complainant U*: there were five interviews with complainant U (a girl), of which a selected portion of one (the fourth) was played to the jury (portions of two others were played at the request of the defence). Part-way through the trial, the appellant was discharged under s 347 of the Crimes Act in relation to two counts of indecent assault (touching her anal area with a stick and touching her vagina with his hand and his penis) in relation to complainant U.[58] Both were said to have happened at an unknown address.

(d) *Complainant V*: there were two interviews with complainant V (a girl), of which one (the first) was played to the jury. The appellant was acquitted on one count of indecent assault (poking her vaginal area with his finger) in relation to complainant V. This was said to have happened at the Crèche.

(e) *Complainant W*: there were two interviews with complainant W (a girl), of which one (the first) was played to the jury. The appellant was discharged under s 347 of the Crimes Act in relation to one count of doing an indecent act on a girl under 12 years of age (urinating on her) in relation to complainant W.[59] This was said to have happened at the Crèche.

(f) *Complainant Y*: there were five interviews with complainant Y (a boy), one of which (the first one) was played in full to the jury (portions of

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57 The appellant's application for discharge on the latter count was dismissed prior to the trial: Ruling 4, above n 43, at 13.

58 *R v Ellis* HC Christchurch T9/93, 6 May 1993 (Williamson J, Direction to Jury (No 3)) at 2. A similar application for discharge on these counts had been dismissed prior to the trial: Ruling 4, above n 43, at 12.

59 *R v Ellis* HC Christchurch T9/93, 5 May 1993 (Williamson J, Direction to Jury (No 2)) at 2.

three others were also played at the request of the defence). The appellant was acquitted on one count of doing an indecent act on a boy under 12 year of age (urinating on his face) in relation to complainant Y. This was said to have happened at the Crèche.

Other aspects of the Crown case

[48] In addition to the evidence of the complainants, the Crown called evidence from parents of most of the complainants, parents of other children at the Crèche, other Crèche workers (including one of the workers who was charged along with the appellant but discharged under s 347 of the Crimes Act before the trial), others associated with the appellant and two general practitioners who examined some of the complainants. It also called expert evidence from Dr Zelas under s 23G of the Evidence Act 1908 (the 1908 Act). This evidence, discussed in greater detail below,[60] included the parents' reports of behavioural changes in the complainants said to be consistent with those experienced by children who have been sexually abused.

[49] The Crown argued that there were similarities in the accounts of the complainants, which meant the accounts of individual complainants supported the accounts of others.[61] The Crown pointed to a number of examples of this. According to the Crown, complainants 3–7 said the appellant urinated on them; complainants 3, 6 and 7 reported penis-to-mouth contact; complainants 1, 2, 4, 5, 6, and 7 all referred to anal and/or vaginal touching by the appellant; complainants 3–5 made allegations involving needles and sticks; and complainants 4 and 5 referred to allegations involving baths. All the complainants other than complainant 5 said offending happened in the toilets at the Crèche. Others said offending happened at the appellant's home. Some said offending happened elsewhere and, when it did, other adults were present. All of the complainants said the appellant made threats to them. The trial Judge told the jury that similar facts may be relevant to prove a pattern of events that coincidence cannot satisfactorily explain away.

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60 See below at [100]–[234].

61 The Crown referred to all the complainants who gave evidence but we will restrict our discussion to those in respect of whom convictions were entered.

[50] The Crown said the following evidence also supported its case:

(a) Two Crèche workers reported discussions with the appellant in which the appellant referred to the use of implements and wooden sticks and straws as part of sexual practices. Another reported a discussion about "golden showers", where urination is part of a sexual practice. The appellant accepted some (but not all) of these discussions had happened but said that he mentioned these to shock those to whom he was talking. He said he had read about sticks and implements in a magazine. The Crown asked the jury to see the evidence of Mr Ellis' reported discussions as supporting the accounts of the complainants, given the similarities between what the appellant was reported to have said and some of what the complainants described in their evidence and the fact the complainants had not heard these discussions.

(b) One of the Crèche co-workers also gave evidence that the appellant said he used a polaroid camera to photograph sexual activity. (The Crown said this was significant because complainant 5 said the appellant and the appellant's mother photographed "the circle incident" referred to below.[62])

(c) The parent of a child who had attended the Crèche gave evidence of an incident at the Crèche, which she thought had taken place in about 1990. She went to use the staff toilet and waited because the door was closed. When it opened, the appellant emerged with a little girl. The prosecutor said the girl was from the "Big End" of the Crèche so should have been toilet-trained and therefore was not in need of assistance from the appellant. Nor was there any need for the door to be closed. The witness said the appellant looked surprised and defensive. She asked him what the girl was doing in the staff toilet and he replied the children's toilets were full. She thought this was strange. The Crown suggested to the jury this was evidence of opportunity and was

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62 See below at [385](c).

consistent with the complainants' allegations about abuse in the toilets at the Crèche.

(d) A former Crèche worker gave evidence that she and a colleague visited the appellant after he had been suspended from the Crèche but before he had been questioned about the allegations.[63] She said the appellant guessed about a dozen names of children who were likely to be complainants. She recalled four of these names: complainants 6 and 7 and complainants P and T. The prosecutor invited the jury to infer that he knew the names because he had, in fact, abused them. During cross-examination, the appellant said he had been told by his wider support network some of the names of the children making allegations. He said this happened before his interaction with the former Crèche worker, which, he said, explained why he correctly named several of the complainants.

(e) Mother 4 gave evidence that when she was in the bath with complainant 4, complainant 4 moved her open mouth above the mother's genital area, as if attempting oral sex. The prosecutor said complainant 4 would not have had the opportunity to see such behaviour at home and invited the jury to infer she learned it from being abused.

(f) Two Crèche workers gave evidence that they and others noted the appellant often spent extended periods of time in the staff toilets at the Crèche, and one of those workers said that the appellant used the toilet more frequently than what they considered was normal. The appellant said he used the toilet for smoking. Although the prosecutor referred to this evidence only briefly in his closing address, it left open the inference that the appellant's toileting practices created opportunity for the offending said to have occurred in the toilets.

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63 The former Crèche worker was called as a defence witness and gave evidence that was favourable to the defence case in several respects. However, in her evidence-in-chief, she referred to visiting the appellant, and she was cross-examined by the Crown prosecutor about her recollection of the appellant successfully naming some of the complainants.

(g) Two Crèche workers said the appellant said to them that a game he played with Crèche children in the toilets "could look bad".

(h) Mother 3 gave "recent complaint" evidence that, some time before the investigation started, complainant 3 had come home from the Crèche one day and said the appellant had done "wees and poos on the children" that day.[64] There was no other recent complaint evidence.

(i) There was evidence from two medical practitioners who had examined the complainants who had alleged penetrative sexual activity.[65] The doctor who examined complainant 3 (who alleged anal penetration with a stick and burning paper) reported no sign of abnormality. She said this did not mean no sexual abuse had happened. She accepted that if the alleged activity had happened, it could have been expected that the complainant would have been in some pain and discomfort for some days afterwards. The doctor who examined complainant 4 (who alleged penile penetration of her vagina) reported a notch in the complainant's hymen. She said it was highly probable that this had been caused by trauma to the hymen, which would need to be caused by something penetrating into the vaginal entrance. The prosecutor said this was consistent with the allegation made by complainant 4, though not conclusive proof. The same doctor examined complainant 5, complainant 6 and complainant T and reported no abnormalities, except in relation to her anal examination of complainant 6. She said complainant 6's anus had folds in the tissue which could be natural or could be the result of the healing of a tear. If the latter, that would indicate forceful stretching of the anus. The prosecutor said this evidence supported in some measure complainant 6's account but, again, accepted it was not conclusive.[66]

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64 When mother 3 asked how that could be, complainant 3 responded that he was just joking.

65 The Crown did not charge the appellant with sexual violation in relation to the allegations involving penetration, but rather with indecent assault. The prosecutor told the jury that this was because the Crown recognised children's inexperience in such matters and their limitations in describing accurately how far something would penetrate.

66 Professor Dawn Elder's evidence in this Court called into question this evidence: see below at [417].

Defence case at trial

[51] We did not have access to the closing address of the appellant's trial counsel. But a copy of the Crown closing address was retrieved from the Crown solicitor's files and was available to us and the Judge summarised the defence case as part of his summing up. We were able to glean the defence case from these documents and from other aspects of the trial record.

[52] At the heart of the defence case lay the proposition that the complainants' allegations were unreliable and could be explained by contamination from a number of sources — parents, other children and media. The defence also argued that the behaviours said by Dr Zelas to be consistent with those of sexually abused children were ordinary childhood behaviours or could have been caused by numerous other stress-related factors. These arguments remain central to the case of the appellant in the present appeal and we will discuss them in more detail later.

[53] The main witness for the defence was the appellant himself. He denied that any of the alleged conduct had occurred.

[54] The defence called an expert witness, Dr Keith Le Page, whose evidence contradicted aspects of that of Dr Zelas.

[55] In support of its case that the complainants' accounts were unreliable, the defence argued that there were no spontaneous allegations by the complainants;[67] all were made for the first time when the complainants were questioned, in some cases by leading questions directed at them by their parents. The defence said the similarities between the accounts given by different complainants could be attributed to cross-contamination from parent to parent and complainant to complainant.

[56] The defence case was that not only was there no evidence from an adult to support the complainants' evidence, the evidence that was available called into question the plausibility of the complainants' accounts. The Crèche was comparatively small and usually crowded with children, parents, workers and other

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[67] The child of mother A did not make an allegation of sexual abuse.

people. It could have been expected that a co-worker or a parent would have seen the alleged offending happening or noticed that Mr Ellis was spending long periods in the toilet area with children. This was particularly so because the door to the toilets, where a number of offences were said to have happened, was left open and the area was visible from the body of the Crèche.[68] It would also have been expected that the complainants would have been visibly upset afterwards given the events they described.

[57] A number of parents and co-workers called to give evidence for the defence said they never saw anything at the Crèche or in the appellant's behaviour that gave them cause for concern. Those parents and co-workers described the appellant as creative, lively, energetic and gregarious and as having a good sense of humour. He was said to like chasing the children at the Crèche, playing boisterous and physical, "rough and tumble" games with them and sometimes playing tricks on them. It was also said he liked to shock people. The supervisor and other workers at the Crèche gave evidence that they saw nothing in his behaviour suggesting sexual abuse of the children.

[58] Other inconsistencies or gaps the defence argued existed in the prosecution case were as follows:

(a) Six of the seven complainants said other children were directly involved as fellow victims in their abuse. Those who were not complainants at the trial were not called to give evidence. In some cases, those who did give evidence did not refer to the episodes in which they were said by another complainant to have been abused.

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[68] The jury went on a site visit to the Crèche building (and also to the site of the Crèche prior to its relocation), but this happened well after the Crèche had closed. The site visit occurred pursuant to a direction from the Judge made in accordance with the statutory regime applicable at the time of trial: *R v Ellis* HC Christchurch T9/93, 14 May 1993 (Williamson J, Direction to Jury (No 4)). A box of miscellaneous photographs, found by accident three years after the trial, included photos of the toilet area at the time the Crèche was operating. These had not been disclosed by the Police to the defence so were unavailable at the trial. Mr Harrison produced copies of these at the hearing of the appeal. They illustrate how visible the toilet area was from many parts of the Crèche building.

(b) The adults said by a complainant to have been present at some of the episodes did not confirm their presence. And those who were said by complainants to have been present when the offending happened and complicit in it were either not charged (for example, the appellant's mother) or were charged but later discharged (the appellant's co-workers). Some of the adults said to have been present at, or involved in, some episodes were never identified.

(c) Some of the offending was said to have occurred at a residence in Hereford St, where the appellant had lived as a boarder. The owner of this house gave evidence that he lived there continuously and could not remember any children from the Crèche visiting, apart from one visit when a group came with the appellant and another Crèche worker to see the appellant's animals. There was no indication that the appellant ever returned to the address after he stopped living there.

(d) There was no medical evidence supporting the complainants' accounts of some of the more extreme allegations involving penetration of the anus with sticks, a needle inserted into a complainant's penis, burning paper being inserted into a complainant's anus and so on.[69] Nor was there evidence that a parent noticed a complainant in pain or bleeding, both of which could have been expected given the nature of the injuries some of the complainants were said to have suffered.[70]

(e) There was no evidence of complainants going home with unclean clothes or smelling of urine or faeces, despite the allegations that complainants were urinated on and defecated on.

(f) Several of the complainants mentioned they were taken to places away from the Crèche in a car driven by the appellant. The appellant's evidence was that he did not have a driving licence (though he thought

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69 Apart from the evidence described above at [50](i).

70 The evidence of Professor Elder in this Court was to the effect that, if the events as described by the relevant complainants actually occurred, there would have been serious injuries that would have been apparent at the time.

he could drive if pushed) and did not own a car. Others who knew him said they had never seen him drive.

Conviction and sentence

[59] In summary, the appellant was convicted on 16 charges involving complainants 1–7.[71] He was convicted on all charges relating to four complainants and on some but not all charges relating to three complainants. He was acquitted on all charges relating to four complainants, and was discharged on three charges relating to two complainants during the trial under s 347 of the Crimes Act.

[60] The appellant was sentenced to 10 years' imprisonment on 22 June 1993.[72] He was released from prison in February 1999.

Complexity

[61] As this account of the background indicates, there were a number of factors that made the present case complex. In particular:

(a) The complainants were very young when the events leading to the charges occurred and when they were interviewed. Most were still only between six and seven years old at the trial.[73]

(b) There were a very large number of complainants and an even larger number of children interviewed.[74]

(c) The interviews took place months, if not years, after the complainants had left the Crèche and an even longer period after the events leading to the charges were said to have occurred and there was then a further delay until the trial.[75]

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71 However, as mentioned above at n 28, complainant 1 recanted her evidence after the trial and the three convictions in relation to her were quashed by the Court of Appeal in 1994.

72 *R v Ellis* HC Christchurch T9/93, 22 June 1993 (Williamson J, Sentencing Notes).

73 The exceptions amongst the seven complainants at the time of trial were complainant 1 (nine years old) and complainant 2 (eight years old).

74 As indicated earlier, many were interviewed multiple times.

75 The interviews relating to the seven complainants took place between 27 February 1992 and 9 December 1992 and the trial began on 26 April 1993.

(d) The large number of children involved in the investigation meant there was also a large number of affected parents, who were understandably anxious about their children's wellbeing. Some of the families involved were connected through the Crèche or through friendships between the children or the parents. Parents sought support from each other in some cases and there were regular meetings between parents that were attended by some of the complainants' parents.[76]

(e) At the December 1991 meeting and the Knox Hall meeting, parents were asked to look for any significant behavioural changes in their children.

(f) It took a considerable amount of time to investigate complaints and interview children, partly because of the large number of children that had to be interviewed by a small number of available and qualified interviewers and partly because some of the children were interviewed multiple times. For some of the complainants, interviews took place some months after the initial meetings. This meant that some parents were left without support for a long time, which no doubt increased their anxiety. This led some parents to question their children, sometimes in very direct terms, which in turn led to the defence contention that there had been contamination of the complainants' evidence.

(g) There was a great deal of publicity and controversy about the case before and during the trial, not just in Christchurch but nationally.

[62] Many of these factors were interconnected; in many cases one factor magnified the effect of others. The factors that made the case so complex contributed to the delays between the events in issue and the complainants' interviews and in completing the investigation and bringing the case to trial. The delays then added to the complexity.

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[76] See above at [40].

[63] All of this made the case almost unique in the challenges it posed to everyone involved in the case, including the prosecution, the defence and the trial Judge. In a report written in 1999,[77] which we discuss below,[78] a former High Court Judge Sir Thomas Thorp referred to the fact that cases like the present case involving multiple allegations by young children (referred to in an American report as "mass allegation creche cases"[79]) call for special care and examination. Sir Thomas noted that the High Court was not advised of this at the appellant's trial. He considered that was understandable because this case appeared to be the first of its kind in New Zealand. We agree with Sir Thomas' observation that the need for special care and examination in a case like the present seems not to have been fully appreciated by those involved in the investigation and trial of the appellant.

[64] The case also posed difficult challenges for the parents of the complainants. They were naturally very concerned for their children when they were informed that allegations had been made against the appellant. Parental love and concern would have made it very difficult for them to comply with the requests made by the authorities to refrain from asking their children direct questions about the alleged offending. The delays in completing the investigation and the fact that there was public controversy about the case exacerbated this. This judgment is not then to be read as a criticism of the parents of the complainants.

[65] We emphasise that this judgment is also not intended as a criticism of those involved in the investigation and prosecution and the trial itself. Our focus has been solely on conducting a careful analysis in order to evaluate whether a miscarriage of justice occurred. We acknowledge that our review of the case has the benefit of hindsight and of advances in scientific knowledge in relation to some of the issues that arise. Obviously, neither of those advantages was available to those involved in the case at the time.

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77 Thomas Thorp *Opinion for the Secretary for Justice re Petitions for the Exercise of the Royal Prerogative of Mercy by Peter Hugh McGregor Ellis* (March 1999) [Thorp Report].

78 Referred to below at [69].

79 Thorp Report, above n 77, at 16.

Previous appeals and inquiries

[66] In the nearly 30 years between Mr Ellis' trial and the appeal before this Court, the appellant has challenged his convictions twice in the Court of Appeal.[80] As well, there have been several inquiries, including a Ministerial Inquiry and a Parliamentary Select Committee inquiry. The scope and nature of those reviews varied (as we will come to). Although occasionally critical of aspects of the case against Mr Ellis, none of the appeals or inquiries concluded that Mr Ellis' convictions were unsafe.

1994 appeal

[67] The appellant initially appealed to the Court of Appeal against both conviction and sentence immediately following trial. The conviction appeal was dismissed, except in respect of three charges relating to complainant 1, who recanted her evidence. Those convictions were quashed and verdicts of acquittal directed.[81] The sentence appeal was dismissed. An application for legal aid for an application for leave to appeal to the Judicial Committee of the Privy Council (the Privy Council) was declined.

Petitions to the Governor-General

[68] In December 1997, the appellant presented a petition to the Governor-General seeking a pardon or a reference of the case back to the Court of Appeal under s 406(a) of the Crimes Act. This led to a reference back to the Court of Appeal raising a limited number of points for reconsideration.[82] The appellant presented a second petition in November 1998. Part of the object of the second petition was to request a widening of the terms of any reference back to the Court of Appeal as set out in the first reference.

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80 Once in an appeal against conviction under s 383 of the Crimes Act, and once following a s 406(a) reference by the Governor-General to the Court of Appeal, as we discuss below.

81 1994 CA judgment, above n 50, at 195.

82 The reference was made by an Order in Council dated 4 May 1998. The appellant argued in the Court of Appeal that the reference should be treated as a full appeal but this was rejected by the Court in a judgment delivered on 9 June 1998: *Ellis v R* [1998] 3 NZLR 555 (CA) [1998 CA judgment].

Thorp Report

[69] In March 1999, Sir Thomas Thorp submitted a report to the Secretary for Justice entitled "Opinion for the Secretary for Justice re Petitions for the Exercise of the Royal Prerogative of Mercy by [the appellant]".[83] This responded to a request from the Secretary for Justice for advice about the second petition to the Governor-General. Sir Thomas recommended (among other things) that the reference to the Court of Appeal be expanded to cover issues that had not come within the reference responding to the first petition. That recommendation was accepted and an expanded reference to the Court of Appeal was made by an Order in Council dated 12 May 1999.

1999 appeal

[70] In 1999, the Court of Appeal heard and determined the questions referred to it in the Governor-General's reference, but the appellant's appeal was again dismissed.[84]

Eichelbaum inquiry

[71] In 2000, a former Chief Justice, Sir Thomas Eichelbaum, was appointed to conduct a Ministerial Inquiry to evaluate the reliability of the evidence given by the complainants.[85] Sir Thomas concluded that the appellant had not proven that the convictions were unsafe, meaning there was nothing to warrant a pardon.[86] Subsequently, the Governor-General declined the appellant's request for a pardon.

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83 Thorp Report, above n 78.

84 *R v Ellis* (1999) 17 CRNZ 411 (CA) (Richardson P, Gault, Henry, Thomas and Tipping JJ) [1999 CA judgment]. The report in the New Zealand Law Reports ([2000] 1 NZLR 513) is an abridged version of the judgment. For that reason, we refer to the Criminal Reports of New Zealand version.

85 The Ministerial Inquiry was initiated after the appellant presented a third petition to the Governor-General in October 1999 (after the 1999 CA judgment) seeking a free pardon and a Royal Commission of Inquiry. Sir Thomas Eichelbaum was therefore appointed in order to assist in resolving the third Royal prerogative application.

86 Thomas Eichelbaum *The Peter Ellis Case: Report of the Ministerial Inquiry for the Hon Phil Goff* (Ministry of Justice, Wellington, 2001) [Eichelbaum Report]. Neither counsel relied on this report and both said they considered it had no part to play in the appeal.

Select Committee inquiry

[72] In 2005, the Justice and Electoral Committee of the House of Representatives released its report on two petitions to Parliament about the appellant's case.[87] Both petitions asked that the House urge the Government to establish a Royal Commission of Inquiry into the appellant's case. The Committee declined to do so, but made other recommendations in relation to the case.[88]

B THE APPEAL

Statutory provisions

[73] The appellant had a right to apply for leave to appeal to the Privy Council in relation to both judgments. Prior to the appellant's application for leave to appeal to this Court being filed, the parties agreed to the application for leave (and the appeal in the event leave was granted) being dealt with by this Court, rather than the Privy Council.[89] This means the relevant provisions in the Crimes Act for appeals to this Court govern the appeal.

[74] This Court granted leave to appeal against both the 1994 and 1999 appeal judgments. In the case of the appeal against the 1994 decision, the relevant appeal provision is s 383A of the Crimes Act. In the case of the appeal against the 1999 decision, the relevant provision is s 406A of the Crimes Act. Both of these sections have now been repealed but the transitional provisions in relation to them make them still applicable to the appeal.[90]

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87 Justice and Electoral Committee *Report on Petition 2002/55 of Lynley Jane Hood, Dr Don Brash and 807 others and Petition 2002/70 of Gaye Davidson and 3346 others* (8 August 2005).

88 These included recommendations that various law reforms be considered, that the Attorney-General not oppose (or oppose only in principle) a proposed application by the appellant for leave to appeal to the Judicial Committee of the Privy Council and that the Legal Services Agency use its discretion to provide legal aid for that process.

89 See the Supreme Court Act 2003, ss 50–51; and Senior Courts Act 2016, sch 5 cls 3–4.

90 Sections 383A and 385 of the Crimes Act apply to the appeal, notwithstanding that they were repealed by the Criminal Procedure Act 2011: see Criminal Procedure Act, s 397. And s 406A applies notwithstanding its repeal by the Criminal Cases Review Commission Act 2019: see Criminal Cases Review Commission Act, sch 1 cl 4.

[75] Appeals under s 383A of the Crimes Act must be determined in accordance with s 385 of that Act. Section 385(1) relevantly provided that an appeal against conviction must be allowed if the Court is of the opinion:

> (a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
>
> (c) That on any ground there was a miscarriage of justice; or
>
> (d) That the trial was a nullity …

[76] The proviso to s 385(1) allowed the appellate court to dismiss an appeal if one of the above grounds was made out but the court considered that no substantial miscarriage of justice actually occurred. We do not need to explore the concept of substantial miscarriage of justice as it was not suggested by the Crown that this proviso could be applied in the present case and we say no more about it.

[77] An appeal under s 406A is limited in scope: the appeal is against "the Court of Appeal's opinion on or determination of the question" (or questions) referred to it under s 406(a). As noted earlier, the 1999 appeal decision dealt only with the specific questions referred to the Court in the Governor-General's reference, so only those matters are in issue in the appeal under s 406A.[91] But this is not of any practical moment because of the fact that both the 1994 and the 1999 appeal decisions are under challenge and the appeal against the 1994 appeal decision is brought under s 383A, which invokes the general grounds of appeal in s 385 mentioned earlier.

Grounds of appeal

[78] Although there was at times a lack of precision in appellant's counsel's identification of which of the s 385 provisions he relied upon, at its heart appellant's counsel's contention was that a miscarriage of justice occurred at the appellant's trial. This also corresponds with the approved question on which leave was given.[92]

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91 See above at n 82.

92 SC leave judgment, above n 27.

[79] Lead counsel for the appellant, Mr Harrison, advanced the appeal under five broad headings.[93] He argued that:

(a) *Section 23G*: the expert evidence given by Dr Zelas under s 23G of the 1908 Act strayed outside the bounds of what could properly be admitted under that section and was unfair in that it improperly bolstered the complainants' evidence, leading to a miscarriage of justice. It was also argued for the appellant that Dr Zelas' involvement for the Police in the investigation and prosecution of the appellant affected her objectivity.

(b) *Contamination*: the evidence of the complainants was also adversely affected (or, at the very least, may have been adversely affected) by contamination before and during the evidential interview process, particularly through direct questioning by the parents of some of the complainants. The appellant says the risk of contamination of the complainants' evidence was underestimated at the time of the trial. The science relating to contamination has advanced since the trial and with the benefit of that science there is a basis for concern that the risk of contamination affecting the evidence of at least some of the complainants was greater than would have been understood at the time of the trial. It is also argued that the jury was given incorrect reassurance by Dr Zelas in relation to the risk of contamination.

(c) *Interviews*: the way in which the evidential interviews with the complainants were conducted compromised the quality and integrity of the accounts given by the seven complainants. It was argued that the evidence of the experts before us showed that there was now much greater knowledge about the risks involved in the child interviewing process and the steps that need to be taken to avoid or minimise these risks.

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[93] Mr Harrison was the appellant's trial counsel and was one of the counsel who represented him in the 1994 appeal but not the 1999 appeal.

(d) *Memory evidence*: the jury was not appropriately assisted by expert evidence relating to memory. This ground connects to many of the other grounds of appeal.

(e) *Unfair trial*: there was an unfair trial for several reasons which, singly or in combination, caused a miscarriage of justice under s 385(1)(c). It is argued that the trial was unfair because:

(i) there was a "sanitisation" of charges — the more fanciful or bizarre allegations were not the subject of charges;

(ii) in a pre-trial application, the trial Judge ruled that the Crown was not required to present all of the complainants' interviews to the jury and the defence was required to seek the trial Judge's permission to play any additional tapes or when proposing to cross-examine a witness on an allegation not directly relevant to the charges. As a consequence only some of the evidential interviews were played to the jury, so that the jury saw only some of the complainants' testimony, excluding much of the accounts given by complainants that involved the more extraordinary allegations. It is argued that this meant the defence was constrained in exposing the extent and nature of those other allegations to the jury; and

(iii) the jury was presented with the transcripts of the evidential interviews which were played to the jury as part of the Crown case, but not the cross-examination relating to those interviews, nor transcripts of the further interviews that were played at the instigation of the defence. The jury was also given a chart of the complainants' behaviours that were said to be consistent with the behaviours of sexually abused children generally, reflecting the evidence of Dr Zelas. It is argued this oversimplified that evidence and presented an unbalanced picture to the jury.

(f) *Medical evidence*: another issue that arose in the course of argument was the appellant's contention that some of the medical evidence given at the trial was wrong and unfairly damaged the defence case.

Approach on appeal: some preliminary issues

Changing law and changing science

[80] In the years that have passed since the trial of Mr Ellis and the subsequent appeals, much has changed in the law. Much has changed also in the science that underpinned the conduct of interviews of the complainants, and that underpinned the expert evidence provided at trial by Dr Zelas and Dr Le Page. These changes give rise to two preliminary issues in the context of this appeal. First, in assessing the several issues of admissibility of evidence that arise in this appeal, should the Court apply the rules of evidence that applied at the time, namely the 1908 Act and the common law rules, or should current evidence law apply? And secondly, in addressing whether a miscarriage of justice has occurred how should the Court weigh the "new" science which casts a different light on the collection and presentation of evidence at the trial.

