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

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

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 114/2025
[2026] NZSC 76

BETWEEN	MB Appellant
AND	THE KING Respondent

Hearing:	12–13 March 2026
Court:	Winkelmann CJ, Ellen France, Kós, Miller and Cooke JJ
Counsel:	J E L Carruthers for Appellant M J Lillico and J M Pridgeon for Respondent
Judgment:	11 June 2026

JUDGMENT OF THE COURT

A The appeal is allowed.

B The convictions are quashed and a retrial is ordered.

C Any bail application should be made to the District Court.

D We make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant until final disposition of retrial pursuant to s 200(2)(d) of the Criminal Procedure Act 2011.

REASONS

(Given by Miller J)

Table of Contents

	Para No
Introduction	[1]
Use of counter-intuitive evidence	[9]
Counter-intuitive evidence	[14]
Developments since *DH v R*	[29]
Reduction of counter-intuitive evidence to agreed statements	[31]
Section 126A	[35]
Specimen directions	[39]
Counter-intuitive evidence led orally	[40]
Conclusions	[41]
The trial	[44]
The counter-intuitive evidence	[46]
Use of the counter-intuitive evidence at trial	[53]
The prosecutor's cross-examination of MB	[54]
The prosecutor's closing address	[59]
Defence counsel's closing address	[66]
The Judge's directions	[68]
The Court of Appeal decision	[70]
Submissions	[73]
The appellant	[73]
The Crown	[77]
Assessment	[79]
Directions as to the purpose of the counter-intuitive evidence	[80]
Misuse	[81]
The prosecutor's use of the counter-intuitive evidence	[82]
The Judge's directions as to misuse	[90]
Permissible use of counter-intuitive evidence by prosecutors	[96]
Judicial directions	[100]
The second ground of appeal	[102]
Disposition	[107]
Appendix: statement of agreed facts	[111]

Introduction

[1] MB was convicted after trial in 2023 on 11 charges of serious sexual offending against C over a period of about three months in 2000, when he was 36 and she was 15.[1]

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[1] *R v [MB]* [2023] NZDC 29046 (Judge Gibson).

[2] MB and C met through an Internet chatroom. C's account was that she was struggling with self-esteem and depression and used the chatroom because she was in search of connection. She said she exchanged photos with MB and disclosed her age. His photo depicted a different and much younger man. He met her, picking her up from school, and she said he immediately began plying her with substances and abusing her. The offending of which he was convicted was said to have begun in public places and continued at an apartment where he installed her for a few days after encouraging her to leave home, and at a motel. It ranged from indecent assault to rape. He took photographs and videos with professional camera equipment, and used this material to coerce her into continuing to co-operate with him. It came to an end when the police tracked her down at the apartment after her family reported her missing.

[3] C disclosed the alleged offending to a boyfriend in 2000, and she reported it to Crime Stoppers | Aukati Takahi Ture in 2020. Her explanation for reporting at that time was that she saw MB's profile online, noted that it referred to camera use and equipment, and feared he would target other young women.

[4] MB gave evidence at trial. His account was that he communicated privately with C after she reached out to him. She reported problems at home and threatened self-harm. He denied exchanging photographs and said that C told him she was 18. They met in person because he chose to help her. He allowed her to share an apartment with a tenant when she called to say she had run away from home, and tried to get her a job. He denied any sexual conduct or photography and offered evidence that others, including his partner, knew he was trying to help C.

[5] The Crown offered counter-intuitive evidence. It took the form of a statement of agreed facts admitted under s 9 of the Evidence Act 2006 and it covered, among other topics, delayed reporting, grooming and normalisation behaviours, coercive control and reasons why an abused adolescent may not report offending to a parent.

[6] MB's appeal is concerned principally with the Crown's use of the counter-intuitive evidence and the trial Judge's failure to give directions about it.

He says the evidence was used in ways which are not consistent with this Court's decision in *DH v R*.[2] The appeal was argued with *TW v R*, which raised similar issues.[3] We are delivering separate judgments in the two appeals. The issues of principle are addressed in this judgment.

[7] A second ground of appeal in MB's case concerns the prosecutor's decision to lead evidence from C, at some length, after her evidential video had been played. It is said that this was done using impermissibly leading questions and resulted in needless repetition which was unfair because it lent her evidence an illusory air of consistency.

[8] Following the hearing of the appeal, this Court issued a results judgment allowing MB's appeal and ordering a retrial.[4] This judgment records our reasons.

Use of counter-intuitive evidence

[9] We summarise the principles applicable to counter-intuitive evidence here. These principles restate and clarify what the Court said in *DH*. That judgment was concerned with the admissibility of counter-intuitive evidence. The Court did not go into detail about the use that prosecutors may make of it at trial.