Law of evidence

[81] As to the first issue, the Evidence Act 2006 (the 2006 Act) addressed issues of transition between the pre-existing law of evidence and the rules of evidence contained in the 2006 Act. Section 5(3) addresses the 2006 Act's application to proceedings as follows:

> This Act applies to all proceedings commenced before, on, or after the commencement of this section except—
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> (a) the continuation of a hearing that commenced before the commencement of this section [being 1 August 2007]; and
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> (b) any appeal from, or review of, a determination made at a hearing of that kind.

[82] On their face, these words appear to exclude the trial of Mr Ellis, and subsequent appeals, from its application. That interpretation has some attraction because an interpretation which has the 2006 Act applying to proceedings heard before its enactment could see the courts mired in endless appeals based on a failure to apply

an Act not yet in force. And it is an interpretation which is consistent with s 32 of the Legislation Act 2019 which affirms that the repeal of an enactment does not affect the previous operation of the enactment or the validity of anything done under it.

[83] Nevertheless, Mr Snelgar (who argued this aspect of the case for the appellant) argued that issues about the proper admissibility of the evidence at the 1994 trial should be resolved applying the 2006 Act, rather than by reference to the rules of evidence that applied at the time. There were two parts to his argument. The first turned on the definition of when a hearing commences provided in s 4(2) of the 2006 Act:

> A hearing commences for the purposes of this Act when, at the substantive hearing of the issues that are the subject of proceedings, the party having the right to begin commences to state that party's case or, having waived the right to make an opening address, calls that party's first witness.

[84] Mr Snelgar submitted this was a wide definition, allowing room for a court to interpret it in a way which is most consistent with the New Zealand Bill of Rights Act 1990. However, Mr Snelgar accepted in argument that it might not be favourable, in all cases, for his client if the 2006 Act rather than the 1908 Act applied to the issues of admissibility arising on this appeal. Having accepted that, he acknowledged this was an argument he could not, and did not wish to, press further.

[85] The second part of his argument was based on the Court of Appeal decision in *R v Bain*, in which the Court decided that the 2006 Act applied to the retrial of Mr Bain.[94] As Ms Colley (who argued this aspect of the case for the Crown) pointed out, that case does not assist the appellant's argument. The issue for the Court was the rules of evidence to apply at a retrial commencing after the 2006 Act came into force. Applying s 5(3), the Court of Appeal found that the retrial had to be conducted under the 2006 Act's rules of evidence. That is a different circumstance to the one we are considering.

[86] We are satisfied that in accordance with s 5(3) of the 2006 Act, and in accordance with s 32 of the Legislation Act, issues of admissibility in this appeal are

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94 *R v Bain* [2008] NZCA 585.

to be determined under the law of evidence that applied at the time of Mr Ellis' trial in 1994.

Science

[87] That takes us to the second preliminary issue. How does the miscarriage of justice ground of appeal apply when the appeal is advanced on the basis of fresh evidence of changes in practice, knowledge or science, not reasonably available to the trial court, but which is before the court on appeal? It is well established that under this ground, the court has the flexibility to identify and intervene to prevent a miscarriage of justice however caused.[95] In *R v Sungsuwan*, this Court affirmed the principle that the overall consideration under the miscarriage of justice ground must be to "ensure justice where there is real concern for the safety of a verdict" — in other words whether the error or irregularity that is found could have affected the outcome of the trial such that there has been a substantial miscarriage of justice.[96]

[88] But of course not every change in practice or scientific consensus since the time of trial will give rise to a miscarriage of justice — the issue for the court will always be whether the new evidence as to changes in practice or scientific consensus is such as to evidence a substantial miscarriage of justice.[97]

[89] Senior counsel for the Crown, Mr Billington KC, argued there are limits on the extent to which new scientific knowledge about children's memory, suggestibility, interview techniques and guidelines and the potential for contamination of children's accounts of alleged offending against them can be applied retrospectively to a trial from 1993. He sought to distinguish cases where new science establishes innocence in a conclusive way[98] and those where the new scientific knowledge does not do so, but rather just provides a different context in which the same question addressed by the jury (whether the accounts of the complainants were reliable) would have had to be addressed. He argued evidence based on new scientific knowledge should not be

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95 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [70]; and *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.

96 *Sungsuwan*, above n 95, at [70]. See also *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [30]; and *Lundy*, above n 95, at [150].

97 *Lundy*, above n 95, at [120].

98 For example, *R v Hanratty* [2002] EWCA Crim 1141, [2002] 3 All ER 534; and *R v Dougherty* [1996] 3 NZLR 257 (CA).

admitted on the basis it was insufficiently cogent or, alternatively, that it did not provide a basis on which the Court could conclude a miscarriage of justice occurred.

[90] We do not accept that submission. Our task is to determine whether a miscarriage occurred and we do not see how we could ignore evidence before us that calls into question the accuracy and reliability of expert evidence before the jury on which the jury may have relied in coming to its verdicts. We see the present case as in the same category as the English cases in which confessions that were found reliable at trial were challenged on appeal some years later on the basis of new scientific knowledge about the vulnerability of the appellants to make false confessions.[99] As the Court of Appeal of England and Wales observed in *R v Fell*, when reviewing the safety of a conviction, it is "impossible to conduct that review other than through present day eyes".[100]

Scope of appeal

[91] As mentioned earlier, leave to appeal was sought and granted in respect of both the 1994 and the 1999 appeal judgments. The appeal against the 1999 appeal judgment is governed by s 406A of the Crimes Act, which limits the scope of appeal to the Court of Appeal's decision on the matters referred to it under s 406(a). The matters referred to the Court of Appeal were limited in number and excluded some issues that have taken on importance in the current appeal. In addition, as will emerge in the more detailed narrative we provide in connection with particular grounds of appeal, the 1999 appeal judgment did not address some of the matters that had been referred to the Court under s 406(a), at least not in any detail. They were, however, pursued in argument before us. The Court of Appeal's 1999 judgment considered that some of the matters referred to it under s 406(a) were not appropriately addressed by a court exercising criminal appellate jurisdiction, but were more suitable for investigation by a Commission of Inquiry. In respect of others, the Court took the view that it would not consider an issue, even when it was within the terms of the reference, if it had already disposed of that ground on the merits in the 1994 appeal, and no new material

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99 *R v King* [2000] 2 Cr App R 391 (EWCA Crim); and *R v O'Brien* [2000] Crim L R 676 (EWCA Crim). See also the Scottish case, *Gilmour v Her Majesty's Advocate* [2007] HCJAC 48, 2007 SCCR 417.

100 *R v Fell* [2001] EWCA Crim 696 at [85].

was raised in respect of it.[101] The approach to the reference by the Court of Appeal in 1999 was not argued before us, and we therefore make no comment upon whether it was the correct approach.[102]

[92] Importantly, the fact that this Court granted leave to appeal against both the 1994 and 1999 appeal judgments and, in relation to the former, that the broader appeal provision (s 383A of the Crimes Act) applies, means there is no impediment to us addressing all of the grounds of appeal advanced on the appellant's behalf, even if they involve issues not addressed in the 1999 appeal judgment.

Evidence in this Court

[93] It is uncommon, but not unprecedented, for evidence to be received of more than a merely updating kind by a final appeal court. Because of the unusual circumstances of this case, and in particular the "new science" basis of several of the grounds, we were satisfied that it was appropriate to receive fresh evidence. Prior to the appeal hearing, the Court gave leave for the briefs of evidence of all of the experts named below at [94]–[95] to be adduced on a provisional basis and all (except Professor Ross Cheit) appeared at the hearing by audio-visual link, though not all of them were cross-examined.[103] We heard objections to some aspects of the evidence but have decided to admit all of it on the basis that it is fresh and credible and, with a few minor exceptions, is relevant and cogent to the issues in the appeal.[104] Two issues relating to the admissibility of the expert evidence that require some discussion are addressed below.[105]

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101 1999 CA judgment, above n 84, at [13].

102 We note that since this appeal was argued before us, the Court of Appeal has released its decision in *Watson v R* [2022] NZCA 204, which addresses the court's jurisdiction on a s 406(a) reference. As we do not address this issue, we make no comment on that decision.

103 All experts swore affidavits confirming their briefs were true and correct.

104 None of the evidence that we found to be irrelevant had any bearing on our consideration of the matters at issue in the appeal.

105 See below at [358]–[359] and [416]–[418].

[94] The appellant adduced evidence in support of his appeal from the following experts:

(a) Professor Harlene Hayne, who was formerly the Vice-Chancellor of the University of Otago | Te Whare Wānanga o Ōtākou and is now the Vice-Chancellor of Curtin University in Western Australia.[106] Before becoming Vice-Chancellor of the University of Otago, she was a Professor of Psychology and Head of the Psychology Department at the University. She is widely published in the area of memory development.

(b) Professor Mark Howe, Research Chair in Cognitive Science, Professor of Psychology and Director of the Centre for Memory and Law at City, University of London, United Kingdom. As is apparent, he is also an expert in memory.

(c) Associate Professor Deirdre Brown, a clinical psychologist and Associate Professor in clinical and forensic psychology at Victoria University of Wellington | Te Herenga Waka. She is also an expert in memory and is involved in the training of Specialist Child Witness Interviewers in New Zealand.

(d) Dr Thelma (Tess) Patterson, a clinical psychologist and Head of Department, Department of Psychological Medicine at the University of Otago. Her evidence related to the (lack of) scientific underpinning for the evidence given at the trial by Dr Zelas under s 23G of the 1908 Act.

(e) Professor Dawn Elder, a consultant paediatrician at Wellington Hospital and Professor and Head of the Department of Paediatrics and Child Health at the University of Otago, Wellington. At

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[106] Professor Hayne refers to assistance she received from Professor Maryanne Garry, Associate Professor Rachel Zajac, Associate Professor Deirdre Brown, Dr Tess Patterson, Dr Bridget Irvine and Ms Linda Hobbs. Her opinion was peer-reviewed by three internationally recognised experts.

the request of the appellant's counsel, she reviewed the medical reports relating to complainants 3, 4, 5, 6, and 7 and found they were, on the basis of current knowledge, incorrect. Her evidence also dealt with the likely medical consequences of the sexual touching that some of the complainants said occurred. Her evidence was that some of the actions described by those complainants could be expected to have resulted in physical injuries that would have been apparent to their parents.

[95] The Crown adduced evidence from the following experts:

(a) Professor Gail Goodman, Distinguished Professor of Psychology, University of California, Davis, United States of America. Her expertise is memory, particularly child memory and the law.

(b) Dr Frederick Seymour, a clinical psychologist and Emeritus Professor at the University of Auckland | Waipapa Taumata Rau, and Dr Suzanne Blackwell, a clinical psychologist and Honorary Research Fellow/Academic in the Psychology Department, Faculty of Science at the University of Auckland. They collaborated on a brief of evidence responding to the briefs of the experts called by the appellant.

(c) Professor Ross Cheit, Professor of Political Science and Public Policy, Brown University, Providence, Rhode Island, United States of America. His brief of evidence responded to Professor Hayne's comparison of the interviews in the present case with those in an American case in which a childcare worker was convicted of sexual offending against children in a childcare centre but later exonerated.[107] Ultimately, the appellant did not rely on this comparison and so it was not necessary for Professor Cheit to participate in the hearing or for the Court to address the comparison.

[96] The process by which the experts gave evidence in Court was as follows. The briefs of evidence of the various witnesses were taken as read. For the hearing, counsel

[107] *State of New Jersey v Michaels* 264 NJ Super 579 (1993), 625 A 2d 489.

agreed on a list of topics on which oral evidence would be received. Where there was more than one witness on that topic, the witnesses on that topic appeared by audio-visual link. Each made a short statement summarising their position and each was then available for cross-examination. After any cross-examination and re-examination, any questions from the bench were put to the witnesses, followed, where necessary, by further cross-examination or re-examination.

[97] In relation to some topics, the process had the effect of reducing the areas of disagreement among the experts and the summary statements made by the witnesses also assisted the Court in identifying the differences between them and the significance or insignificance of those differences.

[98] We are grateful to the expert witnesses for the way they conducted themselves in this process. In some cases, this necessitated witnesses in other time zones making themselves available at very unsociable hours.

How we address the issues

[99] We will deal with the grounds of appeal in the following order:

(a) Section 23G of the Evidence Act 1908;

(b) Contamination;

(c) Interviews;

(d) Memory evidence; and

(e) Other unfair trial issues.

C SECTION 23G OF THE EVIDENCE ACT 1908

[100] This ground of appeal focuses upon the evidence of Dr Zelas, admitted at trial under s 23G of the 1908 Act. It is contended that Dr Zelas' multiple roles in the investigation and trial affected the objectivity of her evidence and that her evidence

strayed well beyond what was admissible under s 23G. It is argued that her evidence caused unfair prejudice to Mr Ellis leading to a miscarriage of justice.

[101] The section, now repealed, regulated the admission of expert evidence relating to the mental and intellectual development of children and the behaviour of sexually abused children. It provided:

> **23G Expert witnesses**
>
> (1) For the purposes of this section, a person is an expert witness if that person is—
>
> (a) A medical practitioner registered as a psychiatric specialist under regulations made pursuant to section 39 of the Medical Practitioners Act 1968, practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or
>
> (b) A psychologist registered under the Psychologists Act 1981, practising or having practised in the field of child psychology and with experience in the professional treatment of sexually abused children.
>
> (2) In any case to which this section applies, an expert witness may give evidence on the following matters:
>
> (a) The intellectual attainment, mental capability, and emotional maturity of the complainant, the witness's assessment of the complainant being based on—
>
> (i) Examination of the complainant before the complainant gives evidence; or
>
> (ii) Observation of the complainant giving evidence, whether directly or on a videotape:
>
> (b) The general development level of children of the same age group as the complainant:
>
> (c) The question 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.

How we address this issue

[102] We address this issue under the following headings:

(a) Legislative history of s 23G. This assists in understanding the purpose and scope of the provision.

(b) What the courts said about s 23G at the time. These are the principles that we apply in determining whether Dr Zelas' evidence was properly admissible under this provision or otherwise.

(c) The s 23G evidence at trial. This was given by Dr Zelas but also by the defence expert, Dr Le Page.

(d) How the issue was addressed in the 1994 and 1999 appeals.

(e) The s 23G issues on this appeal and our resolution of them.

Legislative history of s 23G

[103] Section 23G was introduced into the 1908 Act as part of a group of amendments contained in the Evidence Amendment Act 1989. The amendments introduced innovations to the way evidence could be given by child complainants in sexual cases. Section 23D empowered judges to make directions as to how complainants' evidence was to be given at trial with s 23E setting out the various modes available including videotapes, closed circuit TV and the use of screens, and s 23F contained procedural protections for a child complainant when under cross-examination.

[104] It is clear enough that overall, these amendments to the 1908 Act were designed, through procedural reform, to support fairness for child complainants in cases of alleged sexual offending. But there is little by way of legislative history to contextualise what, as we shortly explain, is difficult statutory language in s 23G.[108]

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[108] The lack of legislative history may be due in part perhaps to the fact that the provisions started life as part of an omnibus bill, the Law Reform (Miscellaneous Provisions) Bill 1988.

The explanatory note to the initial Law Reform (Miscellaneous Provisions) Bill 1988 provides no insight as to the role that s 23G was to play, limited to the purely (if not fully) descriptive passage:[109]

> [Section 23G] makes special provision for the admission of expert evidence from psychiatrists and psychologists who practise in the field of sexually abused children. Such an expert witness may testify about the intellectual attainment, mental capability, and emotional maturity of the complainant, and generally about children of the same age group as the complainant.

[105] The broader legal context of the times does however suggest that the provision was included in response to a Court of Appeal decision, *R v B*, involving a prosecution for child sex abuse.[110] In that case the prosecution wished to call evidence from a child psychologist, including the psychologist's expert assessment of the similarities between the complainant's behaviour and the behavioural patterns of young people who have been subjected to sexual abuse. The behaviours in that case included evidence of anger toward her family, negative dreams of a kind "frequently experienced" by sexually abused people, and evidence that she had sexual knowledge beyond what was typical for people her age. The proposed expert evidence also included what is commonly called counterintuitive evidence — expert evidence intended to contradict incorrect assumptions about the behaviour of sexually abused children that are commonly held amongst the general population and that may therefore affect the jury. In *R v B*, the counterintuitive evidence sought to be led was that the child's love and affection for the alleged offender, and a delay in complaining of the abuse, were all in fact typical behaviours in child victims of sexual abuse.

[106] The evidence was ruled inadmissible for several reasons, including that the evidence was tendered to enhance the complainant's credibility, whereas the credibility of the complainant was a matter for the jury alone. The judgment of the Court contained discussion regarding the prospects for the admissibility of such evidence. McMullin J commented:[111]

> As child psychology grows as a science it may be possible for experts in that field to demonstrate as matters of expert observation that persons subjected to sexual abuse demonstrate certain characteristics or act in peculiar ways which

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109 Law Reform (Miscellaneous Provisions) Bill 1988 (122-1) (explanatory note) at x–xi.
110 *R v B (an accused)* [1987] 1 NZLR 362 (CA).
111 At 368–369 (citations omitted).

> are so clear and unmistakable that they can be said to be the concomitants of sexual abuse. When that is so the Courts may admit such evidence as evidence of direct observation. … In the difficult and distressing field of child abuse, instances of which are coming to the notice of the Courts in increasing numbers, there may be a case for the enactment of special statutory provisions for the admission of evidence of the kind sought to be given in this case. It is important that those who sexually abuse children should be brought to justice. But the effect of any such changes on the criminal law generally would have to be considered.

[107] Somers and Casey JJ expressed similar views as to the threshold such evidence would have to meet to be admissible.

[108] In the later case of *R v Accused (CA174/88)*, McMullin J synthesised the three Judges' views into the following proposition:[112]

> The common theme … is that before a psychologist or other similarly qualified person can be allowed to give evidence that a particular child has exhibited traits displayed by sexually abused children generally, it must be demonstrated in an unmistakable and compelling way and by reference to scientific material that the relevant characteristics are signs of child abuse.

[109] Section 23G certainly responded to the issues highlighted in these judgments. It lowered the threshold that the common law imposed, so that expert evidence could be tendered to assist the jury, while restricting the expert to discussion of "consistency" and "inconsistency" in order to maintain the fundamental rule against comment on the credibility of a witness. With the distance of years, and the benefit of experience, we can now say that it proved to be a difficult provision for lawyers, witnesses and judges to apply. Dr Blackwell gave evidence to this Court about her experience of giving evidence under this provision and of the great care needed not to overstep what the section permitted.

[110] One difficulty with the provision was identifying just where the line was to be drawn between evidence which could properly be given under s 23G, and evidence which illegitimately strayed into commenting upon the credibility of the witness.

[111] Another difficulty arose from the structure and wording of s 23G(2)(c). On one level just about any behaviour could be said to be consistent with the behaviour of sexually abused children, and equally, no behaviour inconsistent with the same.

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[112] *R v Accused* (*CA174/88)* [1989] 1 NZLR 714 (CA) at 720.

Based on the legislative history, as supported by the text of the provision, it seems likely that s 23G(2)(c) was intended to enable the admission of two types of evidence. The first, what we refer to as "consistency" evidence, is opinion evidence, based on the expert's professional experience or on professional literature, that certain types of behaviour in a child of a particular age group could be an indicator of sexual abuse. The second, "inconsistency" evidence, is counterintuitive evidence that debunks incorrect and commonly held assumptions that certain types of conduct are inconsistent with the complainant having been the victim of sexual abuse.

[112] Another problematic feature of s 23G(2)(c) was the assumption embedded within it, that reliable evidence could be given on the issue of consistency. It did not for example adopt the threshold suggested in *R v Accused* set out above at [108]. The expert evidence we heard was that the consensus of scientific opinion at the time of Mr Ellis' trial was that certain behaviours were red flags, indicating a need for further investigation, and were not in themselves an indicator that the child had been sexually abused. The further investigation would explore the context in which the behaviour arose and other possible causes. And further, that with the exception of some kinds of sexualised behaviour, the behaviours that might be red flags could also simply be normal childhood behaviour.

[113] In part, the appellant's case has been advanced as an attack on the admissibility of the evidence given by Dr Zelas under s 23G on the basis that the provision was fundamentally flawed. The appellant emphasised for example comments in the 2003 case of *Jarden v R*, in which the Court of Appeal made the following observation:[113]

> We remark, in passing, that the bench as presently constituted, with its trial experience, has reservations about resort to s 23G in contemporary circumstances. It is not often invoked by the Crown, perhaps through recognition of the practical difficulties of staying within the permissible scope and because of the significant potential for unfairness should that not be achieved.

[114] It is true that the section was repealed on the enactment of the 2006 Act, and no equivalent provision was included in that new Act. Nevertheless, while it remained in force, the section smoothed the path for the admission of evidence that fell within

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113 *Jarden v R* CA51/03, 4 August 2003 at [30].

the categories described. And as the Court of Appeal in *R v Aymes* remarked, *Jarden* did not go so far as to say that evidence under s 23G cannot be given:[114]

> There will be cases where s 23G evidence needs to be given – for example where the Crown wishes to rely on (admissible) evidence of behaviours as backing up allegations of abuse but the assessment of such behaviours is outside the ordinary experience of jurors, such as the significance of the sexualised behaviours of young children …
>
> The Court, in making the remarks it did in [*Jarden*] at para [30], was speaking in the context of the particular case where it was almost impossible for the s 23G evidence to be given … without the expert expressing an opinion on whether abuse had occurred and commenting on the complainant's credibility (which is not allowable).

What the courts said about s 23G

[115] In another decision called *R v B*, the Court of Appeal summarised the effect of s 23G as it was applied since its enactment as follows:[115]

> Where evidence is admissible in terms of s 23G its limits are set by the very terms of the section. The expert is limited to providing the jury with background assessments concerning the intellectual attainment, mental capability and emotional maturity of the complainant, coupled with evidence of the general development level of children of the same age in order, no doubt, to provide a benchmark. Section 23G(2)(c) then permits the expert to express an opinion whether evidence at the trial relating to the complainant's behaviour is consistent or not with the behaviour of sexually abused children of a like age. What the section does not allow is for the expert to comment directly or indirectly upon the credibility of the complainant's evidence, much less to express an opinion [on] whether sexual abuse has occurred.

[116] The principles that governed the admissibility of s 23G evidence, as they were being applied at the time of trial and subsequently, can be stated quite shortly:

(a) While evidence given under this section could assist juries by providing specialist information outside of a juror's ordinary experiences and knowledge, experts were required to keep their evidence within the bounds of the section. Expert evidence carried great weight with juries, and taking care to confine the evidence to its proper bounds was important.[116]

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114 *R v Aymes* [2005] 2 NZLR 376 (CA) at [116]–[117].
115 *R v B* [2003] 2 NZLR 777 (CA) at [25].
116 *Crime Appeal (CA244/91) v R* CA244/91, 20 December 1991 at 19; and *R v Tait* [1992] 2 NZLR 666 (CA). See also *R v S* [1995] 3 NZLR 674 (CA) at 676–677.

(b) A problem inherent in expert evidence under either s 23G(1) or (2) was that it easily crossed over into commenting on, or appearing to comment on, the credibility of the complainant and hence of the allegations. Direct evidence as to the credibility of a witness, or the truthfulness of allegations, was inadmissible because it was for the jury to decide those issues.[117]

[117] A strict approach was taken to the application of these rules, with departure from them resulting in some cases in a finding that a miscarriage of justice had occurred. In the 1991 decision, *Crime Appeal (CA244/91) v R*, Hardie Boys J, in delivering the judgment of the Court of Appeal, said that the limits of the section were so clearly in place that any exceeding of them must be regarded as serious because "[o]ne cannot know what influence it will have on a jury".[118] In the 1992 case of *R v Tait*, the Court of Appeal said that two statements by a Crown witness, a child psychologist called to give evidence under s 23G, fell outside the proper bounds of the section — statements that it was "extraordinarily unusual for a 5-year-old to report to make a statement like that and it not being substantially true", and that it was "hard from my point of view to see how the behaviour described this morning doesn't tie in with the alleged incident".[119]

[118] There are many other examples in the case law where the expert was held to have stepped outside the bounds of the section. These included cases in which the expert witness:

(a) appeared to conclude that sexual abuse had taken place;[120]

(b) appeared to suggest that a witness was giving accurate or truthful evidence, including one case where the expert stated there was "no

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117 *Tait*, above n 116, at 670–671. See also *R v S*, above n 116, at 676; *R v B*, above n 115, at [25]; and *Aymes*, above n 114, at [107].

118 *Crime Appeal (CA244/91)*, above n 116, at 19.

119 *Tait*, above n 116, at 670. However, in that case, in light of admissions made by the accused, the proviso in s 385(1) of the Crimes Act was applied, and the conviction upheld.

120 *R v S*, above n 116, at 678.

known prior sexual abuse" thereby impermissibly suggesting to the jury that the allegations at issue were true;[121]

(c) used language suggesting that a behaviour or behaviours were diagnostic of sexual abuse;[122]

(d) described highly sexualised behaviours as "possibly highly suggestive of abuse" (that language was diagnostic in nature, going beyond evidence of mere consistency);[123] and

(e) suggested that a change in behaviour was specifically linked to the alleged offending (that was held to amount to the expression of an opinion that the complainant was telling the truth).[124]

[119] It is clear from these examples that s 23G was a difficult section under which to give evidence. As the Court of Appeal observed in *Tait*:[125]

> The case demonstrates the importance of these expert witnesses being fully briefed as to the limits of their permissible evidence and of the Judge appropriately dealing with a situation where those limits are exceeded …

[120] In *Jarden*, the Court of Appeal noted that the boundary between permissible and impermissible opinion evidence under s 23G might in practice seem indistinct, but the party calling s 23G evidence and the trial judge (whose responsibility it was to assure compliance within the statutory limits) "must be astute to prevent the border being crossed".[126] The Court of Appeal emphasised on several occasions in judgments

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121 *Jarden*, above n 113, at [16]–[18] and [25].

122 *R v B*, above n 115, at [29].

123 *R v S*, above n 116, at 677. The Court however approved evidence suggesting that clustering of certain behaviours was suggestive of sexual abuse. We return to that issue later.

124 At 678.

125 *Tait*, above n 116, at 671.

126 *Jarden,* above n 113, at [15]. A similar point was made in *R v S*, above n 116, at 677, where the Court also emphasised the responsibility of counsel in ensuring their witnesses understood the limits of the section.

dealing with s 23G the desirability of a pre-trial hearing where s 23G evidence was to be called to determine its proper scope and resolve any admissibility issues.[127]

[121] Given the important role of a trial judge in this context, when the Court of Appeal heard appeals on the basis that expert evidence under s 23G had gone further than it should have, the Court would often look at the trial judge's summing up to see whether it had addressed problematic aspects of the evidence. In *R v S*, the Court identified a number of problems with the expert evidence but considered that they had been addressed satisfactorily in the Judge's summing up, so that there was no miscarriage of justice.[128] By contrast, in *R v B*, the Court considered that although the trial Judge had "valiantly attempted to retrieve the balance in the course of his summing-up", it was a case of "too little too late" and the appellant's conviction was quashed.[129]

[122] One further aspect of the authorities addressing the application of s 23G is worth exploring at this point. On the face of it, s 23G(2)(c) created a very low threshold for admissibility — on a literal interpretation behaviours commonly seen in children who were sexually abused and in those who were not sexually abused could be said to be consistent with the behaviours of children who were sexually abused. However, as the Court of Appeal stated in *Aymes*, admissibility of evidence under s 23G(2) had to also be determined by reference to the underlying common law principles of evidence as they applied at the time — the evidence had to be relevant to an issue or issues in the proceeding, and its probative value had to outweigh any unfair prejudicial effect that it might have.[130] In *Aymes*, Glazebrook J explained the application of the relevance threshold to s 23G(2)(c) evidence as follows:

> [109] The comment that an expert can give s 23G evidence even if that evidence is irrelevant, in our view, goes too far. It cannot be imagined that Parliament would sanction the giving of irrelevant evidence. We consider, for example, that s 23G(2)(c) evidence relating to behaviours that are exhibited in

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127 Prior to the enactment of s 23G, the Court of Appeal had said that where expert psychological evidence was intended to be led addressing the consistency of certain behaviours with sexual abuse, there should be a pretrial hearing to determine the admissibility and scope of the evidence: *R v Accused (CA174/88)*, above n 112, at 721. The Court reiterated this in the context of expert evidence under s 23G: see *R v B*, above n 115, at [24]; and *Aymes*, above n 114, at [118].

128 *R v S*, above n 116, at 678–680.

129 *R v B*, above n 115, at [27].

130 *Aymes*, above n 114, at [109]–[110]. See, for example, *R v R (T45/93)* (1994) 11 CRNZ 402 (HC). Those principles are now codified in ss 7 and 8 of the Evidence Act 2006.

> the same proportions by children who have been abused as by children who have not is unlikely to have probative value and, therefore, should not be given, unless the point at issue is whether the behaviours are normal.

[123] As to how that evidence should be expressed, she said that the expert's evidence could extend to expressing a view, based on published studies, as to how consistent a behaviour was with sexual abuse:[131]

> It is in our view implicit in s 23G(2)(c) that, not only must the evidence say whether there is consistency or inconsistency with the behaviour of sexually abused children of the same age group, but the expert must articulate how consistent it is and also say if it is consistent with other factors. For example, the evidence may show that there could have been a trauma in the child's life. The child's behaviour may be consistent with that trauma having been sexual abuse but it may also be consistent with other possible trauma. This should be pointed out by the expert. It is also encumbent on an expert, where there are differing bodies of opinion, to refer to the contrary views or at least to provide suitably qualified evidence-in-chief.

[124] In an earlier case of *R v S*, it was held that an expert must not describe certain conduct as "highly consistent" with abuse nor suggest "the degree of weight to be attached to the behaviours".[132] This might, as a matter of first impression, appear to conflict with the statement in *Aymes* that the expert "must articulate how consistent it is".[133] But the two approaches are in fact aligned — while it was permissible to refer to how commonly certain behaviours were seen in a cohort of sexually abused children, it was clearly not permissible for the expert to comment, whether directly or by implication, as to how suggestive this was that sexual abuse had in fact taken place in the case before the court.[134] Further, as noted in the passage quoted above, the Court in *Aymes* made it clear that the expert may not say that the complainant's conduct is consistent with that exhibited by sexually abused children without also informing the jury what other explanations there may be for that conduct.

[125] One final topic that we should address before we leave the framework provided by the case law is the nature of the expert witness' obligations. As emerges from the case law, the expert was not to adopt the language of advocacy[135] and was to take care

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131 *Aymes*, above n 114, at [113].

132 *R v S,* above n 116, at 678.

133 *Aymes*, above n 114, at [113]. The complainant's behaviour in *Aymes* has been described as "sexual knowledge and behaviour to an extreme degree". All the experts in the present case agreed that such behaviour calls for further investigation.

134 *R v S*, above n 116, at 678.

135 *Jarden*, above n 113, at [25].

to ensure that their evidence was appropriately balanced by acknowledging any other possible explanation for the behaviours.[136] This stemmed from the broader common law principle that the role of an expert witness is to assist the decision-maker[137] (in this case the jury) and should be "driven by professional skill and experience, not a perceived need to support a preconceived outcome".[138] An unmistakable lack of impartiality could result in evidence being held inadmissible. However, issues of impartiality were typically dealt with on the basis that it should be left to the jury to determine the weight to be attached to the evidence in light of issues of partiality exposed through cross-examination.[139] But as acknowledged in the case law at the time, the giving of inaccurate, unbalanced evidence by an expert witness could well lead to a miscarriage of justice because of the weight that juries attach to expert evidence.[140]

The s 23G evidence at trial

[126] As the Crown acknowledges, the Crown case at trial against Mr Ellis centred on the jury finding the complainants' allegations credible and reliable — there was very little in the way of corroborative evidence. At trial, the Crown highlighted, alongside the evidence of the complainants, two particular strands of circumstantial evidence: the first, about the appellant;[141] and the second, behavioural changes that parents recounted having seen in their children in their time at the Crèche, after their departure from the Crèche and around the time of and following their disclosures.[142] The Crown also argued that at least some of the evidence of the complainants

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136 *R v Tihi* [1990] 1 NZLR 540 (CA); *R v Webb* HC Auckland T030201, 3 November 2003 at [16]; and *Aymes*, above n 114, at [113].

137 *National Justice Compania Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1993] 2 Lloyd's Rep 68 (QB) at 81–82, reversed on appeal (see [1995] 1 Lloyd's Rep 455 (EWCA Civ)) but not in relation to the law on the obligations of an expert witness.

138 *Wrightson Ltd v Fletcher Challenge Nominees Ltd* HC Auckland CP129/96, 21 August 1998 at 21.

139 See generally *R v Calder* HC Christchurch T154/94, 12 April 1995 at 7. See also Tristram Hodgkinson and Mark James *Expert Evidence: Law and Practice* (5th ed, Sweet and Maxwell, London, 2020) at [6-001]. For a discussion of the modern approach in New Zealand, see *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR 750 at [100].

140 *Crime Appeal (CA244/91)*, above n 116, at 19.

141 See above at [50].

142 See above at [48].

supported the evidence of other complainants, given the similarity of some of their allegations.[143]

Dr Zelas' multiple roles

[127] Dr Zelas was a key Crown witness at the trial and features in many of the issues before us in this appeal. Therefore, before we begin our analysis of her trial evidence, we briefly digress to address the many roles she played in relation to the investigation and trial of the appellant.

[128] Dr Zelas was the witness called by the Crown to give evidence under s 23G. She was at the time a specialist psychiatrist, with additional training in child psychiatry. Prior to preparing her s 23G report and giving evidence for the Crown, Dr Zelas had extensive involvement in the case, sometimes acting apparently independently, sometimes acting to assist in the preparation of the prosecution case. Dr Zelas attended the Knox Hall meeting. Although it is unclear in what capacity she attended that meeting, she did answer questions from the parents.

[129] Dr Zelas provided an interview to the *Holmes* show — a television current events programme that at the time was very high profile — in March of 1992. In that interview she was asked about and confirmed the risk that a parent's questioning of a child could contaminate the account the child later gave of events. Strangely, when Dr Zelas was cross-examined about this appearance she said she had no recollection of it, although she accepted that she must have appeared on the show when evidence of this was put to her by defence counsel.

[130] She then acted as professional supervisor for two of the interviewers who conducted the evidential interviews. Ms Sidey said that in this role Dr Zelas reviewed the tapes to "clarify certain parts of the disclosure" made by the complainant for "its reliability", and to consider the interviewer's future approach. Related to this was Dr Zelas' role in assisting the supervisee's decision-making in respect of planned next steps for the interview of the complainant, with Dr Zelas having an opportunity to provide feedback on that plan.

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143 See above at [49].

[131] Later in the investigation she assisted Police by reviewing transcripts and videotapes and then giving advice. For example, in her deposition evidence, Ms Sidey said that Dr Zelas assisted the Crown and Police in making the decision to re-interview three complainants who had made further allegations of sexual abuse. That decision arose from a meeting between Dr Zelas, the Crown, Police and Ms Sidey, which Ms Sidey labelled a "multidisciplinary approach" to decision-making.

[132] It was presumably in this latter role of assisting the Police that Dr Zelas wrote a letter dated 28 August 1992 to Detective Sergeant John Ell,[144] in response to a request by the Police for her to review the videotapes of the interviews with complainant 5 and complainant 6. (We will call this letter "the 28 August 1992 letter".) A copy of this letter was produced as an exhibit to the affidavit of Professor Hayne. We discuss this letter later.[145]

[133] The letter records Dr Zelas' concern about the possibility that the evidence of complainants 5 and 6 was unduly influenced by parents and in the case of complainant 5, siblings. It also contains advice to the Police on further inquiries that should be made.

[134] Another letter written by Dr Zelas to the prosecutor dated 22 March 1993 deals with issues relating to complainant 5. (We will call this "the 22 March 1993 letter".) We also discuss this letter later.[146]

[135] It is clear from both of these letters that Dr Zelas had a significant role in the Police investigation of the allegations against the appellant and the conduct of the interviews of the complainants. The 22 March 1993 letter records that Dr Zelas advised and directed the interviewer in some detail on the conduct of the interviews with complainant 5.

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144 Detective Sergeant John Ell was one of the police officers responsible for the conduct of the investigation.

145 See below at [256]–[264].

146 See below at [256]–[264].

[136] Dr Zelas was not cross-examined on either of these letters.[147]

[137] The appellant submitted that the multiple roles Dr Zelas played in the investigation and at trial created a consequential risk to her objectivity as an expert witness. As we will come to, there are grounds for concern that she did cross the line between being an expert assisting the court and being an advocate for the Crown case.

Dr Zelas' trial evidence

[138] Dr Zelas gave evidence at trial for the best part of two days. Her evidence was wide ranging. She described the general development level of children of the same age group as the complainants, which included the operation of memory (although some of that evidence went beyond the scope of s 23G, an issue relevant to a later ground of appeal); how children in general acquire knowledge, addressing in particular how they acquire knowledge of and speak about sexual matters and acts; and how children respond to questioning and the implications of that for interviewing children. Having reviewed the interview tapes, she assessed the mental ability of each complainant and their language skills and vocabulary, linking those observations to how they had responded to questioning.

[139] Dr Zelas' evidence was that there are behavioural responses/general indicators that are consistent with sexual abuse in children of a particular age. Although she acknowledged that those "symptoms" were not solely confined to child sexual abuse (in that they could be caused by other sorts of traumatic events in a child's life), she said:

> What tends to be apparent from studies of children who have been sexually abused however is that some [symptoms] are more likely to be indicative of sexual abuse than others and that clustering of a number of symptoms is more likely to indicate abuse than the existence of a solitary symptom.

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147 In the case of the 28 August 1992 letter, this was because the appellant's counsel was not aware of it at the time of the trial. It had been an exhibit of an affidavit sworn by Dr Zelas on 24 March 1993 but the copy of this affidavit in the court file omitted the exhibit and it appears this was also the case on the copy that the appellant's counsel had. The 22 March 1993 letter was also an exhibit to that affidavit. The 22 March 1993 letter was part of the copy of the affidavit in the court file and it seems it would therefore have been available to the appellant's counsel at the time of the trial.

[140] Dr Zelas then addressed whether, based on evidence called at trial, each of the complainants had exhibited behaviours that were consistent with the behaviours of a child of that age who had been subject to sexual abuse. Across all of the complainants in respect of whom charges were laid, she described 20 categories of behaviour which the Crown later categorised as follows: fear or dislike of Mr Ellis; reluctance/fear of attending Crèche; fear of or obsession with penises; fear of other adult males; fear of intruders/robbers/burglars; clothing problems; eating problems; toileting problems; bathing problems; sleeping problems/nightmares/night terror; headaches/vomiting/stomach aches; vaginal/anal soreness; stealing/taking/hiding objects; withdrawn/scared behaviour; tantrums; masturbation; sexual behaviour; poor co-ordination; fear of animals; and fear of threats of death to themselves/parents.

[141] Many aspects of Dr Zelas' evidence were challenged on cross-examination. A general theme of that cross-examination was that her evidence lacked balance, undermining the validity of the conclusions she drew in respect of each complainant.

[142] She was cross-examined in relation to the significance of the behaviours she identified as consistent with sexual abuse. Counsel for the appellant put to her that many of the behaviours she identified as consistent with the behaviour of sexually abused children were inclusive of a wide variety of childhood disorders and ordinary childhood behaviours. She accepted that the majority were but said that was unlikely to be true of sexualised behaviour. She reiterated her stance taken in evidence-in-chief that "sexualised behaviour in young children is one of the behavioural indicators most specific to sexual abuse so it is unlikely to be due to other behaviours".

[143] Dr Zelas also said that when these behaviours are looked at as symptoms that endure over a period of time "none of them are normal" but rather reach "the significance of what is clinically referred to as a symptom". While she accepted that the behaviours were also symptoms of general anxiety, she said that was why it was important to look at the full spectrum of behaviours, "and why those behaviours or behavioural symptoms that are less commonly associated with other causes such as the various sexualised behaviours become particularly significant". She accepted however that it would be inappropriate to diagnose sexual abuse on the basis of behavioural symptoms.

[144] In re-examination Dr Zelas was asked to clarify the sense in which she used the words "consistent" and "inconsistent". She provided the following definition of consistency:

> That it occurs in a significant proportion of sexually abused children and therefore is not in conflict with the possibility that abuse has occurred. In other words it does not conflict in any way the allegation of sexual abuse that has occurred and perhaps increased or is consistent with it.

[145] To the question "[t]o your knowledge would there be a range of behaviour inconsistent with sexual abuse of children of that age?", she responded:

> Insofar as the majority of those behaviours that are found are age appropriate demonstrations of anxiety and distress in a child then any one of them alone could be caused at some point by some other precipitating factor so it really isn't possible to say that there is another group of symptoms that would not be consistent with sexual abuse. There are things that would be inconsistent for instance would be things that perhaps are entirely due to say intellectual retardation, ….

Evidence of the defence expert, Dr Le Page

[146] The defence called its own expert witness, Dr Le Page, a psychiatrist who specialised in children's mental health. He addressed largely the same topics in his evidence as Dr Zelas. Of the behaviours Dr Zelas discussed as consistent with sexual abuse he said:

> … all of those apart from the sexualised behaviour are all symptoms of threat stress and it is extremely important to identify what the threat source is because those symptoms can occur with any threat stress. With sexualised behaviour that raises the index of suspicion that one needs to explore that for its sexual history if you like to determine how why and when that occurred but the other symptoms are generalised symptoms which can accompany any threat stress …

[147] Dr Le Page was taken by counsel for the defence through the evidence relating to each complainant. He offered perspectives different from those of Dr Zelas as to the significance of the behavioural symptoms described in the evidence. For each complainant, he described the context in which the behaviours arose and outlined further investigation he thought needed to have been undertaken before a conclusion about consistency/inconsistency could be drawn. He emphasised the absence of family history to properly contextualise the evidence received.

[148] Dr Le Page used the language of s 23G(2)(c) variably — behaviours were described as being "not consistent", equally consistent as "not consistent" and "inconsistent" with behaviours of sexually abused children of the same age group as the complainants.

[149] In cross-examination, Dr Le Page was challenged on his approach to s 23G. It was put to him that he was inserting into s 23G a requirement for the taking of a full family history, which was not a requirement of the legislation. He responded that the taking of such a history was the desirable thing to do in fairness to the children and their families.[148] He was challenged that the issue for an expert giving evidence under s 23G was not whether behaviour was diagnostic of sexual abuse but rather whether it was consistent, in the sense that Dr Zelas had defined that word. He maintained his point that Dr Zelas had looked at the behaviours with a single focus of concern and had "no concern with the possible origins elsewhere of these symptoms".[149]

How the issue was addressed in the 1994 and 1999 appeals

1994 appeal

[150] It is difficult now, after so many years, to fully understand the grounds of appeal advanced for Mr Ellis at his first appeal. We do not have counsel's written submissions, and in giving judgment the Court of Appeal took the approach of grouping appeal grounds together under two headings — unreasonable verdict and miscarriage of justice, although the way that s 23G issues were addressed under each of these headings was sometimes problematic.

[151] The argument that the verdicts were unreasonable was advanced on the basis that the complainants' evidence was not credible, given the content of their interviews, the extent to which their accounts were contradicted by other evidence, and the

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148 As we discuss below at [219]–[221], the experts before us were also of the view that taking a full family history would have been desirable. Buts 23G did not permit evidence of this to be given at trial.

149 The prosecutor challenged Dr Le Page on his characterisation of Dr Zelas' evidence in this way, stating that "that was not Dr Zelas' evidence, she was prepared to acknowledge in cross-examination that many of the behaviours she refers to were also consistent with other causes". As discussed below at [219], we consider that there was force in Dr Le Page's evidence on this point.

unsatisfactory nature of the interviewing processes. In rejecting that argument the Court took into account, together with other matters, that the jury had the benefit of the evidence of Dr Zelas for the Crown and Dr Le Page for the defence about the significance of the behaviours exhibited by each of the complainants. The Court was however critical of Dr Le Page's evidence, saying that Dr Le Page thought his task was to express an opinion about whether the reported behaviour indicated child sexual abuse, that is to say tended to prove it. The Court noted that he "was adamant it did not but, as his approach did not conform with subs (2)(c), his evidence on that aspect had to be discounted".[150]

[152] However, in the Court's view Dr Zelas' evidence was available to assist the jury. Of that evidence the Court said:[151]

> Parents reported behavioural changes around the time the children were at the creche, the most common being regression in toileting habits in the case of children who were supposed to have been fully toilet-trained by the time they moved into the preschool section. Those changes were accompanied in the majority of cases with sleeping problems, nightmares, and night terrors, and there were other difficulties. While Dr Zelas acknowledged that they could be consistent with domestic and other upsets disclosed in the evidence, she considered that what she saw as "clusters" were consistent with sexual abuse.

[153] The Court of Appeal added that Dr Zelas' evidence of behavioural consistency under s 23G(2)(c) clearly accorded with the provisions of the subsection. She limited "her opinion to the *consistency* with child abuse of the behaviour" reported by parents, apparently avoiding direct diagnosis of child sexual abuse.[152]

[154] Under the miscarriage of justice ground the Court addressed several arguments including whether Dr Zelas' evidence under s 23G — her evidence as to the consistency of each complainant's behaviour with that of sexually abused children of the same age group, her evidence of their intellectual attainment, mental capability and emotional maturity and as to the general development level of similarly aged children — had occasioned a miscarriage of justice. The Court dealt with these arguments in quite a peremptory manner. It did not record an analysis of the evidence, dealing with the argument only in the most general terms by observing that the line

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150 1994 CA judgment, above n 50, at 187.
151 At 187.
152 At 187 (emphasis added).

between evidence allowed under s 23G and the expression of an opinion on the credibility of a particular child is difficult to draw, continuing:[153]

> It is inevitable that general statements about young children's mental capacity etc may be seen as applying specifically to these children — for example, the way young children use magical thinking; their tendency to give unusual or bizarre description of events of which they have had no previous experience; their ability to recall central details more readily than peripheral ones; and the stages of memory development and ability to recollect past matters.
>
> All these were features very relevant to the accounts given by the complainants in this case, and they were the matters on which the jury would clearly be assisted by expert opinion. As Mr Stanaway pointed out, Dr Le Page (called by the defence) gave the same kind of evidence, although perhaps not in full agreement with Dr Zelas. There may have been one or two unimportant exceptions, but in the very extensive evidence given by both these experts we detect nothing to substantiate the suggestion that they overstepped the limitations imposed by s 23G and started expressing views on the credibility of individual complainants.

1999 appeal

[155] As noted in the chronology set out earlier, in 1999 the Governor-General acting pursuant to s 406(a) of the Crimes Act referred certain grounds to the Court of Appeal for consideration in respect of the 13 convictions. The referral raised six grounds upon which there may have been a miscarriage of justice. These included:

(a) errors in techniques used to obtain complainant's evidence;

(b) that the significance of some complainant's retractions of their allegations was not properly understood;

(c) that the risk of contamination of the complainants' evidence was underestimated and not properly understood;

(d) that a ruling rejecting defence counsel's request to cross-examine the complainants on inconsistencies was unfair;

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[153] At 191–192. The Court of Appeal did not address the submission made on behalf of Mr Ellis that Dr Zelas' evidence under s 23G(2)(c) (the behavioural consistency evidence) caused a miscarriage of justice. Rather, as is clear from the reasoning set out in the quoted excerpt, it focused only on the evidence given under s 23G(2)(a) and (b). As noted above, Dr Zelas' behavioural evidence was instead dealt with under the unreasonable verdict ground.

(e) that there may have been jury bias; and finally

(f) that certain material relevant to the defence was not disclosed to it.

[156] As noted above, the Court ruled that it would not re-adjudicate upon any ground of appeal already heard and disposed of on the merits unless a new matter had come to light that made reconsideration of the ground necessary or desirable.[154] It also ruled that it could not go beyond the terms of the reference.[155] The evidence under s 23G was not part of the reference and so was not addressed in the judgment.

The s 23G issues on this appeal and our resolution of them

[157] We address three issues in respect of s 23G:

(a) Did Dr Zelas' evidence comply with the requirements of expert evidence given under s 23G? This issue involves consideration of whether the boundaries of s 23G were overstepped, and whether Dr Zelas complied with her obligations as an expert witness.

(b) If not, how was the s 23G evidence dealt with in the overall context of the trial and did it give rise to unfairness? It is necessary to view the evidence in this context in order to judge what unfair prejudice was caused by it.

(c) In light of the above, has a substantial miscarriage of justice occurred?

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154 1999 CA judgment, above n 84, at [13].
155 At [17] citing the 1998 CA judgment, above n 82, at 559.

Did Dr Zelas' evidence comply with the requirements of expert evidence given under s 23G?

[158] We have concluded that in important respects Dr Zelas' evidence strayed beyond what was permissible under s 23G. We repeat the final sentence of the extract from *R v B*, quoted above at [115]:

> What the section does not allow is for the expert to comment directly or indirectly upon the credibility of the complainant's evidence, much less to express an opinion [on] whether sexual abuse has occurred.

[159] Expert witnesses are not permitted to provide commentary upon the reliability and credibility of the evidence of witnesses of fact because assessment of that evidence is for the jury. However, Dr Zelas commented in detail on how the complainants' evidence was given, and upon its content, in a way which is likely to have been understood by the jury as supporting, even endorsing, the complainants' reliability and credibility. In particular, her evidence included a number of aspects that have been found in the cases discussed earlier to go outside the bounds of s 23G.[156] For example, her evidence:

(a) appeared to conclude that sexual abuse had taken place;

(b) appeared to suggest that a witness was giving accurate or truthful evidence;

(c) used language suggesting that a behaviour or behaviours were diagnostic of sexual abuse; and

(d) suggested that a change in behaviour was specifically linked to the alleged offending.

[160] In addition, as we will explain later, she wrongly stated that if a complainant exhibited a cluster of behaviours, this was more likely to indicate abuse than a solitary behaviour. She also engaged in circular reasoning.

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156 See above at [118].

[161] Examples of these features of her evidence are set out below.

Endorsing the Crown case that there had been abuse

[162] On a number of occasions Dr Zelas gave evidence in which she accepted or appeared to accept the complainants' evidence of abuse as a true account and that the sexual abuse they alleged had taken place (factors (a) and (b) above).

[163] For example, she expressed her opinion that being abused had contributed to developmental issues with complainant 6:[157]

> The mother gave evidence about [complainant 6's] poor physical skills noted to be below average when she started school and then there to be something of a marked improvement following the child talking about abuse. As to whether that is consistent or inconsistent with other children of this age who have been sexually abused, delay in physical skills can of course be due to a variety of things but that does not normally dramatically change in the way that has been described here *unless it is actually linked in some way to the disclosure of the abuse. Physical skills, like other skills, can be delayed for emotional reasons and in this instance it would appear that the emotional factors associated with having been abused have contributed to the delay in her physical skills* with a dramatic improvement as the mother said after … [complainant 6] had started to discuss these matters. It could be consistent with a child of that age who has been sexually abused.

[164] In *R v S*, the Court of Appeal said a statement to the same effect by Dr Zelas in that case "goes beyond the section [s 23G]".[158] We agree and think the same could be said about Dr Zelas' statements in the present case.

[165] Another example relates to complainant 3. Dr Zelas described the events complainant 3 recounted involving offending by the appellant as "real things" (as opposed to things he had made up):

> As to [complainant 3's] use of toys and play things during the course of the interview, he was setting up a toilet at one stage. As far as his mental capability was concerned, as to his ability to distinguish between reality and fantasy of play, I thought it was very good for his age. On the one hand he was able to set up or arrange furniture to represent a place in a symbolic fashion in a way that seemed quite well thought out and precise and at times he would correct himself and say no that wasn't there it was further away it

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157 For all quoted excerpts of Dr Zelas' evidence appearing in this section of the judgment ("The s 23G issues on this appeal and our resolution of them"), all of the italicised portions represent emphasis added by this Court.

158 *R v S*, above n 116, at 678.

> was over there but he also used that process as an avoidance, he got so much into it and got the interviewer into it so he used it as a blockade in keeping the interviewer at bay to some extent. On one occasion [complainant 3] threw a doll describing something the accused had done and he said he didn't throw me across the room like that, that indicates a capacity to distinguish between real and pretend, there were several instances of that. He knocked a toy toilet over when setting up this place, and knocked over something set up to represent bars for children to play on, and in the first instance he said I didn't really knock the toilet over and said something else about the bars, *in other words he was distinguishing between things that were happening inaccurately between things he was using to demonstrate and real things he was demonstrating with the materials*.

[166] Similarly, Dr Zelas observed that complainant 4's "brassy bold sort of emotional responses" and "laughing in a harsh" or inappropriate manner when anxious was "consistent with a child's ability or attempts … *to protect themselves from anxiety associated with a traumatic event such as sexual abuse*". As well, she said complainant 4's frequent fears at night time required the "development of routines that would comfort her and make it easier for her to feel safe", which was "consistent with the anxieties associated with child sexual abuse".

[167] From the jury's perspective, the likely effect of this evidence was that Dr Zelas thought that the complainants were telling the truth about the abuse they said they had suffered, a view that she was not entitled to express.

Evidence that suggested behaviours were diagnostic

[168] Dr Zelas stated in her evidence that she was not saying that the identified behaviours of the complainants were diagnostic of sexual abuse.[159] The Crown prosecutor made this clear in his closing address:

> Dr Zelas in re-examination gave evidence that at no stage had she or anyone else attempted to diagnose these children as having been abused solely on the basis of behavioural indicators. The Crown says that it does not solely rely on behavioural indicators at all but says that in combination with the testimony of the children and their parents the behavioural indicators are important pieces of supportive evidence.

[169] However, as the discussion that follows shows, we consider that when the overall effect of Dr Zelas' evidence is considered, the jury was likely to have

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159 See below at [178]–[180].

considered that she was, in fact, indicating that the fact the complainants exhibited the behaviours was diagnostic of sexual abuse (factor (c) above).

Evidence as to "clusters" of behaviours

[170] We referred earlier to the evidence Dr Zelas gave of what she described as "clusters" of symptoms. Her evidence was that these were especially significant:

> What tends to be apparent from studies of children who have been sexually abused however is that some [symptoms] are more likely to be indicative of sexual abuse than others and that *clustering of a number of symptoms is more likely to indicate abuse than the existence of a solitary symptom*. *These symptoms include such things as sleep disturbance in a child, nightmares; disturbances of a child's mood; tearfulness, for instance, sadness; the presence or the turning of anxiety into bodily symptoms such as headaches, stomach aches, perhaps vomiting, there may be open expressions of anxiety and fearfulness in the child so that the child may be anxious about separating from a parent, anxious about going to school, anxious about some particular situation or more diffusely anxious about nothing in particular but just anxious*.

[171] She also gave evidence that the more of such "factors" (behaviours) that are present the greater the likelihood of abuse:

> When I talk about something being consistent we are talking about that there is a likelihood it may be associated with a certain type of event or condition and *the more of such factors that are present the greater the likelihood*.

[172] This view resurfaced in cross-examination when Dr Zelas was asked to consider other possible explanations for behaviours that were in fact expressions of anxiety. It appeared her approach was to dismiss alternative explanations for the behaviours. Speaking at a general level, she replied:

> … there have been studies of sexually abused children which suggest that *clusters of certain symptoms are more likely to indicate sexual abuse* even though they are [also] symptoms of anxiety in the child.

[173] An example of her approach can be seen in relation to complainant 7. She was asked whether the relevant behaviours could be consistent with other forms of anxiety and also with natural fears all children have. Dr Zelas responded:

> One has to look, that's why I said before just mentioning a word or topic like that can be misleading because one must look at all the behaviours of the child, one must look at the severity of the symptom and one must look at the

> consistency of that symptom over time and I would suggest that the symptoms as described in relation to this child are not normal behaviours of normal intensity and normal duration.