[10] This appeal and *TW* are concerned with the use made of such evidence at the appellants' trials. We have held that in both cases prosecutors misused counter-intuitive evidence and judges did not correct them or give adequate directions about the evidence. The Court of Appeal has allowed a series of appeals in similar cases since *DH*,[5] but in this case and *TW*, the appeals were dismissed.[6]

[11] We preface the principles by affirming that counter-intuitive evidence continues to serve an important purpose. As the Supreme Court of Canada observed in *R v Barton*, when speaking of sexual violence against women, some myths and

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2 *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625.
3 See *TW v R* [2026] NZSC 77.
4 *[MB] v R* [2026] NZSC 33 (Winkelmann CJ, Ellen France, Kós, Miller and Cooke JJ) [SC results judgment].
5 See for example *[J] v R* [2019] NZCA 384; *Bruce v R* [2023] NZCA 159; *[W] v R* [2024] NZCA 425; *[T] v R* [2025] NZCA 256; and *R (CA32/2025) v R* [2026] NZCA 74.
6 *[MB] v R* [2025] NZCA 490 (Hinton, Brewer and Gault JJ) [CA judgment]; and *T (CA449/2023) v R* [2025] NZCA 136.

stereotypes have deep roots in society.[7] It is in the interests of justice that jurors should be cautioned against adopting them in cases where they may be at work. To do so is not unfair to defendants. But jurors may misunderstand the purpose and limits of counter-intuitive evidence, and that risk must be guarded against. Prosecutors must use it appropriately and judges must explain its purpose and limits. This is a systemic issue which must be addressed by participants in criminal trials to minimise errors made at trial and the associated need for appellate courts to order retrials.

[12] The principles are:

(a) The purpose of counter-intuitive evidence is that of correcting erroneous or prejudicial beliefs that some jury members might intuitively hold about the anticipated characteristics or behaviours of victims of sexual abuse generally. It does not address the facts of the case or, in particular, the credibility or reliability of the complainant or the defendant. It is intended to ensure that jurors bring a neutral approach to their assessment of the other evidence in the case.[8]

(b) The evidence should identify and address specific misconceptions that are relevant to the case, and not simply describe the usual behaviour of victims. By way of example, evidence that abused children may not take the first opportunity to complain will not be substantially helpful, and so should not be offered, if that issue does not appear to the judge to arise on the facts.[9]

(c) The limitations expressed in (a) and (b) above are reflected in statutory provisions about judicial directions that may be given in sexual cases.[10] The delay direction under s 127(2) of the Evidence Act may be given when evidence is offered or a comment made tending to suggest the complainant delayed or failed to complain. Directions under s 126A are given when the judge thinks it necessary

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7 *R v Barton* 2019 SCC 33, [2019] 2 SCR 579 at [1] per Moldaver, Côté, Brown and Rowe JJ.

or desirable to address any relevant misconception. That may be the case, for example, when an explanation for delay is in issue.[11]

(d) The judge must tell the jury of the purpose of the counter-intuitive evidence, as noted in (a) above. The jury must also be directed that they may not use counter-intuitive evidence diagnostically; in other words, they may not reason that it makes the evidence of the complainant more likely to be true. Rather, they must base their verdicts on the other evidence in the case.[12]

(e) To reinforce the prohibition on diagnostic use, the jury should be told that counter-intuitive evidence is based on research studies that are independent of the case, that those who compiled the evidence did not interview anyone involved in it and that it has nothing to do with the facts of the case.[13]

(f) As explained in *DH*, *M (CA23/2009) v R* and *OY v Complaints Hearing Committee*,[14] counter-intuitive evidence must not be linked to the circumstances of the complainant, to avoid the risk that the jury will use it in a diagnostic way.[15]

(g) A prosecutor may refer to the counter-intuitive evidence when opening and closing the case to the jury, to explain a relevant misconception that may arise. It is appropriate to tell the jury that the counter-intuitive evidence shows a given behaviour is not, of itself, inconsistent with abuse. But the prosecutor may not link the counter-intuitive evidence to the complainant's account.[16]

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8 See below at [26]–[27] and [101].

9 See below at [16], [30] and [41].

10 See Evidence Act 2006, s 4(1) definition of "sexual case".

11 See below at [35]–[37].

12 See below at [23]–[25], [91] and [100].

13 See below at [24], [33] and [39].

14 *DH*, above n 2, at [30(b)]; *M (CA23/2009) v R* [2011] NZCA 191 at [49]; and *OY v Complaints Hearing Committee* [2013] NZCA 107, [2013] NZAR 629 at [59(b)].