[174] There was consensus amongst the experts who gave evidence before us that certain "red flag" behaviours such as inappropriate sexual knowledge or behaviour, toileting problems and nightmares, and other development problems could justify further investigation into the possibility of sexual abuse. But Dr Zelas' evidence in relation to "symptoms" and "clusters of symptoms" went further than that. Its overall effect was that the presence of clusters of behaviours could support a conclusion that sexual abuse had taken place. This was therefore beyond the proper bounds of what could be admitted under s 23G.

[175] In this Court, there was agreement between the expert called by the appellant on this point (Dr Patterson) and the Crown's experts (Dr Blackwell and Dr Seymour) that at the time Dr Zelas gave her evidence there was no consensus to support the view that clusters of symptoms were diagnostic of sexual abuse. Dr Patterson referred to a consensus statement issued in 1994 by international experts on child sexual abuse that there were no specific behavioural syndromes that characterise children who have been sexually abused.[160] Dr Patterson said this statement was based on a meeting of experts that took place in 1993, and although it was not specified in the statement, the studies they relied upon were drawn from the preceding decades' research.

[176] Dr Seymour's evidence before us was that a consensus had formed by 1993 that there was no diagnostic cluster of behaviours and further that, to his knowledge, there was no study to support the proposition that clustering of symptoms was indicative of child abuse and that the more of the behaviours exhibited by the child, the more likely it was that sexual abuse had occurred.[161]

[177] We acknowledge that in *R v S*, the Court of Appeal did not express concerns regarding evidence given by the expert that clusters of behaviours were consistent with

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[160] Michael E Lamb and others *The Investigation of Child Sexual Abuse: An Interdisciplinary Consensus Statement* (1994) 18 Child Abuse and Neglect 1021.

[161] Dr Zelas said under cross-examination that she was not saying clustering of symptoms was indicative of sexual abuse, but as discussed above, she had earlier in her evidence used the word "indicative". Dr Blackwell and Dr Seymour resisted the suggestion that Dr Zelas' discussion of "clusters" misled the jury. At its highest, they thought the discussion might have been confusing.

allegations of child sexual abuse.[162] However, it is not clear how that point was argued before the Court in that case. The Court also did not have before it the evidence we have heard that there was no proper basis for the expert's evidence that children who had been victims of child abuse exhibited clusters of behaviours.

[178] The Crown argued that Dr Zelas did appropriately state the bounds of her evidence. For example, it was said Dr Zelas properly and accurately described the nature of her role and the focus on behavioural consistencies (not diagnosis) in her cross-examination when she stated:

> It's not a case of proceeding to find symptoms and say[ing] this child has been sexually abused. It is a process of looking at the whole totality, not only of the child's behaviour but also of the information coming from the child and looking at the consistency or otherwise between those matters and what I have been doing in Court is underlining those behaviours that these children have shown by the account of their parents and in some instances from things they have said themselves during interviews that are consistent with those behavioural symptoms which are generally accepted as occurring with increased frequency in children who are sexually abused.

[179] Later in her cross-examination she said:

> [I]t is inappropriate to diagnose sexual abuse solely on the basis of behaviour symptoms and that is not something that I would do, it is different from looking at what behavioural symptoms there may be in a child who is also disclosing evidence of child sexual abuse verbally or through their demonstrations.

[180] We agree that on a number of occasions Dr Zelas made explicit that sexual abuse cannot be diagnosed on the basis of behavioural symptoms. But these are brief passages in her very lengthy and detailed evidence. The risk was that her evidence, taken as a whole, created the impression that, if these behaviours appeared in numbers and were persistent, that would support the conclusion that sexual abuse had occurred. In other words, there was a significant risk that the jury would have understood her evidence as indicating that in this case the behaviours were *diagnostic* of sexual abuse.

[181] This risk was substantially aggravated by the production at trial by the Crown of a chart purportedly summarising the behavioural evidence ("the Chart"), which we

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[162] *R v S*, above n 116, at 677. The expert in that case was also Dr Zelas.

discuss below.[163] And, as we now come to, her evidence was problematic in itself in another way — because it was based on circular reasoning.

Circular reasoning

[182] Where behavioural evidence was given under s 23G, it was important that an expert commenting on that evidence fairly acknowledge other possible explanations for the behaviour (that is, explanations other than that the behaviour resulted from sexual abuse). As the Court of Appeal noted in *Aymes*, an expert must give a fair and balanced explanation of his or her views, which means that they must consider the possibility of trauma other than sexual abuse giving rise to behavioural problems.[164]

[183] In her evidence, Dr Zelas summarised her approach as follows:

> If one takes any particular symptom and looks at it in isolation it is possible that it could have been caused by a variety of different things. The issue is to look at all of the behavioural symptoms that a child displays *and have that alongside the information that the child is giving verbally about what has occurred.*

[184] On this approach, it was legitimate to link a child's problematic behaviours to sexual abuse rather than some other trauma if the child concerned was alleging that he or she has been sexually abused; this forestalled the consideration of other possible causes of the behaviour. The difficulty with this analysis was that the very point of consistency evidence under s 23G was to assist the jury to determine whether allegations of sexual abuse were true. There is a circularity in reasoning that behaviours which could be explained in a number of ways nevertheless corroborate an allegation of sexual abuse, on the basis that they are corroborative because that allegation has been made. Or, to put it another way, to look to the complainants' behaviours to support an allegation and then reach back to the allegation as a reason to suggest the behaviours are reliable supports for the allegation is to engage in dangerous circular reasoning.[165]

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163 See below at [203]–[210].

164 *Aymes*, above n 114, at [106].

165 Both Dr Le Page (at trial) and the experts before us were clear that the combination of certain behaviours and an allegation of sexual abuse called for an investigation of the allegation. But this is quite different from Dr Zelas' reasoning.

[185] There is a specific example of this approach in Dr Zelas' evidence in relation to complainant 5. Having described various behavioural issues that complainant 5 was having, Dr Zelas said:

> We have heard also that at this time or about this time [complainant 5's] parents had separated and were living apart. As to whether any of the matters I said are consistent with sexual abuse are also consistent with such an occurrence, they could be and *if there were not detailed information coming from a child which suggested sexual abuse then one would need to look for other possible reasons as to why these behaviours might have occurred.*

[186] Then, when she was asked whether a reluctance to go to the Crèche toilet could be consistent with the parents' separation, Dr Zelas said:[166]

> It's not likely to but one would have to explore matters and exclude that possibility. I should say however that the association also of the more severe symptoms with his disclosure of sexual abuse appears to link them quite closely with a specific matter that does relate to child sexual abuse rather than to other life events in the child.

[187] Dr Zelas gave evidence of this type in a trial from a similar time period. This and other aspects of her evidence were discussed in *R v S*.[167] In hearing that appeal the Court of Appeal described Dr Zelas' reasoning as "circular" but concluded that this deficiency in her evidence went to weight rather than admissibility and so was an issue for the jury.[168] The fact that the trial Judge specifically cautioned the jury in relation to this aspect of Dr Zelas' evidence may have influenced the Court in its view. There was no such caution given to the jury in this case. And, if the Court of Appeal was making a general comment in *R v S* that this type of deficiency (circularity of reasoning) went only to weight and was therefore a matter for juries, we disagree. Rather, it takes the evidence outside the bounds of s 23G and strays into impermissible commentary on the credibility of the relevant complainant's evidence.

[188] For our part, in the present case where everything hung on the jury's assessment of the complainants' credibility, we see this form of circular reasoning as highly problematic. The experts who gave evidence before us were clear that, where a child exhibits some of the behaviours discussed above, and, in particular where one

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166 An example of factor [159](d) above.
167 *R v S*, above n 116.
168 At 677–678.

of those behaviours is sexualised conduct, that provides a basis for further inquiry into the possibility of sexual abuse. But, if as a result of such inquiries a complaint emerges, the fact of that complaint does not convert these triggers for investigation into indicators that sexual abuse occurred. Dr Zelas' circular reasoning was wrong and compounded the problem with her evidence relating to behavioural clusters. And as we address below, it contributed to the unbalanced picture presented to the jury by Dr Zelas.

Memory evidence

[189] While general memory evidence may have been admissible under s 23G(2)(a) as evidence of the child's mental capability,[169] it was plainly difficult evidence to give while staying within the bounds of what was permitted under the section and within the bounds of the long established rule that experts may not comment on credibility. Dr Zelas did not confine herself to general evidence of the mental capability of the complainants as she was required to do, but provided direct comment on the functioning of their memory assessed by reference to their evidence against Mr Ellis. In doing so she tended to support the reliability of their evidence against him. For example, when discussing the mental capability of complainant 2, Dr Zelas addressed her memory and recall abilities as follows:

> In general my appreciation of [complainant 2]'s memory and recall abilities, [is that] they appeared to be good for her age. I think they were good for her age. In the process of that recall she as I was saying verbally re-enacted and put a lot of feeling, was able to convey feelings that were associated to the events that she was recalling and communicate those very clearly to those listening. She was able to recall more information in relation to direct questions than free recall again which is consistent with her age *but she was also able to indicate when she did not remember things and seemed at times quite thoughtful about matters she was considering.*

In context, this was commentary on complainant 2's recall of the alleged offending. The effect of this evidence was that when complainant 2 did not remember things she said so, and that when she did remember events she was thoughtful in her answers. This provided impermissible support for the reliability of complainant 2's evidence.

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169 We do not determine whether it was in fact admissible under that section.

[190] Then in relation to complainant 4 Dr Zelas said:

> With regard to memory and recall, in terms of age appropriateness and so on, [complainant 4] was appropriately more clear or most clear about central events that either involved herself or the central events of an action she had observed. *She had some detail for more peripheral events but they tended to be less precise and she became more readily muddled about those and those are age appropriate findings*. [Complainant 4] showed particularly in the first interview that she was more able than some of the children to deliver information in a more narrative style but there was still the age appropriate limitations and the quantity of information that she was able to give by this means and in general she required triggers through questioning or through the availability of materials to assist her recall and enable her to describe events.

Dr Zelas' evidence then was that although complainant 4 could be muddled when recalling peripheral events she was clear about key events. In the interview on which Dr Zelas was commenting, the key events involved the alleged offending by Mr Ellis.

Was Dr Zelas' evidence appropriately balanced?

[191] At trial Mr Harrison challenged Dr Zelas' independence on the basis of the multiplicity of roles she played, submitting to the jury that she was not independent in the evidence she gave. On appeal to this Court, Ms Gray (who argued this aspect of the case for the appellant) pointed to this extensive involvement in support of the appellant's argument that Dr Zelas' evidence was unbalanced.

[192] An expert giving s 23G evidence was required to ensure that the jury was aware of other possible explanations for the behaviour. It was known at the time, and indeed conceded by Dr Zelas, that some of the behaviours could simply be normal childhood behaviours, and many could be produced by anxiety arising from any number of stressors. It is fair to acknowledge that Dr Zelas was careful in her evidence-in-chief to make this point:

> The types of symptoms that one might expect to find in children of this age group are quite wide ranging because based on what I was saying before they actually represent a child's expression of anxiety and that can be manifested in different ways according to not only the age but also the personal characteristics of that child. I should say too that as you will recognise when I enumerate them for you many of these symptoms are not solely confined to child sexual abuse but can be caused by other sorts of traumatic events or disturbances in a child's life.

But it is right to also record that this passage was immediately qualified by her reference to her theory regarding the significance of clustering of symptoms.[170]

[193] Dr Patterson conducted a careful analysis of Dr Zelas' evidence, identifying each occasion on which Dr Zelas conceded another possible explanation, and the occasions on which she pushed back against that alternative explanation.[171] Even though the Crown did not directly challenge that transcript analysis, it submitted Dr Zelas appropriately qualified her evidence, providing the jury with a reasonable opportunity to consider other explanations for the behaviours. For the Crown, Dr Blackwell and Dr Seymour pointed to various instances where Dr Zelas explored relevant alternative or complementary factors that "may have caused or contributed to" the behaviours of the complainants. Relying on those instances, Dr Blackwell and Dr Seymour said alternative explanations for the behaviours were adequately explored. However, Dr Patterson arrived at the opposite viewpoint.

[194] We think Dr Patterson's summary of what emerges from the transcript analysis is a fair account of Dr Zelas' evidence on this point. It is this. Dr Zelas rarely considered in her evidence-in-chief alternative explanations for the behaviours in the complainants she identified as consistent with sexual abuse. When she was directly asked to consider these alternative explanations under cross-examination, she typically refuted the proposed alternative explanation because the complainants had "clusters of symptoms", and/or because the symptoms occurred in children who were complaining of abuse.[172]

[195] The following examples illustrate this:

(a) Complainant 5 had anxieties and fears at night time, something that was said to have developed since the time of his disclosure of sexual abuse. His parents had recently separated and were living apart. Dr Zelas accepted complainant 5's fears could be consistent with parental separation, but added: "if there were not detailed information coming

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170 See the quoted excerpt of Dr Zelas' trial evidence above at [170].

171 This analysis could have been advanced by way of submission in this case.

172 Dr Zelas' evidence on behavioural clusters is discussed above at [170]–[181] and her evidence on circular reasoning is described above at [182]–[188].

from a child which suggested sexual abuse then one would need to look for other possible reasons as to why these behaviours may have occurred".

(b) Mother 6 gave evidence of complainant 6's poor physical skills, which she said improved after the reporting of abuse. Dr Zelas accepted delayed development of physical skills could be caused by a variety of things but added "that does not normally dramatically change in the way that has been described here unless it is actually linked in some way with the disclosure of abuse". Mother 6 also spoke of complainant 6's tantrums and verbally aggressive behaviour. Dr Zelas was asked if these could be consistent with matters other than sexual abuse and answered: "Yes it can and again that is why one has to look at the whole constellation of behavioural symptoms a child presents rather than look at them in isolation."

[196] In short, Dr Zelas did at times acknowledge the alternative explanations. She may not have intended to be seen as dismissing or minimising them, but the impression the jury would have been left with was that the alternative possible explanations could effectively be discounted.

[197] We have already referred to the multiple roles Dr Zelas had in relation to the investigation and prosecution.[173] We think there is reason for concern that these multiple roles affected her ability to give balanced expert evidence at trial. As the 28 August 1992 letter and 22 March 1993 letter illustrate, she advised the Police on the conduct of their investigation and the interviewers on the conduct of their interviews. In the course of this work she assessed the credibility and reliability of the complainants' evidence. While her pre-trial involvement did not necessarily disqualify her from giving evidence under s 23G, bearing in mind that such evidence should not have involved commenting on the credibility or reliability of the complainants' evidence, the fact is that her evidence went beyond the boundaries of s 23G and her pre-trial involvement may have contributed to that occurring.

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[173] See above at [127]–[135].

[198] The lack of balance in Dr Zelas' evidence is an issue we return to shortly in relation to the issue of contamination.

Conclusion on compliance with the requirements of s 23G

[199] In our view, significant portions of Dr Zelas' evidence were inadmissible because they fell outside the categories of admissible evidence as prescribed by the language of s 23G and as that section was applied by the courts, and because at times she commented directly on the credibility of the evidence of the complainants. The passages we have set out above could not be otherwise admissible because they breached the fundamental rule of evidence (that was well established at the time) that an expert witness must not give evidence to bolster the credibility of a witness of fact. When we step back and look at the evidence in its totality, we think it is fair to say that Dr Zelas presented a persuasive commentary on the evidence of the complainants — a commentary which was strongly supportive of the truthfulness and reliability of their evidence.

[200] Dr Zelas' evidence in relation to the significance of clusters was also unfair to Mr Ellis because it was incorrect. The consensus at the time was that there was no particular cluster of behaviours which was suggestive of sexual abuse over other forms of trauma, but this was not acknowledged by Dr Zelas in her evidence.[174]

[201] Finally, the unbalanced nature of Dr Zelas' evidence was unfair to Mr Ellis. It was unbalanced in that in many instances she did not acknowledge the possibility of other explanations for the behaviour or, where she did acknowledge alternative explanations, she then minimised them. As Sir Thomas Thorp noted in his report:[175]

> [Dr Zelas] turned to consider the case of each of the complainants and in each case testified to a list of behavioural characteristics which she said were "consistent with sexual abuse". Although she did not directly express an opinion as to the credibility of the individual complainants, her consideration of matters which might have pointed against credibility and advice that they did not necessarily do so can hardly have appeared to the jury otherwise than supportive of the children's credibility.

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174 As noted earlier, the scientific consensus was that the presence of such behaviours was a basis for investigation as to whether the cause may be sexual abuse, but not diagnostic of sexual abuse.

175 Thorp Report, above n 77, at 30.

Could these errors and irregularities have had an impact on the outcome of the trial?

[202] To assess this question we consider how the evidence implicated in these errors and irregularities was dealt with at trial — the Crown's ultimate submission being that whatever issues arose, those were addressed through the course of the defence case and in the Judge's summing up.

The Chart

[203] The impact of Dr Zelas' evidence regarding the complainants' behaviours has to be viewed in the context of the use made of it by the Crown. Towards the end of its case, the Crown produced a chart (prepared at Detective Eade's direction but based on the evidence of the complainants and parents) in which the name of each complainant was placed on the x-axis, and the 20 categories of behaviour mentioned above at [140] listed along the y-axis. When a complainant or parent referred to one of the behaviours during their evidence, the Detective (or a representative) placed an X in the relevant column, noting that the "indexed behaviour" had been exhibited by the complainant.

[204] Strictly speaking, the Chart does not purport to summarise Dr Zelas' evidence under s 23G(2)(c). However, the behaviours recorded across the x-axis substantially corresponded with those analysed by Dr Zelas and it seems likely that the Detective used her descriptors when preparing the Chart. On any reasonable view, the Chart was, therefore, a summary of the behaviours exhibited by the complainants which were said to be consistent with the behaviours of sexually abused children generally. In essence, it encapsulated in graphical form Dr Zelas' s 23G(2)(c) evidence.

[205] The defence objected to the production of the Chart and its retention by the jury on the grounds that it did not cover the full range of surrounding circumstances in relation to behaviours shown by each complainant. Additionally, the defence submitted that by adopting broad categories, the Chart minimised the differences between how those behaviours manifested in each complainant. The trial Judge said that schedules such as the Chart, which are prepared to assist the jury, were admissible if the contents were proved in evidence and the Judge was satisfied there was no unfairness. He said that the issues identified by the defence did not establish

unfairness — the question of whether what has been said was reliable, or accurate, was a matter for submission to the jury.[176]

[206] The Chart was permitted to be used by the jury during deliberations, alongside the transcripts of the complainants' videotaped interviews forming part of the Crown case. The jury did not however have the notes of evidence,[177] and in particular did not have access to the notes of evidence of the cross-examination of Dr Zelas or the complainants' parents, nor to the evidence of Dr Le Page.

[207] The Judge's ruling allowing the Crown to produce the Chart and provide it to the jury for use during its deliberations was one of the grounds pursued in the 1994 appeal. The appellant argued that the Chart gave an unfair advantage to the Crown by unduly focusing the jury's attention on behaviours that occurred over a five-year period without any distinction or reference to their duration or timing, or the surrounding circumstances. Of this criticism the Court of Appeal said:[178]

> We accept the validity of this criticism. On the other hand, this was a legitimate and convenient way to focus the jury's attention on the evidence of this behaviour which had been given over the preceding weeks and enabled them to relate it to the particular child concerned, thereby avoiding the risk of confusion with other children. That the jury saw the schedule in its proper perspective is borne out by the fact that they acquitted the accused on the charges involving four of the complainants named in the schedule. We are not prepared to differ from the Judge's ruling that it could be admitted.

[208] We take a different view. We address the significance of the acquittals below.[179] But it is sufficient to note at this stage that the Chart in the form produced was an oversimplification of the evidence about the complainants' behaviours. It did not fairly depict the significance of the evidence it purported to summarise. Rather, it presented the evidence stripped of the context that the defence had elicited through cross-examination of Dr Zelas and through Dr Le Page's evidence-in-chief, as to the circumstances in which the behaviours were exhibited. Moreover, the style in which the evidence was presented carried the implication that the more X's the stronger the

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176 *R v Ellis* HC Christchurch T9/93, 27 May 1993 (Williamson J, Oral Judgment (No 15)) at 4–6.
177 To which we return below at [407]–[415] as part of the appellant's submissions on fair trial.
178 1994 CA judgment, above n 50, at 188.
179 See below at [232].

evidence of abuse — a misrepresentation which would only have amplified the unfair prejudice created by Dr Zelas' evidence in relation to clusters of behaviours.

[209] The prosecution should not therefore have been permitted to produce the Chart as it was an unbalanced and unfair representation of the evidence. That unfair prejudice was itself exacerbated by the fact the jury had the Chart with it when it retired to consider its verdicts, and did not have the potentially balancing material contained in the transcripts of evidence. (We later return to discuss in greater depth the general fairness obligation to counteract imbalance in the materials retained for jury deliberations.)[180]

[210] The Chart was inadmissible as an unfair representation of what was in any case seriously flawed evidence. Its production and retention by the jury meant that they had before them not only Dr Zelas' incorrect and unbalanced evidence, but also a chart which reinforced and oversimplified that evidence.

Significance of the evidence to the Crown case

[211] As noted earlier, Dr Zelas' evidence was a critical part of the Crown case. It was also very helpful to the Crown in meeting some of the arguments run by the defence to raise doubts as to the reliability of the complainants' accounts.

[212] The closing address of the Crown prosecutor bears out the submission made for the appellant that Dr Zelas' evidence was a critical part of the Crown case. The Crown emphasised the behavioural evidence as one of the key planks of its case. During the closing submissions, the Crown prosecutor said the behavioural evidence "cannot be underestimated" and that when combined with the testimony of the complainants and their parents, the "behavioural indicators are important pieces of supportive evidence". Counsel then proceeded to give a lengthy recapitulation of the behavioural evidence on a complainant-by-complainant basis, making clear that such evidence was a major foundation of the Crown case.

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180 See below at [407]–[415].

[213] The Crown said that the role of the two experts, Dr Zelas and Dr Le Page, was to provide the jury with information to assist them in determining the reliability of the complainants' evidence, although adding the usual caution that whether jurors accepted that evidence as reliable was ultimately a matter for them. The Crown was very critical of Dr Le Page's evidence in its closing address. The Crown also took the jury through the Chart, noting that most of the indicators were present before disclosure of abuse, continuing:

> In other words the Crown says you will take some considerable comfort from the fact that these children were clearly exhibiting signs of substantial anxiety and fear about the Crèche toilets, the Crèche generally, Ellis, intruders and strange men, all before disclosing abuse against Ellis.

How the defence dealt with the evidence — cross-examination

[214] The Crown argued the defence had the opportunity to rebut any arguably problematic aspects of Dr Zelas' evidence through their own case, through cross-examination and through their witness, Dr Le Page.

[215] The opportunity to cross-examine to challenge inadmissible evidence is unlikely to cure any unfair prejudice attaching to that evidence. In this case we think that was especially so — the inadmissible commentary that Dr Zelas provided was simply far too great in volume, and the defence should not in any event have been diverted to the attempt to answer it.

[216] Even were it theoretically possible to have cross-examined Dr Zelas to meet the unfair prejudice, Dr Zelas proved herself a staunch defender of her central points that in the case of these complainants, individual behaviours had to be viewed in the context of the fact they were complaining of abuse, the duration of the behaviours and their appearance alongside other behaviours. As Dr Patterson observed, she rarely conceded an alternative explanation.

Defence expert

[217] Nor was Dr Zelas' evidence adequately answered by the evidence of Dr Le Page. In the context of the trial it is apparent that Dr Le Page's evidence did not go well. He struggled with the language of s 23G and how it was being used by

Dr Zelas. Dr Le Page's evidence was that the behaviours Dr Zelas was referring to were either usual childhood behaviours or could be explained by other stress events in the children's lives. His evidence however was that all of the behaviours described in evidence were inconsistent with sexual abuse. He was challenged by the Judge and by Crown counsel as to his use of the word "inconsistent".[181]

[218] Dr Le Page's evidence would have been confusing for the jury. He used the word "inconsistent" simply to rebut Dr Zelas' evidence that the behaviours were consistent with abuse. In relation to some behaviours, Dr Le Page said further investigation might have been warranted, but because that did not occur, it was not possible to conclude that the relevant behaviour was "consistent" with the behaviours of sexually abused children for the purposes of s 23G(2)(c). Therefore he characterised them as "inconsistent". He also frequently related his evidence directly to the complainants, saying behaviour of particular complainants was inconsistent with sexual abuse — failing, as had Dr Zelas, to observe the bounds of the section. The overall conclusion reached by Dr Le Page under s 23G was that none of the behaviours displayed by the complainants were consistent with those of sexually abused children generally.

[219] There was something however in Dr Le Page's fundamental point that before reaching the view that behaviour in a particular child was "consistent" with sexual abuse it was necessary to take a family history as it pertained to the child. Dr Zelas conceded that most of the behaviours were expressions of anxiety due to stress and so could have alternative explanations (her concession was at the theoretical level — as noted, she was generally not prepared to concede alternative explanations for the behaviours exhibited by the particular complainants in this case).

[220] In this Court, Dr Patterson gave evidence that a comprehensive exploration of family, medical, genetic or developmental history, child age-characteristics and life events and experience are necessary to understand the behavioural symptoms that any child is presenting and to confidently rule in or out alternative explanations for the

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[181] Dr Le Page seemed to believe the term "consistent" in s 23G meant "diagnostic". So when he was saying behaviours were inconsistent with sexual abuse, this may have been intended to mean "not diagnostic". If he had said "not diagnostic", that would have been correct.

behaviour. Dr Blackwell agreed that undertaking a clinical assessment would be helpful and that in her experience, it would be "quite unusual" for an expert to give evidence under s 23G without having assessed the child. But as she went on to note, s 23G(2)(c) did not allow an expert to give evidence of any such assessment they had made. The evidence an expert could give under s 23G expert was limited to commenting on the behaviours described by the child or the parent in their evidence — which does tend to highlight a difficulty with the section.[182]

[221] Dr Le Page's evidence as to the relevance of family history to assessing the significance of any particular behaviour or group of behaviours could have gone some way to addressing the lack of balance in Dr Zelas' evidence — one of the problematic aspects of her evidence. Although it was not permissible for an expert to give evidence of the content of any family history they elicited, nothing in s 23G prohibited a witness explaining the importance of such a history. But his evidence on the relevance of family history was met by Crown counsel on cross-examination in the following passage:

> Q There is no way we can get into the mind of these children at the time, we have to rely on our judicial system, what you want to do is to introduce a proviso into our legislation under s 23G which is to the effect that that evidence can be given provided there is a thorough profile done of the child's family history isn't that what you want to do?
>
> A Well that is the most desirable thing to do in fairness to the children and their families.
>
> Q You know don't you our legislation says no such things?
>
> A Yes I am aware of what it says.

Summing up

[222] In summing the case up for the jury the Judge did not address the respects in which Dr Zelas had overstepped the bounds of the evidence she was permitted to give under s 23G. Nor did he explain in any detail to the jury what would be impermissible use of that evidence.

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[182] See generally the discussion in *Aymes*, above n 114, at [125]–[128].

[223] The Judge began the part of his summing up dealing with the evidence of the two experts by quoting s 23G. That was the extent of the assistance he gave to the jury as to the use to which they could put that evidence. He then continued:

> Dr Zelas gave evidence in terms of that section. She defined what she meant as consistent by saying that it was behaviour which occurred in a significant proportion of the children who had been sexually abused in the same age group. Dr Le Page said that he thought that "consistent with" meant a diagnosis of sexual abuse. In other words that you could reason if a child demonstrates a certain behaviour or behaviours then that child must have been the victim of sexual abuse. Both doctors are in agreement really that behaviours such as those described here do not, of themselves, prove sexual abuse, or as Dr Le Page put it are not diagnostic of sexual abuse. The relevance of behaviours is this. If a child says that he or she has been sexually abused then you are entitled to weigh in support of their statements the fact that they have also exhibited behaviours which have been observed by other people and which a lot of children of the same age group who have been sexually abused have also shown.
>
> I trust that is clear because Dr Le Page seems to have misunderstood the New Zealand provisions. Perhaps it is not surprising because his practice has been in Australia and he has adopted a theory relating to behaviours or indicators which concentrates on an individual behaviour or behaviours to the exclusion of other matters.
>
> Counsel this morning made reference to the fact that I interrupted him while he was cross-examining Dr Le Page in order, he said, to emphasise what was stated in the Act. You will recall what I did was to inquire whether the doctor's use of the term "consistent with sexual abuse" was a shorthand way of saying what was contained in the Act. I was given an assurance at that time that it was and you will recall that from then on Counsel asked the questions in terms of the words used in the section in the Act. Later it became apparent that that was not what Dr Le Page was saying at all. In effect what he was saying was that a certain behaviour did not prove the child had been sexually abused. Under our law he was not entitled to say that and in any event that is not the point of the section.
>
> I thought I ought to clarify that matter. It is an important matter and explains why the evidence of an expert is given in the way it is. To some degree that misunderstanding of the section is behind criticisms made by Dr Le Page of the videotaped interviews for failing to explore all other possible causes of these behaviours and the failure to produce or play in the Court diagnostic interviews.