15 See below at [19], [25] and [99].

16 See below at [99].

(h) The risk of the jury misusing counter-intuitive evidence by linkage to the complainant's evidence means it is difficult to envisage circumstances in which it is appropriate for a prosecutor to refer to counter-intuitive evidence when leading evidence from a complainant or cross-examining the defendant.[17]

(i) The defence may contend that behaviours exhibited by the complainant, such as a delay in complaining, tend to show that the complainant's account is not true or reliable. Juries must be instructed that whether such behaviours prove or disprove the complainant's allegations is a question of fact for them. It is an error to direct them that the counter-intuitive evidence means they should not take such behaviours into account.[18]

(j) As this Court said in *DH*, the more detail that counter-intuitive evidence provides about the behaviour of victims generally, the greater the risk that the jury will misuse the evidence by reasoning that because the complainant behaved in a manner that is common among victims the allegations are more likely to be true.[19] Unnecessary detail should be avoided.

(k) Counter-intuitive evidence sometimes describes misconceptions in probabilistic terms; for example, that a victim may be "likely" to exhibit a relevant behaviour. That may be necessary to satisfy the jury that the relevant misconception is incorrect. But probabilistic evidence increases the risk of improper use by the jury. If the evidence is expressed in these terms the prosecutor should take particular care not to invite such use, and judicial directions explaining proper use will also assume greater significance.[20]

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17 See below at [89].
18 See below at [28] and [95].
19 *DH*, above n 2, at [55].
20 See below at [33], [84]–[86] and [91].

(l) Directions may also assume greater significance when the counter-intuitive evidence extends to behaviour or characteristics of offenders.[21] This evidence is intended to correct misconceptions about the behaviour of victims of abuse generally; *DH* and *M (CA23/2009) v R* recognised that relevant counterintuitive evidence may address behaviour or characteristics of offenders that tend to explain a complainant's behaviour. For example, counter-intuitive evidence may explain that reporting is sometimes delayed where the offender is a family member or authority figure, if a misconception about that arises in the case.[22] Counter-intuitive evidence has also been used to establish that it is a misconception to assume offending would not happen in close proximity to other people.[23]

(m) However, the jury must not be permitted to reason that the complainant's account is more likely true because the defendant exhibited characteristics or behaviour described in the counter-intuitive evidence. Directions should be given when there is a risk that the jury may engage in stereotypical reasoning about the defendant.[24]

[13] It is not in dispute that the counter-intuitive evidence was admissible in this case, so we need not examine its admissibility against the above principles. But we found that the prosecutor used it in cross-examination of MB and in his closing address to suggest that C's account was truthful because her behaviour corresponded to that of victims and MB's behaviour corresponded to that of offenders. The trial Judge did not correct this diagnostic usage. For these reasons, it was necessary to allow the appeal and order a retrial.

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21 See below at [91].

22 *DH*, above n 2, at [53]–[55]; and *M (CA23/2009) v R*, above n 14, at [60]–[64].

23 See for example *DH*, above n 2, at [89]–[95]; *Nancarrow v R* [2020] NZCA 636 at [47(c)]; and *Tovey v R* [2025] NZCA 685 at [38].

24 See below at [25], [91] and [100].

Counter-intuitive evidence

[14] In *DH*, this Court described counter-intuitive evidence as evidence admitted in cases of alleged sexual abuse of young persons to correct erroneous beliefs or assumptions that a fact-finder may intuitively hold and which, if uncorrected, may lead to illegitimate reasoning.[25]

[15] Evidence of this kind normally takes the form of analysis of an extensive empirical research literature, presented by a witness who did not participate in the studies but is qualified to analyse them and extract overall findings.[26] The witness will assess the degree of consensus in the literature about a given behaviour: for example, that there is general agreement that reporting of childhood sexual abuse is most commonly delayed, or that the research reveals no uniform pattern of disclosure.[27]

[16] The admissibility of such evidence rests on the following propositions:

(a) The behaviour of young persons who have been sexually abused is not common knowledge.

(b) Because such behaviour is not within their ordinary experience, jurors may adopt inaccurate beliefs founded on intuition: for example, that a young person who has been abused will complain at the first opportunity.

(c) Counter-intuitive evidence tends to show that young persons who have been sexually abused may behave in ways that are inconsistent with jurors' beliefs.[28] If the circumstances of the case raise such issues—such as delayed reporting—jurors may apply such inaccurate beliefs.

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25 *DH*, above n 2, at [2].