[224] Beyond reading the words of the section, the Judge gave the jury no clear direction on the relevance of the evidence they had heard, and nor did he warn them against improper use of that evidence. This is to be contrasted with the careful summing up in *R v S* referred to earlier.[183]

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[183] *R v S*, above n 116. See the discussion above at [121].

[225] To give but a few illustrations, the trial Judge in *R v S* stressed that the expert was "not expressing a view" about whether the young complainants were truthful, and that any such opinion was "not allowed". Nor was the expert purporting to diagnose the young children as having been "subjected to some improper and unlawful act of a sexual kind" — that was solely a matter for the jury, not the expert. Rather, the s 23G material was designed to facilitate the jury's own assessment of the complainants' testimony by "drawing that comparison with sexually abused children of the same age group".[184] In contrast, in this case, the trial Judge's summing up lacked that essential contextualisation of the use to which s 23G evidence could legitimately be put.

[226] The Judge's treatment of the two experts was also significant. The jury was instructed that Dr Le Page misunderstood s 23G but that Dr Zelas had given her evidence in accordance with it. As we have found, both experts strayed beyond the proper bounds of s 23G. The Judge's summing up did nothing to address this. Dr Le Page's evidence was, for the reasons discussed earlier, of little assistance to the jury. But, to the extent it could have assisted, the Judge's comments about it and his suggestion that the jury could put it to one side meant the jury would likely have ignored it. This meant there was no effective counter to the evidence of Dr Zelas.

[227] Finally, we note that, in his summing up, the Judge gave a direction to the jury, in relation to the use of schedules and charts, that they must not decide the case "merely upon a study of some schedule or chart" and that they should "avoid any temptation to focus … attention just on the schedules". But that direction was not focused on the unfair prejudice we have identified as flowing from the Chart, and as such, we do not consider that the direction could cure it.

[228] Having said this, we observe that the quantity and nature of inadmissible evidence was such that we do not consider any judicial direction could have addressed the unfair impact it had on the trial. Much of this evidence should not have been admitted at all.

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184 At 679–680.

Was there a miscarriage of justice?

[229] We have concluded that Dr Zelas' evidence went beyond the bounds of evidence she was permitted to give under s 23G. Applying the principles in the case law discussed above, strict compliance with the boundaries set by s 23G was required because of the risk of prejudice to the defendant if they were overstepped. Dr Zelas gave evidence that was likely to be seen by the jury as endorsing the reliability and credibility of the seven complainants, and as conveying her opinion that their interviews contained a true account of events. Dr Zelas also failed to acknowledge appropriate limitations upon the opinions she was expressing and to fairly acknowledge alternative explanations for the behaviours, as illustrated by the significance she attached to the making of a complaint.

[230] It is important to stress in this regard that there were other participants in the trial process who had the primary responsibility for ensuring that a s 23G witness' evidence stayed within proper bounds. It was the duty of counsel and the Judge to see that s 23G evidence was given in compliance with the section.[185] They did not do so. There was also nothing in the conduct of the trial overall, the evidence, the closing address of the prosecutor or the summing up that was sufficient to overcome the unfair prejudice which would have been caused to the appellant by the errors and irregularities we have identified in relation to Dr Zelas' evidence. In fact, the introduction of the Chart by the Crown aggravated that unfair prejudice, while adding the additional prejudice of oversimplifying the effect of the behavioural evidence to the detriment of Mr Ellis.

[231] Given the extent of the inadmissible material, the extent to which Dr Zelas' evidence departed from appropriate standards, and the impact that evidence undoubtedly had in the overall context of the trial, we conclude that these errors and irregularities may well have had an effect on the verdicts and thus caused a miscarriage

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185 See, for example, the discussion in *Jarden*, above n 113, at [15], noting that although the "boundary between permissible and impermissible" evidence given under s 23G(2)(c) may seem indistinct, the "party who calls such evidence and the Judge whose responsibility [it] is to assure compliance with the statutory limits, must be astute to prevent the border being crossed". See also *R v Beard* CA135/98, 17 December 1998 at 5, referring to *Tait*, above n 116, at 671 for the proposition that a trial judge should intervene when the expert exceeds the permissible limits of s 23G evidence.

of justice. We also consider that the admission of the evidence that was outside the boundaries of s 23G was an error of law.[186]

[232] We acknowledge that the Court of Appeal noted in its 1994 appeal judgment that the jury "brought in carefully discriminating verdicts which can be seen as conservative".[187] However, we do not see this as providing any assurance that the issues we have canvassed in relation to the expert evidence at the trial did not impact on at least some of the verdicts. And, because the evidence of the complainants was mutually supportive as similar fact evidence, the undermining of some of the verdicts necessarily calls into question all of the verdicts. We cannot know why the jury found the appellant not guilty on some of the charges — there could be many reasons for those verdicts. We do not consider it is possible to reason from the discriminating verdicts that the jury was not influenced by the evidence of Dr Zelas in relation to the guilty verdicts. As the Court of Appeal observed in *Crime Appeal (CA244/91)*:[188]

> This is a problem inherent in the kind of evidence that can be given by those practising in the professional treatment of alleged abuse victims. Their opinions properly carry great weight with the layman, who is not always able to differentiate between an opinion based on incontrovertible research material and that which is based on little more than experiment or hypothesis. But it is the layman who as a member of a jury decides guilt or innocence, and he should not be influenced in that onerous task by opinion that is not solidly based. That is why the common law has developed very slowly in this area, … and why s 23G of the Evidence Act is so limited in its scope. With those limitations so clearly in place, any exceeding of them must in our view be regarded as serious. One cannot know what influence it will have on a jury.

Further comment

[233] Before we leave this ground, we note an aspect of the arguments for the appellant we have not addressed in detail. It was argued that s 23G was bad law, allowing the admission of irrelevant evidence and on occasion evidence with significant unfair prejudicial effect but little probative value. We do not address this ground as it is unnecessary in light of our findings. Although we have highlighted some of the difficulties that arose in connection with s 23G's application, we note that the principles that appellate courts developed in connection with the provision were

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186 Another ground on which a criminal appeal could be allowed: Crimes Act, s 385(1)(b). See above at [75].

187 1994 CA judgment, above n 50, at 195. See also below at [320].

188 *Crime Appeal (CA244/91)*, above n 116, at 19.

designed to address these difficulties. Those are the principles we have applied in assessing this aspect of the appeal.

[234] Nevertheless, it is right to acknowledge that both the Crown and the defence experts were attempting to comply with the requirements of s 23G. They were working with a section which, as is apparent from this case and others at the time, was difficult to apply.

D CONTAMINATION

[235] As we identified earlier, the issue of contamination has been a key issue in this case since before the trial itself. At the outset of the discussion of this topic, it is important to emphasise the factors that made this such a unique and difficult case, which we have highlighted above at [61]–[65]. In particular, we record again our acknowledgment of the difficult situation faced by the parents of the complainants. As noted earlier, the factors earlier identified had a compounding effect on each other. They had a major impact on the contamination issue, particularly the large number of children interviewed, the large number of complainants (and, consequently, the large number of parents of complainants) and the delay between the events founding the charges and the interviews and, later still, the trial, a factor that was compounded by the young age of the children.

Appellant's case

[236] It was argued for the appellant that there was evidence in the record which indicated that there was a substantial risk that the complainants' accounts were contaminated or potentially contaminated by a number of influences both within and outside the interview process. Although the principal risk factor was direct questioning by parents, there were many more potential sources of contamination. It was contended for the appellant that not only is there evidence that there were sources of contamination, there is evidence contained in the interviews that the complainants' accounts were indeed affected by this. The appellant says these contaminating factors rendered the complainants' accounts unreliable.

[237] The appellant acknowledged that the issue of contamination had been before the Court of Appeal in 1999 and rejected at that time: first, because there was no consensus in the scientific community as to the effect of contamination on children's memory; and secondly because the issue of contamination was before the jury, and as an issue of reliability of the evidence, was for the jury to resolve.[189] The appellant says that the science in relation to the effect of contamination has moved on since that time such that there is now scientific consensus as to the contamination factors that can compromise the accuracy of children's memory reports. It is also said there now exists "empirical support" for the concerns raised through cross-examination at trial (which we set out below) and an available scientific framework within which the contamination factors identified at trial can be evaluated. The appellant's case is that, if this material had been before the jury, they would have been assisted in assessing the risk of contamination and a different result may have been reached. Putting it another way, counsel for the appellant submit that the jury was not properly assisted by expert evidence on this critical issue nor, as a consequence, properly instructed. This, they say, evidences a substantial miscarriage of justice.

Crown's submission

[238] Mr Billington said all of the issues relating to contamination were before the jury. No significant new information about contamination is identified in the appellant's case. He said the fact the jury acquitted the appellant on some charges demonstrated that these contamination factors may have been taken into account by the jury. He argued that, to the extent there is new scientific understanding about the risks of contamination, it is problematic to apply this to a trial that happened nearly thirty years ago. We have already dealt with, and rejected, the latter submission.[190]

How the issue was addressed earlier

Pre-trial

[239] Prior to the trial, the Judge made a number of rulings, some of which addressed the issue of contamination. On reading these it is striking that the concerns about the

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189 1999 CA judgment, above n 84.
190 See above at [89]–[90] where that submission is addressed.

evidence of the complainants aired before us were identified very early in the proceedings — they were in the minds of the Judge and counsel not only at the trial, but before it.

[240] The appellant and the three Crèche workers who were, at that time, his co-accused, made a pre-trial application to exclude the evidence of the complainants in relation to all charges on the basis that it was obtained unfairly or that its probative value was outweighed by its prejudicial effect. Their application was unsuccessful.[191] The defence submissions highlighted four points that supported the argument that the conduct of those who obtained the evidence warranted its exclusion. These were:[192]

(a) the interaction between the Police and parents at the December 1991 meeting;

(b) suggestive questioning of the complainants by their parents;

(c) the sharing of information by the parents; and

(d) the manner in which the interviews were conducted.

[241] The Judge did not decide the admissibility issue, preferring to adjourn the resolution of the application until the trial where he would have the opportunity to hear the evidence and see the witnesses. He added that there was considerable force in the Crown's submission that the issues raised by the defence could be more appropriately dealt with in an application for discharge under s 347 of the Crimes Act.[193]

[242] Three of the appellant's co-workers then applied pre-trial for discharge under s 347 in respect of the single charge they each faced, which alleged offending against complainant 5. The principal ground was that the evidence was of insufficient weight to justify a trial. They pointed to a lack of corroboration, the bizarre nature of the allegation, and the evidence of possible contamination of the evidence through

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191 *R v Ellis* HC Christchurch T9/93, 25 March 1993 (Williamson J, Oral Judgment (No 2)). By the time this ruling was delivered, the fourth Crèche worker had been discharged: see above at [42].

192 At 5.

193 At 15.

parental questioning (described by the applicants as intense and confrontational), therapy and frequent interviewing.[194]

[243] The applications were successful. The trial Judge gave three reasons for discharging the three Crèche workers, the first of which was the insufficiency of the evidence.[195] There were three aspects to the Judge's views on insufficiency.[196] The first was that other children who were named by complainant 5 as being present, and who in their own interviews had referred to vaguely similar incidents, did not mention the co-workers as being present. The second was that complainant 5 did not make an allegation against the co-workers until the fourth interview, and that delay was to be viewed and weighed in the context of the number of previous interviews, and parental questioning (the trial Judge said it was common ground that the child was spoken to at length and in detail by his mother about the abuse and therapy[197]). The third was that the interviews in which complainant 5 made allegations about co-workers contained more "bizarre and wilder type[s] of allegations" which require greater strength of evidence to support them.

[244] The appellant subsequently applied under s 347 for orders that no indictment be presented in relation to specific counts or that he be generally discharged from all counts. That application was founded on arguments relating to contamination of the complainants' accounts by, among other things, child-to-child communication about the allegations, parent-to-parent communications, parental questioning of complainants, booklets prepared by complainant 4 and her mother relating to the allegations against the appellant, access to sex education books and faulty procedures in collecting the evidence. As we will come to, these are the main factors cited in the arguments about contamination in the present appeal. The Judge reviewed the evidential interviews in respect of each complainant as against the contamination

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194 The charge arose from statements made in the fourth evidential interview of complainant 5.

195 Ruling 3, above n 42, at 14–15. The other two reasons were the potential for unfair prejudice against the three Crèche workers and the potential hardship to complainant 5, who would have to give evidence twice (because the Judge had earlier severed the trial of the three Crèche workers, on the single charge they faced, from the appellant's trial on all the counts he faced: Ruling 1, above n 47).

196 Ruling 3, above n 42, at 12–14.

197 At 8.

arguments, and concluded that there was sufficient evidence for the charges to proceed to a jury. The application was dismissed.[198]

Treatment of the issue at trial

[245] At the trial, the defence cross-examined the parents of the seven complainants and, at times, the complainants themselves, about potential contaminating factors. It was a major focus of the defence case. Both expert witnesses also gave evidence about the possibility of contamination.

Cross-examination of Dr Zelas

[246] Dr Zelas was cross-examined at a general level by the appellant's counsel about the impact of inappropriate questioning of children by parents (or others) in situations where sexual offending was suspected. On the whole, the effect of Dr Zelas' answers was to minimise concerns that pre-interview questioning of the complainants could have impacted upon their evidence. For example, she qualified Mr Harrison's general proposition that leading questions are "extremely dangerous" by saying:

> When you say that I think there are a number of factors involved, they are very dangerous in the sense of being unwise in any sort of legal or evidential setting because it can be thought that they may influence the response of the child. Children vary in their ability to resist the content of leading questions and because a leading question is used it does not necessarily invalidate the answer but it certainly raises questions as to the reliability of the answer so one needs to be able to look broadly at the manner in which this particular child answers questions and in particular responds to leading questions, and if one does that putting it in context one may well find evidence that the child discards some leading questions but will respond in the affirmative to others not because they are leading but because in fact the information in them is correct and in that instance a child is likely to be able to go on with further exploratory questions that are not leading to be able to recall detail consistent with the content of the answer to the leading question.

[247] Later, the following exchange occurred:

> Q … if you put a leading question from a parent to a child in an environment where there is obviously stress or concern by the parent for the child's safety, then that is an environment whereby the child

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[198] Ruling 4, above n 43. However, in relation to one count (involving complainant 4), the Judge observed that the allegation resulted from a "blatantly leading question" and the Crown agreed not to proceed with that count: at 6.

may take on board part of the parents emotions and the concept of the question, is that not correct?

A That is possible.

Q If that is the case and then there are further questions asked then it is entirely possible for children of this age to develop a whole scenario based on the type of questioning undertaken by the parent?

A Only if as you say the whole series of questions … were all leading questions so that all the information [was] coming from that parent. And even so there would need to be very strong motivations for the child to pick up that information and in my opinion and my experience it is very difficult for a child who has obtained information in that manner to be able to subsequently give a spontaneous and plausible account of those events in a manner that is age appropriate and has the appropriate effect associated with it and is convincing.

[248] In the following exchange with the appellant's counsel, Dr Zelas also appeared to reject the proposition put to her that when the topic is introduced and discussed at home it can appear as the child's own memory:

Q In the situation of particularly young children who are interviewed, there is no flow of narrative but rather a whole series of questions, isn't there?

A Yes that is correct.

Q The danger is that where the concept is introduced and discussed at home then that concept can reappear [as] if it is the child's own memory of something that happened?

A The concept can but the detail is not there and children tend to describe the matter in a different a way. They also tend not to convincingly describe themselves as being a part of it with all the little details that they recall as to feelings or the manner in which something occurred or what happened next because they just don't have the memory to draw on in that respect.

Q Doesn't that depend on the manner in which they were questioned by their parents initially?

A No I don't believe it does, not in my experience.

[249] She was asked in cross-examination whether children have particular difficulty with monitoring the sources of their memories. She did not accept that. She said children were no more likely than adults to confuse memories of actions

they imagine themselves doing or actions suggested to them with memories of actions they actually performed.[199]

[250] Even if contamination was a possible risk, Dr Zelas suggested that this could be easily discerned. She said:

> But they can't then produce the convincing detail about it and commonly if children have learnt something through an adult telling them about it they describe the event in a much more adult way and their language and grammar and maybe even the fluency of what they are saying sounds different.

Dr Le Page's evidence

[251] Dr Le Page, the defence expert, gave wide ranging evidence about the operation of memory in children. Some of his evidence, such as his quite extensive evidence about pathological forgetting, was irrelevant to Mr Ellis' case.

[252] Dr Le Page addressed some aspects of the risk of contamination, contesting some of the evidence given by Dr Zelas. For example, Dr Le Page said children of a similar level of general development to that of the complainants are "far more suggestible" than adults and depending on the circumstances surrounding the suggestion, the child might subsequently reproduce what has been put to them as though it has "come from their mind and not from another source".

[253] Once the information is "in the child's mind" from the leading question, it is capable of being clarified by further questioning, but that possibility is made difficult by the phenomenon of source monitoring. He explained that:[200]

> … children are *less able than older people to monitor where information has come from* and if you add additional information to a child's mind over and above what their experience has been it makes it that much more difficult for the child to monitor where that information has come from, it is not impossible but it creates additional difficulties. Where a concept has been introduced to a child of this age through leading questioning, that child can then create a scenario around that concept.

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199 Dr Zelas did acknowledge that a child's ability to accurately monitor the sources of their memories will depend on the nature of that memory and the emotional impact that the event had on the child at the time. But that was immediately followed by her evidence that children are no more likely than adults to confuse the sources of their memories.

200 Emphasis added.

[254] This was potentially significant evidence, because it reflected what the experts before us confirmed is the correct position: young children are not good at identifying the source of their memories and can report something they have been told as if it in fact happened to them. As well, this aspect of Dr Le Page's evidence accords with the expert evidence in this Court that it is very difficult to rescue a contaminated account through subsequent questioning.[201] We note two things about this evidence however. First, it seems from the transcript that Dr Le Page's evidence on this topic was interrupted and he did not expand on his comments or revert to it later in his evidence. It is not clear from the record why that occurred. Secondly, Dr Le Page's evidence did not engage directly with Dr Zelas' apparently contradictory evidence on the topic (nor was Dr Zelas cross-examined by reference to what Dr Le Page would say in relation to source monitoring).[202]

Closing addresses

[255] While, as noted earlier, we do not have a transcript of the defence's closing address at the trial, we do have that of the prosecutor and much of it is directed at the defence questioning on the topic of contamination, in an effort to negate the anticipated submissions of defence counsel about contamination.

The 28 August 1992 and 22 March 1993 letters

[256] There is one additional point about the treatment of the issue of potential contamination at the trial that needs some explanation: the 28 August 1992 and 22 March 1993 letters.[203]

[257] In the 28 August 1992 letter, Dr Zelas observed:

> It is clear that [complainant 6]'s parents elicited disclosures of abuse by Peter ELLIS by highly leading questioning. [Complainant 5]'s brother and parents did the same. In [complainant 5]'s case, the parents subjected him to intensive interrogation pertaining to 'ritual' abuse between the three August interviews which were on consecutive days. [Complainant 5] would then disclose in the next interview with Sue Sidey the information elicited by his parents the previous night.

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201 We discuss the expert evidence before this Court in greater depth below at [274]–[309].

202 But see below at n 233 where we discuss one explanation for why Dr Le Page may not have linked his evidence directly to the evidence given by Dr Zelas.

203 See above at [132]–[135].

> These facts could make it easy to dismiss the children's statements as having little probative value whether or not they might be accurate. It also makes the similarities between their statements extra important, particularly in matters unlikely to have been influenced by the parents.
>
> …

[258] Dr Zelas advised that a number of follow-up inquiries should be made.

[259] There were further interviews scheduled to take place on 11 and 12 August 1992 for complainant 5 after his fourth interview in early August 1992. However, these planned interviews were cancelled at the instigation of Ms Sidey.[204] Mother 5 was extremely upset about the cancellation of the interview and sent a handwritten letter to the Police to complain.[205] In her letter, she said she had been told the child was suggestible and "Karen [Dr Zelas] informed Sue [Ms Sidey] of this". In the same letter she asked why an expert in ritual abuse of children from Australia had not been engaged. It seems likely the concerns expressed by Dr Zelas in the 28 August 1992 letter were the same concerns leading to the cancellation of the interview.[206]

[260] Mother 5's letter was produced at depositions, but at the trial, the Judge refused to allow mother 5 to be cross-examined on her letter and on the reasons for the cancellation of the interview.[207]

[261] The 22 March 1993 letter set out Dr Zelas' response to a brief of evidence by Dr Le Page in which the latter had analysed the evidence of complainant 5 and called into question its reliability in light of the interviewing techniques adopted, possible contamination and other matters. Dr Le Page had concluded: "it is highly likely that [complainant 5] has been caused to come up with false information". Dr Zelas accepted there were some areas of concern and that complainant 5's account warranted careful consideration at trial, but she went on to refute Dr Le Page's conclusions,

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204 A further evidential interview did take place on 28 October 1992, but this was not played to the jury.

205 The letter was jointly signed by both of complainant 5's parents, but was written by mother 5.

206 As noted above at [136], Dr Zelas was not cross-examined about the 28 August 1992 letter because Mr Harrison was not aware of its existence at the trial.

207 *R v Ellis* HC Christchurch T9/93, 7 May 1993 (Williamson J, Oral Judgment (No 9)).

including his conclusion about the effect on complainant 5's evidence of persistent parental questioning.[208] She did however acknowledge:

> As already stated, I accept that the family has been a potential source of influence upon [complainant 5]. I believe that this influence applies more to later than to earlier interviews, but that the credibility of the information of the child stands upon the characteristics of that information in the videotaped interviews together with any outside corroboration of aspects of his evidence.

[262] Dr Zelas also discussed Dr Le Page's concern about the difficulties associated with information obtained from children once they are in therapy (as complainant 5 was at the time of his second to fifth interviews). She said it would be important to understand something of what took place during that therapy to determine its influence on complainant 5's subsequent disclosures.

[263] What Dr Zelas said in the 28 August 1992 letter and the 22 March 1993 letter can be contrasted with what she said about contamination at the trial (see above at [246]–[250]). On the whole, the effect of Dr Zelas' answers to questions from the appellant's counsel in cross-examination was to minimise any concerns arising from questioning by parents. She did not mention that she had previously expressed concerns about the effect of pre-interview questioning in respect of complainants 5 and 6 or that she had acknowledged the potential influence of therapy in relation to complainant 5. Although Dr Zelas acknowledged that young children can be highly suggestible, she testified that the risk of contamination by parental questioning is lower than one might think and that it can easily be detected using certain linguistic and other markers.

[264] If the 28 August 1992 letter had been available to defence counsel at the trial, it could be expected that Dr Zelas' concerns would have been explored in the

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[208] Dr Zelas observed that it was for the jury to determine to what extent it considered complainant 5's evidence may have been influenced by his parents' questioning.

cross-examination of Dr Zelas.[209] There was no cross-examination on the 22 March 1993 letter either.[210]

Trial Judge's summing up

[265] In his summing up, the trial Judge began by contrasting what he said was the Crown's case ("each child has told the truth about the central matters") and the defence case ("all of the children have told lies because of pressures on them from parents, other children or authorities").[211] Later, he summarised the defence argument about contamination as follows:

> Counsel said that you would take the view young children make things up; that they indulge in make believe; that children could react because of their parents' support and because they thought they were the centre of the family's attention to make up lots of details to comply with the parents' expectations of them. He argued that this was a case in which there were not spontaneous disclosures by any child but rather disclosures which only came after some questions had been asked. (No doubt that was with the exception of [complainant 3's] comment or complaint, if you accept it.)[212] The questioning of a child by parents, Mr Harrison argued, put the ideas into the children's heads. He said in view of the considerable media publicity about Ellis' suspension and the Crèche generally the children could have linked it all to believe the allegations were all correct; that a combination of the parents' questions and news media attention actually resulted in these allegations being made. He said, perhaps not surprisingly, the parents were believing of what their children said to them. He went on to argue that many of the relevant issues were not raised with the children at the time.

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209 There was no cross-examination of Dr Zelas at the trial in relation to the impact of mother 5's questioning of complainant 5 on the veracity of complainant 5's evidence. Although Dr Zelas was asked about mother 5's repeated questioning, this formed part of the defence's theory that the behaviours said to be consistent with those of sexually abused children (under s 23G(2)(c)) were in fact associated with anxiety generated by the mother's regular questioning. There was no exploration of possible contamination.

210 Though it seems the 22 March 1993 letter would have been available to defence counsel at the time of the trial, as we discuss above at n 147.

211 This seems to us to have been a false dichotomy; the defence case was not that the complainants lied but that they had false memories. The Judge did qualify this later in the summing up by saying that Mr Harrison invited the jury to conclude the complainants were telling untruths or lies because they had been consciously or unconsciously misled into doing so. This criticism was rejected by the Court of Appeal in 1994: see 1994 CA judgment, above n 50, at 193, where the Court said the Judge "was simply and starkly making the point that the case turned on credibility, and the central issue was whether or not [the jury] believed the complainants".

212 This appears to be a reference to the recent complaint evidence of mother 3 referred to above at [50](h).

[266] The Judge summarised the cases for the Crown and defence in relation to each complainant, and highlighted defence arguments about contamination that were specific to a particular complainant.

[267] Importantly, the Judge extracted what he considered to be the key propositions from the evidence of Dr Zelas and Dr Le Page relating to contamination. He began with the high-level observation that Dr Zelas possessed more experience with sexually abused children than Dr Le Page. That would have been received by the jury as a further endorsement of Dr Zelas' evidence. Relevantly he highlighted her evidence that direct questions can increase the amount of accurate information reported by a child. In relation to the evidence of Dr Le Page, the Judge noted that:

(a) Dr Le Page said children are more susceptible to source amnesia, which the Judge explained meant children are "unable to recall where a piece of information has come from";

(b) Dr Le Page said children are "more suggestible than adults" given their general level of development; and

(c) if leading questions are asked of children of this age, they may "go on to create a scenario around such concepts".

1994 appeal

[268] In the 1994 appeal, the primary ground was that the verdicts were unreasonable because the evidence of the complainants was unreliable.[213] Contamination was a major focus of the appeal. Many of the contamination factors canvassed in the hearing in this Court were addressed. The Court of Appeal rejected this ground of appeal on the basis that the jury had been informed of these factors so there was no proper basis for an appellate court to interfere with their verdicts.[214]

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213 1994 CA judgment, above n 50, at 188 and 190.
214 At 182–186.

1999 appeal

[269] One of the points founding the reference back to the Court of Appeal under s 406(a) of the Crimes Act was that new material had become available since 1993 which showed the risk of contamination had been underestimated at trial.[215]

[270] The Court considered that a comprehensive review of the contamination factors was not necessary. The Court said this was because it was "apparent from a reading of the trial transcript that the substance of the problem, and also the sources and extent of possible contamination in individual cases were all identified and addressed" at the trial; the new evidence did not "disclose any significant further insight"; "the factual matters" regarding contamination which were collated in the submissions were "known at the time of the trial"; and finally, "all the factors of contamination now relied upon were addressed in the course of the [trial]".[216] The Court considered that the fresh expert evidence filed in support of the appeal lacked the significant "newness" required to show there were serious flaws or problems involving contamination that were previously unknown or unappreciated, meaning there was no basis for setting aside the verdicts.[217]

Eichelbaum inquiry

[271] Sir Thomas Eichelbaum considered that contamination was the "stronger aspect" of the appellant's case, but still found that the *degree* of possible contamination was not sufficiently serious to call into question the convictions.[218] After considering the views of the experts assisting the inquiry, Sir Thomas concluded:[219]

> I have accepted that questioning and investigations by some parents exceeded what was desirable and had the potential for contaminating children's accounts. Also, there was much cross-talk between families. However, I am wholly unconvinced by the proposition that these events produced the detailed, similar accounts given by so many children, in separate interviews stretching over many months. In some instances … the prime opportunities for contamination occurred after the particular child had made the disclosure leading to a conviction.

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215 1999 CA judgment, above n 84, at [20]–[21] and [29].
216 See the discussion at [50(xiv)], [53] and [55].
217 At [56]–[57].
218 Eichelbaum Report, above n 86, at 113–114.
219 At 114.

The contamination issues on this appeal

[272] Earlier we noted that the thrust of the appellant's case is that the science in relation to contamination of the evidence of children has evolved since 1993 such that there now exists consensus as to the contamination factors that can compromise the accuracy of children's memory reports. But, in advancing that submission, the appellant also highlighted through his experts deficiencies in the way in which the issue of contamination was treated at trial given the scientific consensus in 1993.

[273] We therefore address two issues in respect of contamination:

(a) Did Dr Zelas give the jury incorrect reassurance, in light of the state of scientific knowledge in 1993, regarding the risk that the complainants' evidence might be affected by contamination?

(b) Assessed by reference to the modern scientific position, was the risk of contamination of such a degree that a miscarriage of justice resulted?

As the consideration of the first of these is assisted by the analysis of the second, we will deal with the issues in reverse order.

Contamination evidence at trial and current science

[274] As indicated earlier, the focus of much of the evidence about contamination was on the current state of scientific knowledge. In this section, we summarise briefly the experts' evidence before us about the risks of contamination affecting the complainants' evidence in light of the current science.

Professor Hayne

[275] The appellant relied in particular on the evidence of Professor Hayne.

[276] In her evidence, Professor Hayne explained that what children report during an interview can be contaminated by information that has altered the original memory. She said that it is often impossible for children to distinguish between memory representations that are genuine and those that have been altered by information from

another source. She said Dr Zelas' trial evidence to the effect that children are as good as adults at monitoring the sources of their memory is incorrect.[220] The correct position is that children are much more likely than adults to confuse what they have been told with their actual experience. Additional sources of information can lead to changes in the details of an existing memory or to the development of new, but entirely false, memories.

[277] Professor Hayne said the risk of a child reporting contaminated or false memories cannot be eliminated even if the evidential interviews are of the highest standard.[221] She said it is therefore critical that children's memories are retrieved and reported without exposure to other information sources. If such exposure does occur, the fact finder needs to be made aware of the implications for the reliability of the child's testimony.

[278] Professor Hayne said that cross-examination does not address this problem. Experiments have shown that when questioned under conditions involving high levels of suggestive pressure (that is, in conditions similar to cross-examination), a child may change their report, but the change is just as likely to be from a report that accurately reflects memory to one that does not and vice versa. This is especially so when the questioning is in terms that are prone to confuse a child witness.

[279] Professor Hayne identified 14 sources of potential contamination in the present case. The most significant sources can be divided into the following categories:

(a) Meetings involving parents and, in some cases, those involved in the investigation: these were the December 1991 meeting,[222] the Knox Hall meeting[223] and the meetings of the parents' support group.[224]

(b) Complainant/parent conversations: many parents had conversations with their children about alleged abuse and in some cases asked their

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220 Dr Le Page's evidence at the trial contested Dr Zelas' evidence on this point.

221 As we will come to, Professor Hayne's opinion was that the interviews were, in fact, well below that standard.

222 See above at [33].

223 See above at [39].

224 See above at [40].

children questions that were suggestive. Professor Hayne notes that since most of these questioning sessions were not recorded, experts can only proceed on the parents' accounts at trial of the questioning.

(c) Parental cross-talk: parents had ongoing contact with each other and shared information about allegations made against the appellant.

(d) Peer cross-talk: some of the complainants (complainants 3–7 inclusive) also had contact with each other.

(e) Overheard conversations: there were opportunities for complainants to overhear adult discussions about the allegations.

[280] Other opportunities for contamination identified by Professor Hayne were what Professor Hayne referred to as the air of accusation (complainants being told before complainant/parent conversations and their evidential interviews that the appellant was in trouble for his conduct), allegation simulation (complainant 4 demonstrated the alleged conduct on her mother while the two of them were in the bath), booklet construction (complainant 4 prepared a booklet with her mother outlining the allegations as part of her preparation for the evidential interview), scene reconstruction (complainants 3, 5 and 6 were taken to locations where abuse was said to have occurred: 404 Hereford St, the Cranmer Centre, the Masonic Lodge and 348 Armagh St),[225] therapy/counselling (some or all of the seven complainants underwent therapy or counselling up to the time of the trial), sex education books (complainants 1, 6 and 7 had access to sex education books at home) and the

[225] The appellant resided at 404 Hereford Street for part of his employment at the Crèche; the Cranmer Centre was the name sometimes used to refer to the site on which the Crèche was located after the relocation in 1989; and 348 Armagh St was the house of another Crèche worker. Complainant 5 said in evidence at the trial that the appellant and other Crèche workers threw him and other children in trap doors at the Masonic Lodge. This appears to be a reference to allegations he made in his fifth interview, when he said after going down a "trap" (presumably a trapdoor), the appellant's mother hung him and other children in cages from the ceiling. No charges resulted from this allegation. When asked in cross-examination what happened at 348 Armagh St, complainant 5 said, "[t]hey did some bad things". Complainant 6 did not say at the trial what happened at Armagh St or the Masonic Lodge. Neither mentioned Armagh St or the Masonic Lodge in their evidential interviews. Rather, complainant 5 described the trap as being located at the Crèche. Complainant 3 was taken only to the Cranmer Centre.

Safe Education Programme (complainant 2 participated in a sex education programme before the trial).

[281] All of these sources of contamination occurred prior to the trial. But in some cases they occurred after the complainant's evidential interview at which the relevant allegation was made, which means they could not have affected the account in the relevant interview.

[282] Professor Hayne said that since the trial, experts have established that children can report false information about an event as if it happened to them, based on extremely limited and passive exposure to that information. They can also augment those accounts with additional detail that has not been suggested to them. This of course conflicts with Dr Zelas' evidence.

[283] Professor Hayne said that the risks associated with suggestive questioning are multiplied when multiple inappropriate questioning types or statements are used and/or there is a delay between the date of the alleged conduct and the interviewing of the complainant concerned. The evidential interviews took place months, if not years, after the children left the Crèche and delay of this kind can increase the children's susceptibility to suggestion both within and outside the evidential interview. The risks are accentuated if the evidential interview is conducted in a way that does not conform to best practice.

[284] Professor Hayne said she could not comment on whether a particular factor did result in suggestive content being passed on to the complainants or whether they incorporated that content into their memories. Rather, she identified which complainants were exposed to which sources of potential contamination. She said all these factors have been shown through robust studies to contaminate children's accounts of their experiences.

Professor Howe

[285] Professor Howe endorsed Professor Hayne's analysis.

Associate Professor Brown

[286] Associate Professor Brown's evidence substantially accorded with Professor Hayne's analysis.[226] Her primary focus was on the standard of the evidential interviews, about which she expressed some concern. But she also analysed the potential for contamination of the complainants' memories and concluded as follows:

> Based on the comments made by the children during interviews, about conversations held with parents, visiting key locations associated with the investigation, producing art and a storybook about alleged events, and conversations with other children there appear to have been multiple opportunities for external influence on the children's memories. In conjunction with the various risk factors associated with interviews outlined in my report, it is my opinion that there is a realistic and high risk that the children's reports are comprised of partially or wholly false information.

Professor Goodman

[287] Although Professor Goodman took issue with some aspects of Professor Hayne's evidence about memory and interviewing techniques, there was a high degree of agreement between them on the issue of potential contamination. Professor Goodman was clearly concerned about contamination. She described Professor Hayne's report as "thorough" and "compelling" in its treatment of contamination. She made the following observations in her brief of evidence:

> Thus, although I take issue with Dr Hayne's views of the extreme malleability of memory, I am in general agreement with her analysis, tables, and examples in the last section of her report [those summarised above]. I see potential parental and other contamination as the most problematic issue in the Ellis case, and I agree that it likely had a profound and pervasive adverse effect. It's difficult to see how any current "best practice" interview protocol could have overcome the effects of the types of contamination inherent in the Ellis case.
>
> …
>
> … It is my conclusion that, in the Ellis case, contamination by intrafamilial and other sources affected the forensic interviews and preclude a confident evaluation of witness credibility. In agreement with most, if not all, of the other experts who have evaluated the Ellis case, I find that this contamination makes it difficult to know what really happened.

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[226] Associate Professor Brown's central focus was the evidential interviews. She therefore confined her analysis of pre-interview contamination to statements made by the complainants during their interviews which indicated possible sources of pre-interview contamination. For that reason, she did not discuss all the 14 factors identified by Professor Hayne.

…

> In sum, my opinion is that there very likely was contamination and that it had an adverse effect on the reliability of the children's testimony in the Ellis case. Although I disagree with Dr Hayne's characterization of memory and find issue with her quantitative analysis, I would agree with her (and several other experts who have reviewed this case, such as Dr Lamb)[227] on the issue of possible parental contamination adversely affecting the children's testimony, the investigative interviews, and the verdict in this controversial case.

[288] Professor Goodman referred to studies which have shown that younger children are significantly more vulnerable to leading and misleading questions and to misinformation generally. Delay was also a factor which increased the risk of contamination because forgetting can make children (and even adults) more susceptible to suggestibility and false memory accounts. The delays in this case between the time of the alleged offending and the interviews may have weakened the memory of the children and made a subset of them more susceptible to false memories.

[289] In an addendum to her affidavit, Professor Goodman described the contamination risk in relation to each complainant as follows:[228]

> The possibility of contamination differs from actual contamination. Although there may be the possibility or opportunity for contamination, how susceptible any one child will be to it is still an open question. …
>
> Below, I have rated the degree of contamination that research suggests to exist per child whose testimony is associated with guilty verdicts. As I cannot say, if the contaminating influences had an effect on these children's accuracy, I make a likelihood judgment below as to the extent of contaminating influence.
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> …
>
> **Child 2: 1 Interview – Overall Possibility of Contamination – Relatively low**
>
> Parental influence: Child was told about Peter being arrested by police because they believed he did bad touching of children. Mother took Knox Hall instructions to mean about making sure child's well-being is OK (not about asking direct questions or not).
>
> Other Children influence: Did not play with other complainant children.

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227 Dr Michael Lamb was an expert witness for the appellant for the 1999 appeal to the Court of Appeal. His evidence was that there was a high risk of contamination of the complainants' accounts and that, as a result, the probability that the complainants' reports were tainted was extremely high.

228 Professor Goodman used the terminology of "Child 2", "Child 3" and so on. For the avoidance of doubt, her identification of the relevant child corresponds with the terminology used throughout this judgment ("Child 2" is "complainant 2" , "Child 3 is "complainant 3" and so on).

Child 3: Overall Possibility of Contamination – Initial disclosure, Relatively Low, but disclosures later are Moderate

Parental influence: Child has earlier displayed sexualized behavior, and mother had asked if anyone had tried to pull his pants down and touch his bottom. Before leaving the crèche, he disclosed to his mother that Peter did wees and poohs on the children, but he had laughed about it and said he was kidding. This could be an early disclosure of child sexual abuse, a rumor, or the truth. The mother attended the first parents' meeting, left for UK, and upon return questioned her son across several days.

Other Children influence: He lives a few houses down from Child 7 and her brother, and go to same school, but have infrequently interacted.

Child 4: Overall Possibility of Contamination – High

Parental influence: Mother questioned Child 4 in the bath a few days after the Knox Hall meeting. Child 4 and mother made several books together about Peter and the crèche. Cross communication between parents.

Other Children influence: Child 4 talks to Child 6 about the crèche and Peter, 8 4months [sic] before and then after first interview.

Child 5: Overall Possibility of Contamination (for 2nd interview) – High

Parental influence: Father questioned Child 5 before the first interview. Mother questioned him repeatedly in May, June, and July. Child 5 has talked to his brothers.

Child 6: Overall Possibility of Contamination (for first 4 interviews) – High

Parental influence: Mother had heard from a parent ([Mother A]) about an allegation even before the Dec parents' meeting, and she attended that meeting. Mother questioned Child 6 from November 1991 to February 1992, and after that time as well. There was a considerable amount of cross-parent communication.

Other Children influence: She has played with one or more complainant children.

Child 7: Overall Possibility of Contamination – High

Parental influence: Parents interviewed Child 7 and her brother starting in November 1991 and continuing into March before the first interview. There was a considerable amount of cross-parent communication (including with [Mother A]).

Other Children influence: Child 7 had played with one or more complainant children.

Dr Seymour and Dr Blackwell

[290] Dr Seymour and Dr Blackwell took issue with the views of the other experts. Generally speaking, they agreed there were opportunities for contamination, but said opportunity is not the same as evidence that contamination actually occurred. They questioned the applicability of some of the studies on which Professor Hayne relied, arguing the situations in which they were undertaken were different from a forensic situation.[229] They pointed out that it could be assumed that some prior conversation with a parent or other supportive adult would have taken place before a child participates in an evidential interview. There is no reason to believe such conversations are inherently unsafe. They observed that while it may be the case that some of the complainants were impacted by parental cross talk and interaction, there is no evidence available to show that was the case. In many cases the questioning by parents goes the other way; parents often seek assurance from the child that there has been no abuse.

[291] Dr Seymour was cross-examined extensively about this and accepted there was, in fact, *some* evidence of a connection between answers given to suggestible questions by parents and answers given subsequently by the complainants in their evidential interviews. But he said this would be contamination only if the answer in the evidential interview was a false memory, and it was not possible to say whether the memories of the complainants concerned were true or false. Dr Blackwell gave a similar answer in cross-examination.

[292] When referred to the 28 August 1992 letter, in which Dr Zelas expressed concern about the impact of parental questioning on the evidence of complainant 5 and complainant 6,[230] Dr Seymour and Dr Blackwell both accepted that the letter indicated there had been suggestive questioning of those two complainants.

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229 Professor Hayne relied on scientific studies to support the 14 contamination factors she identified in her evidence. Dr Blackwell and Dr Seymour did not dispute the overall findings of those studies but did challenge their applicability to the forensic context. For example, they disagreed with the reliance placed by Professor Hayne on studies involving questioning of children in circumstances that do not follow "ideal interview conditions" or conditions that replicate a forensic interview.

230 See above at [132]–[133] and [256]–[259].

[293] Dr Seymour was also asked about complainant 5. Mother 5 accepted in cross-examination at trial that she had asked complainant 5 after the Knox Hall meeting whether the appellant had touched complainant 5's bottom or penis. She said she had then asked complainant 5 this question again on a continuing basis at least once a week. At his first evidential interview, complainant 5 was asked about the "not good things" about the Crèche he had told his parents, to which he replied: "he fiddled with my rude parts". Dr Seymour accepted there was a connection between the repeated suggestive questioning from mother 5 and the account given by complainant 5 at the interview.

[294] Dr Seymour was also asked about complainant 6. Mother 6 said in evidence that, when she was told by another parent that the appellant had taken several children, including complainant 6, into the toilets at the Crèche and shown them his penis, she recounted this to complainant 6 and asked if she remembered this. Complainant 6 said she did; the appellant had shown the children his penis but they had not touched it. Mother 6 asked complainant 6 if the appellant's penis was sticking out or lying down, demonstrating this with her hand. Complainant 6 demonstrated back with her hand sticking out and said that complainant 7 and complainant P had sucked the penis. At complainant 6's first evidential interview, complainant 6 repeated these allegations. Dr Seymour accepted a connection between the parental question and the child's answer and the account complainant 6 gave in the evidential interview.

[295] Dr Seymour also accepted in cross-examination that there were connections between suggestive parental questions and evidential interview testimony in relation to complainant 2 and complainant 7.

[296] Besides parental influence, Dr Seymour and Dr Blackwell also disagreed with several of the other contamination factors raised by Professor Hayne. They said there is no agreement yet as to the degree (if any) that books, television and film may have on children's reports in the forensic context. Relatedly, they remarked that while there is some evidence that sex education programmes can trigger reporting of substantiated sexual abuse, there is no evidence that children are likely to fabricate abuse allegations as a function of attendance at such programmes. Based on those points, Dr Blackwell and Dr Seymour challenged two of Professor Hayne's contamination factors, namely

sex education programmes and books. They also queried the relevance of therapy and counselling, noting that it is "unknowable" what occurred in therapy and that (in their professional experience) therapists generally do not question children about any abuse allegations they have made.

Propositions that emerge from the evidence

[297] There is then a high degree of consistency in the views of Professor Goodman and Professor Hayne on contamination. Both provided their opinion that:

(a) While children can report sexual abuse with accuracy and detail, children can in some circumstances also falsely report sexual abuse as if it happened to them.

(b) Susceptibility to suggestibility and false memory can be exacerbated by delay between the alleged events and interviews, and by the age of the child, with younger children being more susceptible.

(c) In this case the complainants were young (aged 3 to 5 at the time of the alleged offending).

(d) There was considerable delay between the alleged offending and the interviews.

(e) On the particular facts of this case there were multiple sources which could have contaminated the complainants' memories.

[298] Professor Goodman concluded her analysis by saying that contamination affected the evidential interviews, and would have precluded a confident assessment of witness credibility. This applied particularly to complainants 4, 5, 6, and 7, in respect of whom she saw the risk of contamination as high; she assessed the risk of contamination as lower in relation to the other complainants.

[299] Dr Blackwell and Dr Seymour agreed that there were opportunities for possible contamination, but maintained that opportunity is not the same as evidence of an actual

contaminating effect. Professor Hayne and Professor Goodman both agreed with that proposition and their evidence appropriately focused on the level of the contamination *risk* rather than evidence of actual contamination.

[300] Dr Blackwell and Dr Seymour both accepted some of the complainants had been exposed to suggestive questioning, and Dr Seymour accepted there was some evidence of a connection between answers given to suggestible questions and answers which the complainants later gave in their evidential interviews.

Contamination evidence at trial and the science of the time

[301] As we have outlined above, the issue of contamination of the complainants' memories was traversed in cross-examination, particularly through cross-examination of the parents. But the jury received little assistance from the expert witnesses.

[302] For the most part, the experts before this Court acknowledged that much of the research on contamination and memory emerged after the 1993 trial. Professor Hayne highlighted that memory science (particularly in the forensic setting) was barely in its infancy ("in its very most nascent state") in the early 1990s. Echoing that viewpoint, Professor Goodman explained that scientific knowledge about the interrelationship between child sexual abuse and children's memory was embryonic. Dr Blackwell and Dr Seymour agreed with that characterisation of the scientific terrain in the early 1990s.[231]

[303] Even so, it became apparent at the hearing of this appeal that Dr Zelas' evidence was faulty as against the basic tenets or building blocks of the science on memory, suggestibility and contamination that *were* in place in the early 1990s. Precisely identifying in which respects Dr Zelas fell into error is complicated by how the case for the appellant was advanced in this Court. Neither the appellant nor his experts clearly differentiated between the old and modern science. However, in the course of giving evidence, the experts referred intermittently to the state of knowledge

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[231] However, both Dr Blackwell and Dr Seymour suggested that even today, academics might say that the research about memory is not settled.

at the time of the appellant's trial. Our review of that material leads us to the following conclusions.

[304] First, Dr Zelas effectively dismissed the possibility of contamination. Professor Goodman told us Dr Zelas failed to take account of "debates that had already started in the field of developmental psychology in the law about suggestibility". Nor was her evidence consistent with the emerging science on the contaminating effect of abuse-related questioning. Professor Goodman said the research about children's responses to sexual-abuse related questions, despite being in its infancy, had been both presented at conferences and published by 1991. We therefore consider that Dr Zelas' evidence rejecting or minimising the risk of contamination was incorrect at the time it was given.

[305] Second, Dr Zelas' evidence on source monitoring lacked scientific foundation. During the hearing, we asked Professor Hayne whether Dr Zelas' evidence that children are as good as adults at identifying the sources of their memories was consistent with the scientific consensus at the time of the trial. She replied that it was not, referring to literature published in the early 1990s. Professor Goodman agreed, adding that Dr Zelas' evidence was in tension with research going as far back as 1984. Certainly by 1993/1994, researchers had published studies about the relationship between suggestibility and source monitoring, we were told.

[306] Finally, Dr Zelas overstated adults' ability to reliably detect contamination in a child's account based on certain markers (fluency, complex language and inclusion of convincing detail). Several of the experts said that adults are not especially reliable when distinguishing between true and false accounts. They referred to a 1994 study which generally supported that proposition.[232] Professor Goodman signalled some concern about the methodology behind the study's findings. Even so, the study illustrates that there existed debate within the scientific community in the early 1990s regarding the detectability of contamination in children's accounts. We consider that Dr Zelas' evidence was expressed in unduly unequivocal terms, given that debate. The

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[232] Stephen J Ceci and others "Repeatedly Thinking about a Non-event: Source Misattributions among Preschoolers" (1994) 3 Consciousness and Cognition 388 at 398–400.

jury may have been left with the incorrect view that it was possible to detect whether evidence was affected by contamination using linguistic markers.

[307] Although the substance of Dr Le Page's evidence correctly contradicted Dr Zelas' evidence on children's ability to monitor the source of their memories, he gave that issue less emphasis than issues that were irrelevant to the trial. Moreover, as noted earlier, his evidence on this point seemed to be interrupted. Finally, he did not explicitly link his evidence to that of Dr Zelas, creating the risk that the jury would not have been aware that his evidence did in fact contradict hers — not a fanciful possibility given the complexity of the subject matter and the volume of material the jury had to process.[233]

[308] The effect of Dr Zelas' evidence was to reassure the jury that the complainants' evidence had not been affected by contamination. And to reassure the jury that it is possible to discern whether a complainant's evidence had been affected by contamination, a proposition that was not contradicted by Dr Le Page.

[309] We acknowledge these matters are clearer now than they were at the time. As Professor Hayne and Professor Goodman said, scientific understanding in this area has increased markedly in the nearly 30 years since the trial. But the effect of this evidence is something we must take into account when considering whether a miscarriage of justice has occurred.[234]

Similar accounts and timing of contaminating events

[310] We must also address however whether the risk of contamination can be discounted on the basis of the other evidence produced at trial. As noted earlier, one of the factors that persuaded Sir Thomas Eichelbaum that contaminating factors had not led to false accounts was that the complainants' accounts were detailed and, in

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233 It is apparent from the record that Dr Le Page was not present in Court for the cross-examination or re-examination of Dr Zelas. As we discuss above at [246]–[250], Dr Zelas' evidence on the topic of contamination was given during her cross-examination. That may explain why Dr Le Page did not link his evidence to that of Dr Zelas.

234 See above at [89]–[90].

many cases, quite similar.[235] He also noted that in some cases the contaminating events occurred after the relevant complainant's disclosure. Both are true.

[311] However, in relation to the latter point, Professor Hayne produced timelines for each complainant showing when a contaminating factor arose and how that related in time to the evidential interviews, especially those that were played to the jury. The timelines illustrate that, for some of the seven complainants, many of the contaminating factors arose before the first interview or occurred after the first interview but before subsequent interviews in which disclosures were made. Professor Goodman's analysis in relation to complainants 4, 5, 6 and 7 was to the same effect.

[312] In relation to similarities, we do not consider they are such as to justify ruling out the possibility of the accounts of some of the seven complainants being affected by contamination, given there was some parental cross-talk (and communication by parents to children about the matters disclosed in such cross-talk) and some communications between complainants.

Conclusion: contamination

[313] The Court of Appeal in both 1994 and 1999 saw this as an issue that had been properly ventilated at the trial and therefore must have been taken into account by the jury.[236] However, the argument now put to us is that the jury was misinformed by Dr Zelas about the potential impact of factors such as suggestive questioning by parents and cross-contamination from parent to parent or complainant to complainant.

[314] There was a high level of consensus among Professor Hayne, Professor Howe, Associate Professor Brown and Professor Goodman that there were a number of potential sources of contamination in this case. Professor Goodman rated the risk of contamination as "high" in relation to four of the seven complainants. Dr Seymour and Dr Blackwell accepted that there was a risk of contamination but did not consider

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235 See above at [271]. Professor Goodman said similarities in sexual abuse claims could arise from commonality of experience, parental cross-contamination, children sharing information with other children, and commonalities in children's knowledge bases, expectations and source confusion.

236 See above at [268]–[270].

it could be established that there was actual contamination of the seven complainants' evidence, though Dr Seymour conceded in cross-examination there were some instances where there was a connection between answers given by a complainant to suggestive questions from a parent and the answers given by that complainant in an evidential interview.

[315] There is no doubt the risk of contamination was present. The factors discussed above at [61]–[64], which made this case both complex and unique, were significant contributors to that risk. There is also no doubt that some aspects of the issue were explored at the trial. But we are left with the concern that the jury was not fairly informed of the level of the risk.

[316] Dr Goodman, the Crown expert, gave evidence that contamination did affect the trial, and that it had a "profound and pervasive adverse effect". But Dr Zelas' evidence at the trial suggested that the risk was not significant. While she accepted children can be suggestible, she said it was possible to detect an adult's input to a child's evidence and, at least implicitly, that she did not detect it in the complainants' evidence. She gave that evidence despite the fact that, as noted earlier, she herself had some concerns about the parental questioning of complainants 5 and 6.[237]

[317] Two other aspects of Dr Zelas' evidence would also have added to the false sense of reassurance the jury would have obtained from her evidence about the credibility of the complainants' evidence. The first of these is the circular reasoning relating to child behaviours to which we have referred earlier.[238] The second is the evidence she gave to the effect that children are as good as adults at identifying the sources of their memories, which research has confirmed to be incorrect.[239]

[318] As mentioned earlier, Dr Le Page's evidence did address more accurately the risk of contamination with child witnesses and did correctly identify the inability of young children to identify accurately the sources of their memories as effectively as

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237 See above at [256]–[264].

238 See above at [182]–[188].

239 See above at [249], [276] and [305]. See below at [357]–[358], where we discuss the unsuccessful attempt to come to a consensus statement in this Court about what direction should be given to a jury about issues relating to children's memory.

adults can. But we are left with the concern that the jury was still not properly assisted on this point. First, the evidence of Dr Le Page was discursive and these points were not highlighted. Although his evidence was to the opposite effect of that of Dr Zelas on the issue of source monitoring, he did not highlight that difference. Secondly, Dr Le Page did not contradict Dr Zelas' account that there would be tell-tale signs of contamination with the implication that the jury could detect it. Thirdly, the Judge had been quite critical of Dr Le Page's s 23G evidence and had told the jury Dr Zelas was more experienced than Dr Le Page and those comments may well have impacted on the jury's perception of his contamination evidence. We consider that the overall effect of Dr Le Page's evidence was not sufficient to neutralise the impact of the evidence of Dr Zelas.

[319] As we have outlined earlier, the impact of Dr Zelas' evidence was to give the jury a false assurance about the credibility and reliability of the seven complainants. Dr Zelas gave evidence about each of the complainants in terms that would have been understood by the jury as supporting or endorsing their credibility.[240] She did not mention in her trial evidence the concern she had expressed prior to the trial about contamination by parental questioning in relation to two of the complainants so this was not made apparent to the jury.

[320] We do not consider that the fact the jury acquitted the appellant on some of the charges provides any assurance that the contamination risk was well understood by the jury and taken into account in the verdicts. Again there could be many reasons for the not guilty verdicts and it is unwise to speculate.

[321] We conclude that, at least in relation to some of the complainants, there was a substantial risk that the jury was given a false sense of reassurance on the risk of contamination. Absent that, the jury may have found a reasonable doubt about the allegations made by at least some of the complainants. That would have affected the safety of all the verdicts because the evidence of the complainants was mutually supportive as similar fact evidence, so the jury may have been influenced in its verdict in relation to one complainant by the evidence of another complainant in relation to a

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240 See above at [229].

similar allegation. It is in the nature of this case that the undermining of some of the verdicts necessarily calls into question all of the verdicts.

E INTERVIEWS

[322] Our discussion of this topic is brief, given that the conclusion we have reached in relation to s 23G of the 1908 Act resolves the appeal. We are conscious that the experts put in a lot of effort in the preparation of their evidence about interviewing and we mean no disrespect dealing with it only briefly. There was a measure of agreement among the experts that, if contamination had occurred before the interviews to the extent that the interviewee may have incorrectly reported as a remembered fact something that he or she heard from an outside source, such as from parent or another complainant, even a best practice interview would not repair the situation;[241] nor would cross-examination.[242]

Appellant's case

[323] The appellant's case was that the interviews of the complainants did not meet the best practice standards of the day and, more emphatically, do not meet current standards. Among other things, many of the interviews were long, sometimes even in the face of requests from the interviewee to finish the interview. And many of the complainants were interviewed on multiple occasions, which several of the experts stated is now generally regarded as being a factor that can contribute to a risk of contamination.

[324] The submission for the appellant was that the shortcomings in the interviews, when combined with the delay between the alleged events and the interviews and the effect of contamination both prior to the interviews and in between interviews (when there were more than one), raise very real questions about whether the seven complainants' evidence can be treated as reliable. The appeal ground was variously

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241 Dr Seymour and Dr Blackwell did not expressly agree with this statement. And they contested the ecological validity (also known as external validity) of some of the studies relied on by Professor Hayne.

242 Professor Hayne spoke of an experiment in which children were questioned in cross-examination style on an account of an event they had given on videotape. The children changed many of their original answers but were just as likely to change a true answer as a false one. See the discussion above at [278].

argued as: that unreliability led to an unreasonable verdict; that the interview evidence was so unreliable it should not have been admitted at the trial; and that there was a miscarriage because the jury was not adequately assisted by expert evidence about child memory and, in its absence, were led to believe the evidence obtained from the interviews was more reliable than it was.

[325] We deal with the third of these in the next section, under the heading "Memory evidence".

[326] In relation to best practice standards, Ms Irvine (who argued this aspect of the case for the appellant) relied on the evidence of Professor Hayne and Associate Professor Brown.

[327] Professor Hayne and her colleagues undertook an extensive exercise of coding all the questions asked in the interviews, from which Professor Hayne concluded that the interviews in this case involved too many suggestive questions, a failing that can be significant given the suggestibility of children.[243] Some of these suggestive questions were innocuous, but Professor Hayne emphasised that many were abuse-related, i.e. suggestive questions relating to alleged abuse that primed the interviewee to respond in a manner that affirmed that abuse did occur.

[328] The risk associated with abuse-related suggestive questioning may have been compounded by the repeated nature of the interviews. Professor Hayne acknowledged that repeated interviews do not always lead to increased errors, sometimes even increasing the amount of correct information reported by the child. However, when children undergo repeated suggestive interviews the negative effects on accuracy are said to compound across successive interviews.

[329] Professor Hayne produced a timeline which indicated that, on average, the seven complainants were first interviewed 592 days after leaving the Crèche.[244] She

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243 Professor Hayne defined "suggestive questions" as ones that either suggest the answer the child should give or that the questioner expects, or introduces a detail the child has not already given.

244 As most of the offending was said to have occurred while the complainants were attending the Crèche, the delay between the alleged offences and the interviews was at least as long as, and probably longer than, this: see above at [61](c).

said such delays in relation to young children complainants add to the risk of suggestibility both in interview questioning and discussions with parents and others outside the interview environment.

[330] Professor Hayne made other criticisms as well, including: the over-use of directive questions; the failure to use free recall invitations and cued invitations; the failure in almost all cases to tell the complainants that "I don't know" and "I don't understand" are valid answers or that the child could correct the interviewer if the interviewer made a mistake; and the use of props, dolls (including anatomically correct dolls), other toys and diagrams in a way that did not meet best practice standards.[245] She said the interviewers did not present themselves as naïve to the matters in issue and too often indicated they had knowledge of the relevant events from another source (usually a parent).

[331] Associate Professor Brown was also critical of the interviews and interviewers. (Having said that, it is right to record that she praised the interviewers for their warm, supportive and attentive manner.) In assessing the interviews in this case, Associate Professor Brown focused on today's standards, rather than those of 1993. She said there is more training for interviewers now and a twice-yearly accreditation requirement. It appears there was no similar accreditation requirement in 1993. There is also a Specialist Child Witness Interview Guide, published by the Police and Oranga Tamariki | Ministry for Children, which has much in common with similar protocols overseas.[246] Associate Professor Brown expressed similar concerns to those of Professor Hayne. Although she said there were no highly problematic issues that were consistently demonstrated in each of the interviews that could, on their own, prejudice the reliability of the complainants' accounts, she described the general interviewing strategy as "risky" and as interviewer-led rather than child-led.

[332] Associate Professor Brown said the practice of using aids such as dolls and diagrams has changed since 1993 and there is now a consensus that it is better not to use them, or, if they are used, this should only be later in the interview process. She

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245 Dr Seymour told the Court that anatomically correct dolls were used with only two of the complainants and their use did not lead to any new charges against the appellant.

246 There were, however, earlier guidelines in 1992, at the time the interviews in the case were conducted.

said the use of anatomical dolls is not supported in current New Zealand guidelines. She considered that the use of these aids in some of the interviews in this case may have undermined the accuracy of some of the seven complainants' accounts.

[333] Associate Professor Brown said she sometimes reviews interviews for accreditation of the interviewer. She said if she had evaluated the first interviews with each of the seven complainants, she would have signalled concerns and evaluated the interviewers as "not yet competent". Overall, she concluded the interviews fell short of current best practice standards in New Zealand and were not consistent with modern evidence now available to guide how best to support children to give accurate accounts of their experiences while also minimising any possible "undermining influences".

Crown's submission

[334] The Crown argues that there are limits on the extent to which this Court can judge interviews in 1992 by the best practice standards of today, which are themselves evolving. And, in any event, the experts called by the Crown challenged aspects of the methodology employed in Professor Hayne's analysis and disputed a number of the criticisms of the interviews made by Professor Hayne and Associate Professor Brown. Issues relating to the reliability of the complainants' evidence were matters for the jury and the jury was well-informed about the defence criticisms of the interviews. Thus, no miscarriage of justice arose.

[335] Professor Goodman considered that the first interviews in this case tended to fall within best practice norms of the day (adding that, in her opinion, they also largely "withstand the test of time"). But she considered later interviews became more leading and problematic. While she accepted that free-recall questions represent best practice, she indicated that they may not be effective with young children in forensic interviews. Direct questions may be required to obtain evidence of sufficient clarity and specificity for a criminal investigation.

[336] On the topic of repeated interviewing, Professor Goodman said:[247]

> Children often disclose "piecemeal," only recounting part of what happened, with more information disclosed over repeated interviews, which themselves can keep memories alive, especially if memories are strong to begin with. …
>
> Many child abuse professionals feel that repeated interviewing can be important for some children. Research suggests that with repeated interviewing children may add accurate information to their initial reports. If memory is still strong, repeated interviewing of a misleading nature does not necessarily contaminate memory and can actually strengthen accuracy. However, false memories tend to get more elaborated with repeated interviewing as well.

[337] Similarly, Dr Blackwell and Dr Seymour said multiple interview sessions can have a positive influence on memory reports as the "additional retrieval opportunities" may improve the organisation and accessibility of the information. If the subsequent interviews are carried out correctly (in the absence of a biased, suggestive or coerced style), multiple forensic interviews is an accepted and useful process for child sexual abuse cases in recognition of the complexity of the sexual abuse reporting process and the abilities of young children.

[338] Dr Seymour considered the interviews generally met the best practice of the time and were largely consistent with current practice, with some exceptions. In particular, some were too long and the use of toys and props distracted some interviewees and further lengthened the interviews. However, the use of dolls, props and diagrams did not have a significant effect on what the complainants reported in their interviews.

[339] Dr Blackwell agreed with Professor Hayne that suggestive questions were undesirable. But she said these needed to be seen in context: were they abuse-related and did they prompt a new allegation? She accepted there were examples of suggestive questions prompting reports of sexual abuse that had not previously been made but said, having watched the recordings of the interviews, these were limited to four examples involving complainants 4 and 5.

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247 Citations omitted.

How the issue was addressed earlier

Pre-trial

[340] As mentioned earlier, the appellant applied for a discharge under s 347 in relation to a number of the charges he faced.[248] Issues relating to the conduct of the interviews were raised in support of this application. It was unsuccessful.[249]

Trial

[341] The reliability of the complainants' accounts was obviously a key issue at the trial. Two of the interviewers were cross-examined about the conduct of the interviews. Many of the issues raised in the present appeal were raised with the interviewers at the trial. In his closing address, the prosecutor referred to many of the criticisms about the interview process and argued they should be rejected. He added that the defence had the opportunity to test the reliability of the evidence elicited at the interviews through cross-examination of the complainants.

1994 appeal

[342] In the 1994 appeal, counsel for the appellant argued that the evidence of the complainants was unreliable, in part because of the conduct of the interviews. The Court reviewed the evidence of each of the seven complainants and concluded that the conduct of the interviews accorded with the statutory regime for the presentation of evidence in child sexual abuse cases.[250] It said it was within the competence of the jury to assess whether the interviews were fair and the resulting evidence reliable.[251] It concluded there was no miscarriage of justice concerning the

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248 See above at [42].

249 Ruling 4, above n 43.

250 1994 CA judgment, above n 50, at 188.

251 At 178 and 188, referring to *R v Lewis* [1991] 1 NZLR 409 (CA) at 411. In *Lewis*, the Court of Appeal held that although it is open to the defence to suggest evidence inculpating the accused was obtained by suggestive interview techniques, any allegation of that kind is "well within the competence of a jury to assess if they have the advantage of seeing the tapes played as a whole". The Court said that in *Lewis* there was a certain degree of "coaxing", but whether that led to unreliable allegations was "essentially a matter which a jury should be well capable of evaluating". In the 1994 CA judgment, above n 50, the Court of Appeal said the holding in *Lewis* bore repeating, and that the jury listened to many hours of tapes, putting them in a position to assess the "spontaneity and genuineness" of the complainants' evidence: at 178.

nature of the interview process or the evidence obtained from that process.[252] The Court also rejected an argument that the verdicts were unreasonable because of doubts about the credibility of the seven complainants' evidence.

1999 appeal

[343] One of the points founding the reference back to the Court of Appeal under s 406(a) of the Crimes Act was that there had been changes in the practice of interviewing children in relation to sexual abuse claims since 1992. Expert evidence in support of the appeal made similar points to those raised in the present appeal. Many of the same alleged deficiencies in the interviewing process were canvassed. The Court was not satisfied that there was anything in the arguments made in the 1999 appeal that was not before the Court of Appeal in 1994 and before the jury at the trial.[253]

Eichelbaum inquiry

[344] Sir Thomas Eichelbaum reviewed the interviews in some depth, with advice from two experts appointed to assist the inquiry. He concluded that the interviewing was of a high standard for its time and even by the standards applicable in 2003 was of overall good quality.[254]

Our assessment

[345] As is apparent, there is disagreement among the experts as to whether the interviews met the best practice standards of the day and/or current best practice standards. We do not intend to form a view on either. Answering the question "did the interviews meet the standard?" does not resolve the questions facing an appellate court, namely, "was the verdict unreasonable?" or "did a miscarriage of justice arise from the way the interviews were conducted?". It cannot be said that, if the standard is met, there is no risk of a miscarriage; nor can it be said that non-compliance with the standard will mean a miscarriage has occurred. An appellate court must consider the evidence of each complainant individually, in light of the other evidence before

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252 At 194.
253 1999 CA judgment, above n 84, at [57].
254 Eichelbaum Report, above n 86, at 109.

the jury and the conduct of the trial before making an individual assessment. Having said that, a departure from the best practice standards will still be a concern and will be a relevant consideration when addressing whether a miscarriage occurred.

[346] The standards of 1992 were not, and current standards are not, black and white. Indeed, Associate Professor Brown pointed out that the current Specialist Child Witness Interview Guide provides broad guidance, but is not prescriptive about how to elicit children's reports. There is an emphasis on training, leading to accreditation.

[347] The large number of interviews in the present case was problematic. As noted earlier, in relation to the seven complainants, complainant 5 had five interviews and complainant 6 had six.[255] All but one of the other complainants had three interviews. Although some of the experts acknowledged that repeated interviews (properly conducted) can positively influence memory reports, Professor Hayne and Professor Goodman both highlighted that repeated interviews increase the risk that false memories get more elaborated and any inaccuracies may compound. This is particularly so where suggestive questioning is involved.

[348] It was clear when watching the interviews that some of them were too long, given how young the complainants were when interviewed. At times, the interviewer persisted despite clear indications from the complainant that he or she wanted to finish the interview.

[349] There were also instances where questioning at an interview was problematic. For example, complainant 4's allegation relating to being urinated on by the appellant was preceded by some leading questions by the interviewer.[256] And the allegation by complainant 6 that led to the appellant's conviction of indecent assault involving touching the complainant's vagina with his penis was made after the inappropriate use of an anatomically correct doll. In that instance, we think the use of the doll did affect the complainant's testimony, despite Dr Seymour's view to the contrary.[257]

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255 These were the two complainants referred to in the 28 August 1992 letter.

256 The appellant was convicted on a charge of doing an indecent act on a girl under 12 years of age in relation to this: see above at [46](d).

257 See above at n 245.

[350] The issues relating to the interviews were intertwined with those relating to contamination. As noted earlier, there was a measure of agreement between the experts that if there was contamination of such a scale that the child was unable to separate actual memories from learned memories, this would not be remedied in an interview, no matter how good it was. And Dr Seymour accepted in cross-examination that there were indications in relation to complainants 2, 5, 6 and 7 of a connection between the answers given to suggestive questions asked by parents and aspects of the accounts given by the respective complainants in their interviews.

[351] Having already concluded that a miscarriage occurred in this case, we do not think it is productive to take this issue further.

F MEMORY EVIDENCE

[352] The essence of the appellant's case on this topic is that the jury required assistance to understand the working of children's memories. Not only did the jury not get this assistance, but it was misled on some matters about memory, giving it an incomplete or inaccurate picture. Because this issue is not determinative, we make a few observations on the matters in issue but do not develop these points in any detail.

[353] The question of whether, and if so, in what circumstances, expert evidence on memory should be admitted in a jury trial if the trial were held today is an issue that may come before the Court in the future. We do not wish to express a view on it in the present case where the trial was, in fact, nearly 30 years ago and the law of evidence that applied was the law as it was before the 2006 Act came into effect.

[354] We do however acknowledge that there were aspects of the evidence on memory at the trial that were of concern. For example, the jury was told by Dr Zelas that:

(a) Children are more likely to provide more information when asked direct questions. Professor Hayne said this should have been qualified by the observation that the increased detail comes with decreased accuracy. (Dr Zelas had said direct questioning does "not lead to significantly more inaccurate answers".)

(b) Children are as good as adults at identifying the sources of their memories.[258] As noted earlier, Professor Hayne said this was incorrect.[259] The correct position is that children are much more likely than adults to confuse what they have heard or been told with their actual experience. She said research since the time of the trial has established that children can report false information about an event as if it happened to them, based on extremely limited and passive exposure to the information.

(c) It is difficult for children to provide spontaneous and plausible accounts of events they have only heard about.[260] Professor Hayne said this was also incorrect.

[355] These matters add to the concerns we have already expressed about the evidence Dr Zelas gave at the trial and the concerns about contamination of the complainants' reports in the present case.

[356] During the hearing, we asked the experts to produce a statement of principles that could be given to a jury, sitting today, in a case like the present case, to help them understand the issues as to the reliability of children's memories and reports of those memories. After some discussion, it was agreed all experts would confer and attempt to produce a consensus statement, or at least a single statement in which differences were flagged.

[357] In the end, the experts called by each side produced markedly different statements. No consensus was reached. That of the Crown's experts was similar to the content of reg 49 of the Evidence Regulations 2007, which sets out a direction that can be given to a jury in a case in which a witness is a child under 6 years of age. That of the appellant's experts was considerably longer and more detailed and referred to a number of potential frailties in children's evidence. It is clear that, even today, there

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258 We set out more fully the contents of Dr Zelas' evidence on this point above at [249].
259 See above at [276].
260 See the quoted excerpt of Dr Zelas' evidence above at [247].

is still debate among memory experts about the reliability of children's memories and their reports of events, and the factors affecting that reliability.

[358] Before leaving this topic, we record that the appellant objected to some of the evidence given by Dr Seymour and Dr Blackwell on the subject of memory, on the basis that they were not qualified to give such evidence.[261] In support of his objection, the appellant adduced evidence from Professor Howe, which was countered in some respects by evidence from Professor Goodman.

[359] The question of what is required to qualify a witness as an expert in memory has arisen in a number of recent Court of Appeal decisions.[262] However, those cases consider the issue in the context of the 2006 Act, whereas the current appeal is governed by the law as it was before that Act came into force.[263] Counsel's arguments about the issue were predicated on an assumption that the 2006 Act was the applicable law. All of this means that this is not a good case for this Court to address the issue. In addition, the evidence under challenge has not proved to be important to the outcome of the appeal. In those circumstances, we do not determine the issue, nor do we resolve the other objections to the evidence of Dr Seymour and Dr Blackwell.

G UNFAIR TRIAL ISSUES

[360] As mentioned previously, it was submitted for the appellant that an unfair trial occurred on several grounds which, singly or in combination, caused a miscarriage of justice under s 385(1)(c) of the Crimes Act. Below we address the three grounds raised by the appellant: the claimed sanitisation of charges, limitation of the defence's ability to play tapes favourable to its case (namely those tapes containing more extraordinary allegations), and the imbalance in the materials retained by the jury for deliberations. We then address briefly another issue that emerged in argument but was not pressed by counsel for the appellant: the medical evidence at the trial.

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261 The arguments about the necessary qualifications to give memory evidence in relation to Dr Seymour and Dr Blackwell applied equally to Dr Zelas. Dr Zelas accepted she had done no memory research "other than reading other people's research".

262 See, for example, *M (CA68/2015) v R* [2017] NZCA 333; and *P (CA470/2017) v R* [2020] NZCA 304.

263 See above at [81] to [86].

Sanitisation

Appellant's case

[361] Mr Harrison argued that the 28 charges in the indictment did not reflect the extent of the alleged offending raised during the evidential interviews and did not capture the most serious allegations.[264] For example, he pointed to the fact that some of the complainants alleged that Mr Ellis defecated — not just urinated — on their faces and clothing, but none of the charges reflected those allegations. And he also referred to the allegations by complainant 5 that Mr Ellis and 19 others sodomised him and penetrated his anus with sharp sticks and that burning paper had been put up his anus.

[362] Mr Harrison argued that the charges selected by the Crown were all allegations in respect of which there would be no expectation of corroborating evidence, such as eyewitness evidence of faeces on the head/clothes or obvious signs of injuries or physical signs of distress.[265] This pre-empted any defence challenge based on lack of corroboration. In addition the "sanitisation" meant the Crown presented a misleading picture to the jury. In relation to the allegations by complainant 5 referred to above, it could have been expected that a parent or Crèche employee would have noticed evidence of burn marks, having a stick up the bottom,[266] and sodomy. If those allegations had been true, complainant 5 would have had obvious injuries and would have sought medical assistance.[267]

[363] The essence of the appellant's case on this aspect of the appeal is that the "sanitisation" of charges was unfair and encouraged the jury to ignore the more serious

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264 The appellant was committed for trial on 42 charges involving 20 children but only 28 charges involving 13 complainants were included in the draft indictment: see above at [41]–[43].

265 The appellant says the defence established at trial that none of the complainants had ever come home from Crèche smelling of faeces.

266 We note, however, that the appellant was charged with one count of indecent assault in relation to complainant 3 on the basis that the appellant "touched" the child's anal area with a stick: see above at [46](c). The appellant was acquitted on this count. The allegation made by complainant 3 that led to that charge was that sticks were inserted up the child's bottom. As we note above at n 65, in relation to allegations of penetration, the Crown opted to charge the appellant with indecent assault rather than sexual violation.

267 Professor Elder's evidence in this Court was that there would have been obvious signs of injury if these acts had happened as alleged.

or fantastical allegations. The appellant's case is that this led to an unfair trial and occasioned a miscarriage of justice.

Crown's submission

[364] Mr Billington said the prosecutor's decision on which charges to pursue followed the *Prosecution Guidelines* then in force, which required consideration of evidential sufficiency and, if that was established, a conclusion that it was in the public interest to proceed.[268] He argued that some allegations did not have sufficient evidential foundation to justify prosecution, some children were too young or their parents did not want their children to go through the trial process and some charges (against other Crèche workers) were dismissed prior to the trial.[269] He also argued that, if charges that relied on the more fanciful allegations had been pursued, the point might then have been taken that this was oppressive. And discharges under s 347 may well have resulted.

1994 appeal

[365] Sanitisation was not an issue in the 1994 appeal but the Court did observe, in another context, that the fact that there were charges involving only a small number of the 118 children interviewed pointed to "a responsible winnowing-out process".[270]

1999 appeal

[366] In the 1999 appeal, the Court of Appeal accepted it could be said there had been "a degree of 'sanitising' by the Crown".[271] But, it concluded:[272]

> There was however no suppression of possibly relevant evidence in this respect — all was known and available to the defence at the time of trial. Whether or not a more liberal application of the collateral issue rule would have been appropriate in the light of contemporary knowledge, there was no undue restriction placed on the defence as it was conducted at trial. That apart, the extent to which investigation into other issues could properly have been undertaken clearly raises problems. From a practical viewpoint, it would probably be sufficient simply for the bizarre allegations to be made known (as

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268 Crown Law | Te Tari Ture o te Karauna *Crown Law Office: Prosecution Guidelines* (Wellington, 9 March 1992) at [3].
269 See above at [42].
270 1994 CA judgment, above n 50, at 179.
271 1999 CA judgment, above n 84, at [78].
272 At [78].

> several in fact were). It is their very nature, and lack of apparent reality, which demonstrates the point sought to be made.

Our assessment

[367] We do not consider that the selection of charges by the Crown occasioned a miscarriage of justice. The Crown was required to comply with the *Prosecution Guidelines* in force at the time and there is nothing to indicate that did not occur. It seems to us that the essence of the appellant's complaint is that the jury did not get a balanced picture of the complainants' testimony, which may have given the jury a misleading impression of the complainants' accounts (or, at least, of the accounts of one or more of the complainants). We see that concern as being better addressed in relation to the next ground of appeal, to which we now turn.

Failure to play all tapes of evidential interviews at trial

Appellant's case

[368] The appellant's case under this head builds on the sanitisation point. Mr Harrison argued that the sanitisation of charges meant that the tapes of evidential interviews containing the most extreme allegations were not played to the jury as part of the Crown case. He said this concern was compounded by the pre-trial ruling of the trial Judge to which we refer below.

[369] Mr Harrison argued there were a number of significant matters disclosed by complainants in evidential interviews that were not seen by the jury. Some examples follow.

[370] Three complainants — complainant 4, complainant 5 and complainant 6 — all implicated the appellant's mother in the offending. In the evidential interviews seen by the jury, it was apparent that some of the complainants had alleged that Mrs Ellis was present, or in the vicinity, during some of the offending. But in the evidential interviews not seen by the jury, considerably more serious allegations emerged. For example, complainant 5 said Mrs Ellis put burning pieces of paper and sticks up his anus and did the same to other children. He also alleged that Mrs Ellis hung the

complainants in cages suspended from the roof of a building.[273] Complainant 6 said Mrs Ellis kicked and hit her.[274] She said this happened at Mrs Ellis' house. Mrs Ellis was not charged with any offending.

[371] As mentioned earlier, complainant 5 said in his third interview that he was sodomised by multiple perpetrators — including the appellant — a significant number of times.[275] In addition, complainant 5 named for the first time in his fifth interview two workers at the Crèche, neither of whom were ever the subject of a charge, as principal offenders in a large group of people whose members thrust needles up his penis until it bled and then repeatedly pushed sticks and burning paper "up [his] bum".[276] A number of other Crèche workers were said to have been present when this happened.[277]

[372] Complainant 6 said a person she called "Andrew" touched her vagina and bottom with a knife. Later, she said other Crèche teachers knew that the appellant did stuff to children. In another interview, complainant 6 said a Crèche teacher touched her vagina with a knife and that the knife went in her vagina.

[373] Complainant 7 spoke of the appellant putting his penis in the mouths of children in the toilet at the Crèche and added that the supervisor knew this because

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273 See above at n 225. Complainant 5 said Mrs Ellis hung five complainants in large cages while the appellant and other Crèche workers watched. Mrs Ellis was said to have been part of a group of adults who took the complainants through a trap door (and a tunnel and secret door) to access the room where the cages were located.

274 We note that in complainant 4's third interview, she said the appellant's mother kicked both complainant 4 and complainant 6, which "hurt". The third interview was played to the jury as part of the Crown case.

275 He said the appellant and 19 friends (including "Spike" and "Bolderhead") sodomised him and that it happened about 40 times. Complainant 5 also alleged that as part of the same event the appellant tied up several of the complainants and made complainant 5 ingest pills, putting him to sleep. When complainant 5 awoke, he said he was taken to a hospital where he said the appellant put needles in his hands (and in the hands of complainant 6) while the appellant and his friends laughed and took photographs. Aspects of the offending against complainant 5 and other children were said to have occurred underground in part of a building accessible by trapdoor. It was in that building where the appellant and his 19 friends allegedly congregated to abuse complainant 5, as well as other children. None of these allegations was played to the jury.

276 The trial Judge described the allegations in complainant 5's fourth and fifth interviews as "bizarre and wilder type of allegations which do not have any firm base in common human knowledge or experience of child sexual abuse or even of perverted criminal activity": Ruling 3, above, n 42, at 14.

277 Complainant 5 had five evidential interviews: only the second and fourth were played to the jury as part of the Crown case. Portions of the first evidential interview were also played at the request of the defence.

when he was doing it, the supervisor peeped around the corner. Complainant 7 also alleged that significant sexual offending occurred at the Christchurch City Council premises. She referred to the appellant taking her (and other Crèche children) into a big room with escalators where "secret touching" happened in the middle of the room, while other people were there, working at their desks. After some prompting, she said the secret touching included touching her vagina and bottom. She also said she told other teachers at the Crèche that these events had taken place.

[374] Mr Harrison expanded on his complaint about some evidential interviews not being seen by the jury to cover the fact that the co-accused Crèche workers had been discharged before the trial and that Mrs Ellis was not charged at all.[278] Prior to their being discharged, the Crèche workers had successfully applied for severance of their trial from that of the appellant, which Mr Harrison also submitted created unfairness.[279] He said the allegations made by the complainants in totality were such that the appellant should have been on trial with his three co-accused Crèche workers and his mother sitting alongside him, facing all of the allegations, including those described above. He went so far as to say that the appellant could not get a fair trial if he faced trial on his own.

Crown's submission

[375] Mr Billington argued that no miscarriage arose. He said all of the evidential interviews were disclosed and the full scope of the allegations were known to the defence, including any more bizarre or fantastical allegations. The defence was able to, and did, cross-examine the complainants about the allegations that were not the subject of specific counts. In addition, a number of evidential interviews from complainants that were not relied upon by the Crown (including in several cases more than one interview of the particular complainant) were played at the trial at the request of the defence. The trial Judge facilitated this process, through a pre-trial ruling (discussed below), which would "fairly allow the defence to raise its contention that the evidence of the particular child complainant is not reliable".[280]

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278 See above at [42].
279 Ruling 1, above n 47.
280 *R v Ellis* HC Christchurch T9/93, 23 April 1993 (Williamson J, Oral Judgment (No 6)) [Ruling 6] at 7.

[376] Mr Billington argued this meant the jury was not deprived of knowing about the allegations made in the evidential interviews that did not form part of the Crown case, including the fact that more bizarre or unusual allegations had been made by several of the complainants. The defence pointed out to the jury that there were no adult witnesses to the alleged abuse and it was inconceivable that there was no physical evidence or medical assistance sought for the injuries described.[281]

[377] Mr Billington said if the evidential interviews had all been played, there may have been a ground of appeal based on irrelevant and prejudicial evidence being before the jury. He also suggested the evidence in the unplayed evidential interview recordings could have been used as similar fact evidence if the interviews had been played at the trial.

Pre-trial

[378] In a pre-trial application, the trial Judge ruled that the Crown was not required to present all of the complainants' evidential interviews (and therefore allegations) to the jury. Rather, it was obliged to present only the tapes of the evidential interviews on which it relied.[282] In addition, it was obliged to make available to the defence the tapes of the other evidential interviews so that the defence could determine whether or not to use the other tapes or portions of them in cross-examination of the Crown witnesses.[283] The Judge ruled that the defence was permitted, if it wished to cross-examine on any matters in a particular evidential interview not produced by the Crown, to ask for the tape of that evidential interview to be played and "subject to any matters of excision and relevance", the tape would be played in its entirety.[284]

[379] Mr Harrison argued before this Court that the pre-trial ruling created a tactical dilemma for counsel and did not work well in practice. The defence did, however, successfully apply for some portions of other evidential interviews to be played at the

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281 This submission by the defence was highlighted by the trial Judge in his summing up.
282 Ruling 6, above n 280, at 6.
283 At 6.
284 At 6–7.

trial.[285] However, although the jury had with them in the jury room the transcripts of the evidential interviews played as part of the Crown case, that was not the case in relation to the portions of the other evidential interviews played at the instigation of the defence.

1994 appeal

[380] In the 1994 appeal, the Court of Appeal ruled that the trial Judge was right to make that ruling and that no prejudice to the defence resulted.[286]

1999 appeal

[381] In the 1999 appeal, the Court was not persuaded that the effect of the pre-trial rulings was unduly restrictive or that a miscarriage of justice resulted.[287]

Our assessment

[382] We begin by dealing with Mr Harrison's contention that the appellant could not get a fair trial unless he faced charges reflecting all the allegations made by the complainants and unless his fellow Crèche workers and his mother were also charged and dealt with in the same trial. We do not accept that. We do not consider there is any proper basis to criticise the trial Judge's decision to sever the charges against his co-accused and subsequently to discharge his co-accused. Once those decisions were made, they were essentially irrelevant to the conduct of the appellant's trial. If he had wished to, he could have made the jury aware of the allegations against his co-workers and his mother; they did not need to be fellow defendants for that to occur.

[383] We have addressed the point about the appellant not being charged with all the alleged offending in the discussion of the sanitisation point above.

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285 For the purposes of the appeal to this Court, the parties filed a joint memorandum with a schedule detailing the evidential interviews for all the complainants who were the subject of charges. Additionally, the schedule identifies which tapes were played to the jury and whether they were played as a part of the Crown or defence case. The schedule records that the following tapes (in whole or in part) were played by the defence: (1) complainant Y's second, third and fourth interviews; (2) complainant U's first and second interviews; (3) complainant 5's first interview; and (4) complainant T's second interview. See also the discussion above at [45]–[47].

286 1994 CA judgment, above n 50, at 179–180.

287 1999 CA judgment, above n 84, at [79].

[384] There is more substance in the argument that the appellant was prejudiced because not all the evidential interviews were played to the jury.

[385] We have outlined above Mr Harrison's submission about the more extreme allegations that were made in interviews by the complainants that were not played at the trial. But to balance that, it is necessary to record that some interviews in which extreme allegations were made *were* played to the jury. For example, the jury was aware of the following allegations:[288]

(a) Complainant 3 said: he was sexually abused by the appellant in a public park (although his evidence was uncertain as to what happened in the park); that he had sticks inserted into his bottom; that a group of people including persons named Spike, Boulderhead, Yuckhead and Stupidhead also abused him; that the Crèche children had poos put on them with a stick; and that the children hit each other's bottoms with spades at the instigation of the appellant (observed by a large crowd of people). Complainant 3 said he told one of the Crèche workers about aspects of the offending, parts of which the worker was said to have witnessed (but did not participate in).

(b) Complainant 4 said the appellant put his bottom on another complainant's mouth and made her drink his "pooze". She also alleged that the appellant: took her to a holiday house where he put her into a bed in which the appellant had defecated; touched her bottom with a needle, making her bleed; and sometimes took children on walks and on one occasion bought a hot pie and "smashed" it into complainant 4's face, resulting in burns. She also said that the appellant's mother kicked both complainant 4 and another complainant.

(c) Complainant 5 made strange allegations, some of which resulted in charges and some of which did not. He said he was made to eat the appellant's faeces and that the children were forced to sexually touch

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[288] Some of these seemingly bizarre allegations formed the basis of charges, while others did not. But they were before the jury and provided a base for the submissions made by the defence about contamination and unreliability.

each other while the appellant and others watched. Complainant 5 also relayed the story of the "circle incident" in his fourth interview. He said he was taken to a house along with other children. People stood around a circle playing guitars and dancing while the children stood naked at the centre. Crèche teachers pretended to have sex and the appellant and his mother took photographs. The unknown group of dancing people had knives and pretended they were cowboys. They all wore white suits and had chains around their necks. Complainants were told to physically harm one another (kicking, hitting and punching), and if they refused, they were threatened with being stabbed or killed. Many of the unknown persons looked Asian. Needles were inserted into complainant 5's penis. All of the boys' penises were hurt but not all the girls' vaginas were hurt. Complainant 5 also said the appellant and the three co-workers who were originally charged alongside the appellant tied up several children in a "big ball", put them in the oven and turned it on. There was smoke in the oven. The appellant eventually "grabbed" the children before they were burnt and "pretended to eat" them from a plate. The appellant told complainant 5 he would kill his mother and father.

(d) Complainant 7 said that the appellant hit and kicked her and other children.

[386] Relevant too is that some of the fantastical allegations found in tapes not played to the jury were nevertheless repeated by the complainants at the trial. Taking some of the examples mentioned by Mr Harrison (above at [370]–[373]), we note complainant 5 said in cross-examination that the two previously-unnamed Crèche workers referred to above had sexually abused the complainant, and that he was put into a cage by the appellant and his friends. Similarly, complainant 6 said in cross-examination that a Crèche worker inserted a (plastic) knife into her vagina. Complainant 7 said in response to questions from Mr Harrison that she remembered telling one of the Crèche workers about the appellant abusing her. The Court of Appeal noted this in 1994 when it observed how a number of complainants "readily admitted

in cross-examination to making the more bizarre allegations about sexual activity described in tapes not shown to the jury".[289]

[387] This Court recently considered a situation with some parallels in *Haunui v R*.[290] In that case, Mr Haunui was charged with drug offending after the car he was driving was searched and drugs were found. The passenger in the car (Ms X) was not charged. The Crown case was that Mr Haunui was solely responsible for the drugs. At the trial, Mr Haunui's counsel sought to cross-examine a Police witness on text messages derived from Ms X's phone which indicated she had been dealing in drugs. That would have supported Mr Haunui's case that it was Ms X and not he who was responsible for the drugs. The Crown objected successfully. The Court of Appeal found the objection should not have been upheld, but that no miscarriage had resulted from the exclusion of the evidence.

[388] This Court found that the exclusion of the evidence relating to Ms X's text messages rendered the trial unfair. The Court said:[291]

> … without the text messages, the case was presented to the jury on a basis (primarily that the methamphetamine was the appellant's) which was questionable on the evidence known to the Crown. Further, the Crown knew that the evidence was reliable, in the sense that it was authentic, and that without it the jury was being presented with an incomplete picture of material events leading up to the vehicle stop. Nonetheless, the admission of the evidence was resisted. Against this background, it was unfair that the appellant was prevented from placing before the jury evidence supportive of his defence.

[389] The Crown attempted to counteract any perceived unfairness by submitting that the jury could have reached the same verdict by finding Mr Haunui guilty based on joint possession. But the Court rejected that submission. The joint possession line of analysis received only cursory treatment at trial, meaning the defence lacked a fair opportunity to address it.[292]

[390] The parallels between *Haunui* and the present case are limited, however. In the present case, the Crown was not objecting to the interviews containing evidence

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289 1994 CA judgment, above n 50, at 179.
290 *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189.
291 At [77].
292 At [78]–[81].

inconsistent with its case (that the seven complainants' evidence was, on the whole, sufficiently reliable to ground guilty verdicts) from being played. Nor was it seeking to prevent the complainants from being cross-examined on allegations made in interviews that were not played. And the Crown case was not that *everything* the seven complainants said was reliable; it was accepted that there may be inaccuracies, exaggeration and "magical thinking" in aspects of the complainants' accounts. So, the Crown was not presenting its case to the jury on a basis that was "questionable on the evidence known to the Crown" as was the case in *Haunui*.

[391] There remains a question as to the fairness of the ruling that required the defence to request the playing of interviews during the trial. The prejudice appears to have been limited, however, by the practice that was adopted at the trial. In its judgment in the 1994 appeal, the Court of Appeal summarised this as follows:[293]

> There was discussion between counsel at the *outset of the trial* about the showing of the other tapes (called the defence tapes), all of which were made available by the prosecution, and the entries in the Crown book demonstrate that the defence was able to have played those parts it wanted in order to cross-examine. … After being taken through the Crown book and shown the relevant entries, appellant's counsel accepted that in general the defence was not denied the opportunity of playing whatever tapes they requested, but contended that his counsel at trial had felt constrained by the Judge's insistence on relevancy from seeking more extensive playing …

[392] There is no record of a request by the defence for a tape to be played being refused by the trial Judge. And the record shows that the tapes requested by the defence were played in sequential order as the Crown tapes were played and before cross-examination of the relevant complainant occurred. But, with the benefit of hindsight, we think it would have been preferable to have had a process involving both counsel and the Judge deciding in advance which interviews (or portions of interviews) would be played and ensuring that there were transcripts available for all the interviews the jury saw.

[393] It seems that the Judge did not want to prolong the trial by allowing every interview to be played, no matter how irrelevant. In fact, playing all the interviews could have been prejudicial to the appellant, given the serious allegations made in

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[293] 1994 CA judgment, above n 50, at 179 (emphasis added).

some of the unplayed interviews. But we accept there was some disadvantage to the defence in the solution adopted, in that the ruling seemed to lead defence counsel to believe the number of tapes that could be requested was very limited. However, we are not persuaded that this was such as to cause a miscarriage, given that many of the more fantastical allegations were before the jury and the defence was given the opportunity to ask for the interviews in which other allegations were made to be played.

[394] This issue may not have arisen if there had been fewer interviews. As highlighted earlier, the number of interviews some of the complainants underwent in this case was problematic.[294] The fact that there were so many interviews added to the complexity of the trial in the present case. The limitation on the number of interviews played to the jury was one aspect of this.

Materials provided (or not provided) to the jury

Appellant's case

[395] The appellant also raises concerns about the materials that were (or were not) provided to the jury during their deliberations. The appellant submits this led to a lack of balance and an unfair trial. The specific challenges are:

(a) the jury received transcripts of the evidential interviews that had been played by the Crown, but not the transcripts of the interviews played by the defence;

(b) the jury did not receive the notes of evidence; and

(c) the jury was unfairly permitted to use the Chart prepared by the Crown that summarised the behaviours experienced by the complainants.

[396] We have dealt with the Chart earlier in this judgment and do not say more about it here.[295]

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294 See above at [328], [336]–[337] and [347].
295 See above at [203]–[210].

[397] The transcripts of the complainants' interviews that were part of the Crown case were provided to jurors as the recordings of the interviews were played, to assist jurors in understanding what the relevant complainant was saying in the interview.[296] Jurors were permitted to retain their copies of the transcripts, so they had them in the jury room during their deliberations.[297]

[398] As mentioned above, the transcripts provided to the jury were those of the complainants' evidential interviews that were played by the Crown but not of those played at the request of the defence. Mr Harrison argued that the failure to provide the jury with the notes of evidence and the transcripts of the evidential interviews played at the request of the defence meant that there was no provision of balance during deliberations. This, coupled with the jury being given the Chart, meant the trial was unfair. In particular, the jury did not have access to the notes of evidence where the defence's rebuttal to Dr Zelas' evidence was outlined.

[399] During the hearing, we asked Mr Harrison why the transcripts of interviews (or portions of interviews) played at the instigation of the defence were not available to the jury. He said argument about what portions of particular interviews could be played at the request of the defence occurred during the trial and just before the relevant interview was played, and there was not time to have the relevant transcript edited and provided to the jury as the portion of the interview was played. This seems surprising, as the transcripts of the full interviews already existed and it should have been only a matter of selecting the relevant pages and making copies for each juror. Even if this could not be done before the interview was played, there seems no reason why it could not have been done before the end of the trial so the edited transcript could be available to jurors for their deliberations.

[400] In relation to the notes of evidence, Mr Harrison did not suggest that the Judge ruled against the jury having these. Nor did he suggest that any request had been made to provide them to the jury. Rather, the trial appears to have proceeded according to

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296 Mr Harrison did not take issue with jurors having the transcripts while the recordings were played. His concern related to what jurors had with them in the jury room during their deliberations.

297 Jurors were also provided with a copy of the indictment, the exhibits produced during the trial (photographs, plans, complainants' drawings, lists, records, Crèche books, the complainants' keep safe books, the schedules and charts), written statements of the appellant that were produced in evidence and the Chart.

the practice of the time, when it was customary for the notes of evidence not to be provided to the jury.

Crown's submission

[401] Mr Billington argued that the provision to juries of transcripts of evidential interviews played at a trial was routine in the 1990s. It was appropriate here because some of the tapes were indistinct or unclear and some of the tapes were long (in excess of an hour) and the trial was a lengthy five-week trial.

[402] Mr Billington noted the trial Judge said in his summing up: "these transcripts are only an aid to your assessment of the evidence. You must not let yourselves be persuaded into accepting the transcript is correct just because it is there." He said it was clear the jury took this direction seriously because they asked for two tapes to be replayed during their deliberations, and were also read the relevant portions of the relevant complainant's examination-in-chief and cross-examination.

[403] In relation to the notes of evidence, Mr Billington said it was not the practice to provide these to the jury as is common practice now. He said the change of practice does not mean the earlier practice led to miscarriages. In the present case, the trial Judge's summing up was lengthy and presented a balanced picture of the evidence as well as the Crown and defence cases to the jury.

Pre-trial

[404] In a pre-trial ruling, the trial Judge ruled that transcripts from the evidential interviews played at the trial could be provided to the jury and would assist their understanding of the evidence.[298] The appellant had argued that jurors should not be allowed to have or retain the transcripts. No differentiation was made at that stage between those played as part of the Crown case and those played at the request of the defence. Although not expressly stated, it seems the ruling envisaged that jurors would retain the transcripts after the interview had been played and would therefore have

[298] *R v Ellis* HC Christchurch T9/93, 21 April 1993 (Williamson J, Oral Judgment (No 5)) at 11.

them during the cross-examination of the relevant complainant and in the jury room during the jury's deliberations.

1994 appeal

[405] The Court of Appeal found the decision to allow the jury to have the transcripts in the jury room was appropriate and noted the Judge's ruling had not precluded the transcripts of the evidential interviews played at the request of the defence being provided to the jury. It added:[299]

> However, the fact remains that the jury did not have the transcripts of the defence tapes; nor did they have a record of the cross-examination. We accept that this could have resulted in an advantage to the Crown, but its effect is a matter of degree. In the overall context of the case we do not think it effectively prejudiced the accused, particularly as in instances where the defence was able to make real inroads in cross-examination there were verdicts of not guilty.

1999 appeal

[406] These issues did not arise in the 1999 appeal.

Our assessment

[407] As Mr Billington pointed out, the practice of providing the jury with the notes of evidence during the jury's deliberations began well after the appellant's trial. There is no indication that anyone asked the Judge to give the jury the notes of evidence or that he made any ruling that the notes of evidence not be provided to the jury. Rather, the practice of the day was followed.

[408] Nor, for the reasons set out above, is there any indication that the Judge ruled that the jury could not have transcripts of the evidential interviews that were played at the request of the defence.

[409] However, the position was that the jury had the transcripts of interviews played as the evidence-in-chief of the complainants but did not have any counter-balancing material.

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299 1994 CA judgment, above n 50, at 191.

[410] The Court of Appeal observed in its 1994 judgment that the provision of transcripts to assist the jury "has now become commonplace, with both audio and video-recorded evidence adduced in criminal trials".[300] The Court was referring there to having the transcript while watching the recording of the interview, but not retaining the transcripts during deliberations. In 1995, the Court of Appeal described allowing the jury to retain the transcript during deliberations, as in the present case, as less common than allowing jurors to have transcripts while the recorded interview was played.[301] In an earlier 1995 case, the Court of Appeal said that a situation similar to that which arose in the present case (the jury had the transcripts of interviews with multiple child complainants but did not have a transcript of the cross-examination or the notes of evidence) did not give rise to any concern.[302]

[411] However, in 2013 the Court of Appeal observed:[303]

> In earlier times, although a transcript of the complainant's video was normally available to the jury, a transcript of the remainder of the complainant's evidence (cross-examination and re-examination), and the other evidence in the trial was not generally available to the jury. All this changed some time ago. It is routine for juries to have available a transcript of the entire oral evidence given at the trial as well as other documentary assistance.

[412] Authorities from the 1990s made it clear that balance was required when recordings of interviews were replayed during jury deliberations or part of the evidence was read back to the jury. Clear directions were required, and it was necessary to ensure the relevant parts of the cross-examination were drawn to the jury's attention. Indeed that course was followed in the appellant's trial. The jury asked to view parts of the interviews of complainant 3 and complainant 6. The Judge allowed this but ensured that balance was provided by reading extracts from their trial evidence, including the cross-examination.

[413] In *Webby v R*, the Court of Appeal drew a parallel between a jury watching a recorded interview again during deliberations and the provision of a transcript to a jury

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300 At 190.
301 *Webby v R* CA277/95, 22 September 1995 at 6.
302 *R v S*, above n 116, at 680.
303 *E (CA799/2012) v R* [2013] NZCA 678 at [57].

during deliberations, suggesting that the need for balance was the same in both situations.[304]

[414] We consider that, as the jury had available to them transcripts of some of the evidential interviews played at the trial, they should have had the transcripts of all of them, whether they had been played at the instigation of the Crown or the defence. Similarly, they should have had before them information to counter-balance the transcripts which were the record of the complainants' evidence-in-chief. A transcript of the complainants' cross-examination would have done this. If the trial were held today, the jury would no doubt be given a copy of the notes of evidence as well as all transcripts. We consider that this is not a matter of applying today's standards to a trial that occurred many years ago. It should have been apparent at the time of the trial that such balance was required.

[415] The lack of balance in the materials provided to the jury was an unsatisfactory aspect of the trial and adds weight to our earlier conclusion that the appeal should be allowed. But we would not have allowed the appeal on the basis of this issue alone.

Medical evidence

[416] The Crown objected to the admission of the medical evidence of Professor Elder in relation to the present appeal on the basis that it was not truly fresh evidence. As mentioned earlier, there were two aspects to her evidence.[305] First, her review of the medical evidence at the trial and secondly, her opinion that, if some of the acts that the complainants said the appellant perpetrated on them had occurred, the result would have been discernible symptoms such as severe pain and bleeding.

[417] In relation to the first category, Professor Elder referred to the evidence at the trial from a doctor who examined some of the complainants that it was "highly probable" that a notch-shaped hymenal defect in complainant 4 "resulted from trauma to the hymen", which would "need to be caused by some object penetrating into the

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304 *Webby*, above n 301, at 6.
305 See above at [94](e).

vaginal entrance".[306] Professor Elder said that such a genital finding would now be considered within the range of normal genital variation and therefore could neither support nor rule out sexual abuse. She also referred to the medical evidence at the trial in relation to complainant 6 to the effect that an irregularity in the shape of complainant 6's anal opening supported the possibility of anal interference. Professor Elder said she would not be confident to say such findings support the possibility of anal interference. Professor Elder said her opinions on both of these aspects of the trial evidence relied on studies that post-dated the trial. The evidence is therefore fresh, it is clearly credible and we consider it is cogent in relation to the present appeal. We therefore admitted it.

[418] The second category of Professor Elder's evidence was adduced in support of the appellant's arguments about sanitisation of charges.[307] We are satisfied that this aspect of her evidence is also admissible. We have already addressed the sanitisation argument and need say no more about it.

[419] Mr Harrison said in his written submissions that Professor Elder's evidence supported his fair trial argument. He did not develop this argument, but it can be inferred that it is to the effect that the medical evidence at the trial in relation to complainant 4 and complainant 6 that we have summarised above at [417] was incorrect for the reasons set out in that paragraph. As Professor Elder's evidence was based on studies that postdate the trial as well as both the 1994 and 1999 appeals, she was not critical of the medical practitioners who gave the evidence at the trial, given the state of knowledge of that time. The substance of Professor Elder's evidence was not challenged by the Crown. Unsurprisingly, counsel for the Crown did not address the argument, given that it had not been pursued by the appellant.

[420] One aspect of the defence case at the trial, as recorded by the Judge in his summing up, was that "there is no medical evidence which establishes what the

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306 The doctor accepted in cross-examination that she could not exclude possible causes other than sexual abuse for the trauma.

307 See above at [361]–[363].

children say happened to them". The Crown's submission on the medical evidence was summarised by the Judge as follows:

> As to the medical evidence, Counsel particularly referred to what, he said, was a confirmation of [complainant 4's] evidence about a slight penetration of her vagina by the Accused, and a confirmation of [complainant 6's] evidence of the Accused's penis against her anus.

[421] This indicates that the medical evidence in relation to complainant 4 and complainant 6 was relied on by the Crown at trial, albeit in fairly muted terms. A much more significant part of the Crown's closing to the jury in relation to the medical evidence was its explanation of why a lack of medical evidence in relation to other complainants should not be seen by the jury as significant.[308]

[422] In light of Professor Elder's unchallenged evidence, it is clear that the medical evidence about complainant 4 and complainant 6 was, when assessed against today's standards, incorrect. It provided some support to the Crown case that can now be seen as misplaced. This is another reason for concern about the fairness of the trial when assessed by today's standards.

H RESULT

[423] We have found that the evidence before the jury in relation to both s 23G of the 1908 Act and contamination was incorrect or misleading and, in the case of the former, some of it should not have been admitted. Those two issues are the principal focus of the judgment. Having addressed all the issues raised with us, we have stood back and considered the case in the round. We have concluded that a miscarriage of justice has occurred and accordingly we allow the appeal and quash the appellant's convictions. As the appellant has died, the issue of a retrial does not arise.

[424] The Summary set out at the beginning of this judgment explains our reasons in brief terms and we do not repeat that here. We do, however, repeat our observation about the unique nature of this case and the immense challenges that it posed for all

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[308] The 1994 Court of Appeal judgment referred to the medical evidence but observed that "it took matters no further" and did not otherwise comment on it: 1994 CA judgment, above n 50, at 177. The 1999 Court of Appeal judgment referred to the medical evidence but only in passing: 1999 CA judgment, above n 84, at [33].

those involved in it. We express our thanks to counsel and all the experts who appeared before us for their assistance.

[425] The formal orders of the Court are:

(a) The applications to adduce further evidence are granted.

(b) The appeal is allowed.

(c) The convictions of the appellant are quashed.

Solicitors:
Crown Law Office, Wellington for Respondent

APPENDIX A

Codes for Complainants Referred to in Judgment

Supreme Court	Court of Appeal 1994 and 1999	High Court Trial
1[309]	A	N
2	B	O
3	D	R
4	F	S
5	G	X
6	H	Z
7	K	Q

Complainants P, T, U, V, W and Y were not referred to in the Court of Appeal decisions. The codes for them are those assigned to them for the trial.

[309] As mentioned earlier, the three convictions relating to complainant 1 were quashed by the Court of Appeal in 1994 after she recanted her evidence against the appellant.

APPENDIX B

Summary Table – Complaints Leading to Convictions

Child	EVI	Date	Played to jury	Charge	Verdict
1 (Girl)	1	7 April 1992	No	No charge	-
	2	9 April 1992	Yes (Crown)	Indecent assault	Guilty
	3	28 May 1992	Yes (Crown)	Induced girl under 12 to do an indecent act*	Guilty
				Indecent assault*	Guilty
Note: the above convictions were quashed by the Court of Appeal in 1994.					
2 (Girl)	1	12 May 1992	Yes (Crown)	Indecent assault*	Guilty
3 (Boy)	1	3 April 1992	Yes (Crown)	Doing an indecent act*	Guilty
	2	27 April 1992	No	No charge	-
	3	28 October 1992	Yes (Crown)	Indecent assault	Not guilty
4 (Girl)	1	1 May 1992	Yes (Crown)	Doing an indecent act*	Guilty
				Induced a girl under 12 to do an indecent act	Guilty
	2	28 May 1992	No	No charge	-
	3	3 August 1992	Yes (Crown)	Attempted sexual intercourse	Not guilty
				Indecent assault*	Not guilty
5 (Boy)	1	14 May 1992	Yes (Portions played at defence request)	No charge	-
	2	4 August 1992	Yes (Portions played by the Crown)	Induced boy under 12 to do an indecent act	Guilty
				Indecent assault	Guilty
				Sexual violation by unlawful sexual connection	Guilty
	3	5 August 1992	No	No charge	-
	4	6 August 1992	Yes (Crown)	Did an indecent act	Not guilty
	5	28 October 1992	No	No charge	-
6 (Girl)	1	27 February 1992	Yes (Crown)	Sexual violation by unlawful sexual connection*	Guilty
				Indecent assault*	Guilty
	2	28 February 1992	Yes (Crown)	Indecent assault (this was the same charge as the assault arising from the 27 February 1992 EVI)*	Guilty
	3	18 March 1992	Yes (Crown)	Indecent assault*	Guilty
	4	27 March 1992	Yes (Crown)	Indecent assault	Guilty
	5	28 October 1992	No	No charge	-
	6	29 October 1992	No	No charge	-
7 (Girl)	1	9 March 1992	Yes (Crown)	Sexual violation by unlawful sexual connection*	Guilty
				Indecent assault*	Guilty
	2	6 October 1992	No	No charge	-
	3	9 December 1992	No	No charge	-

Note: charges marked with an asterisk (*) represent allegations that were said to have taken place at the Crèche.

APPENDIX C

Summary Table – Complaints Leading to Acquittal or Discharge

Child	EVI	Date	Played to jury	Charge	Result
P (Boy)	1	9 December 1991	No	No charge	-
	2	10 March 1992	Yes (Portion played by the Crown)	Doing an indecent act*	Not guilty
T (Girl)	1	5 March 1992	Yes (Crown)	Indecent assault	Not guilty
	2	19 March 1992	Yes (Portion played at defence request)	No charge	-
	3	27 May 1992	Yes (Portion played by the Crown)	Doing an indecent act	Not guilty
U (Girl)	1	18 June 1992	Yes (Portion played at defence request)	No charge	-
	2	1 July 1992	Yes (Played at defence request with excisions)	No charge	-
	3	30 July 1992	No	No charge	-
	4	6 August 1992	Yes (Portion played by the Crown)	Indecent assault	Section 347 discharge
				Indecent assault	Section 347 discharge
	5	10 August 1992	No	No charge	-
V (Girl)	1	15 June 1992	Yes (Crown)	Indecent assault*	Not guilty
	2	8 September 1992	No	No charge	-
W (Girl)	1	17 July 1992	Yes (Crown)	Doing an indecent act*	Section 347 discharge
	2	23 July 1992	No	No charge	-
Y (Boy)	1	4 May 1992	Yes (Crown)	Doing an indecent act*	Not guilty
	2	7 May 1992	Yes (Portion played at defence request)	No charge	-
	3	26 June 1992	Yes (Portion played at defence request)	No charge	-
	4	30 June 1992	Yes (Portion played at defence request)	No charge	-
	5	19 September 1992	No	No charge	-

Note: charges marked with an asterisk (*) represent allegations that were said to have taken place at the Crèche.