26 See Jane Goodman-Delahunty, Anne Cossins and Kate O'Brien "A comparison of expert evidence and judicial directions to counter misconceptions in child sexual abuse trials" (2011) 44 ANZJ Crim 196 at 198–199 and 204–205.

27 See Fred Seymour and others "Counterintuitive Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand" (2014) 21 PPL 511 at 517–519.

28 Te Aka Matua o te Ture | Law Commission *Evidence* (NZLC R55, 1999) vol 2 at [C111].

(d) For that reason, counter-intuitive evidence may be substantially helpful to the jury in understanding other evidence or ascertaining facts of consequence to their verdict, provided the particular counter-intuitive evidence is relevant to a live issue in the defendant's trial.[29]

[17] The outcome of a sexual abuse trial frequently rests on the credibility of the complainant. Counter-intuitive evidence is normally offered by the Crown as part of its case (and the now-common practice of using agreed statements rests on the expectation that, absent agreement, the Crown may offer the evidence through an expert witness).[30] The evidence supports the Crown case by reducing the risk that jurors will bring misconceptions to their assessment of the complainant's evidence.

[18] However, expert evidence is not normally admissible to show that a complainant is a credible witness.[31] Witness credibility is a subject within the jury's competence. Courts have reasoned that expert evidence directed to credibility might be given undue weight and risk usurping the function of the jury.[32]

[19] The Court of Appeal summarised the proper use of counter-intuitive evidence in *M (CA23/2009) v R*, in this way:[33]

> … we emphasise two important points. First, where counter-intuitive evidence is given, prosecuting counsel must be careful in the way that he or she uses the evidence. Such evidence is directed at removing misconceptions that the jury might otherwise have about children alleging sexual abuse so that they are able to consider fairly whether or not the particular complainant is to be believed. But the evidence says nothing about the credibility of the particular complainant or whether the abuse that he or she alleges actually occurred. Accordingly prosecuting counsel should not attempt to link the evidence to the circumstances of the particular complainant as this may create a risk that the jury will use the evidence illegitimately, in a diagnostic or predictive way. Second, in such cases the judge should explain to the jury what the purpose of the evidence is and should caution them against improper use of it. The judge should instruct the jury that if they accept the expert evidence, they should not reason that the fact that the complainant behaved in one or more of the relevant ways (for example, delayed in complaining or continued to express affection for

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29 *DH*, above n 2, at [30(c)].
30 See for example *Nancarrow*, above n 23, at [46], n 17.
31 See for example the judgment of a Full Court in *R v Makoare* [2001] 1 NZLR 318 (CA) at [21].
32 See for example *PM (CA682/2013) v R* [2014] NZCA 522 at [23].
33 *M (CA23/2009) v R*, above n 14, at [49].

> the alleged abuser) is, of itself, indicative that the alleged abuse did, or did not, occur.

[20] New Zealand courts have recognised a risk that jurors will find counter-intuitive evidence probative of the complainant's credibility.[34] In *M (CA23/2009) v R*, the Court of Appeal pointed to a risk that jurors will use "descriptive or observational information (some sexually abused children act in this way)" as a "predictive or diagnostic tool (a child who acts in this way must have been sexually abused)".[35] That is an impermissible linkage between the counter-intuitive evidence and the facts of the case.

[21] The Court of Appeal also stated, using the example of delayed reporting, that there may be a tendency for a jury to reason that: delayed reporting is common among sexually abused children; this child delayed reporting alleged sexual abuse; therefore this child was abused.[36] The point the Court was making about this syllogism is that it is invalid because the first or major premise is only true of some members of the class of sexually abused person, but the conclusion assumes it is true of all members.

[22] Because the prosecutor in this case invited the jury to reason in this apparently logical way, we emphasise that, as the Court of Appeal recognised in *M (CA23/2009) v R*, the syllogism is logically invalid. The conclusion that the child was abused follows from the two premises only if the particular behaviour is true of the entire class of which the child is a member. The conclusion would be logically valid if the first premise was that *every* child who behaves in a particular way has been the victim of abuse, but that premise is empirically incorrect: it is not true that every child who behaves in a particular way has been the victim of abuse. The syllogism accordingly does not prove that the child was abused, and for the same reasons it does not prove that C is more likely to have been abused. All that can be said of the counter-intuitive evidence is that it shows a given behaviour described in

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[34] See *DH*, above n 2, at [30(b), (d) and (e)] and [55].

[35] *M (CA23/2009) v R*, above n 14, at [32(e)].

[36] At [32(e)].

that evidence of itself neither proves nor disproves the alleged offending in the case before the jury.[37]

[23] The need for directions is not confined to cases where the prosecutor inappropriately links counter-intuitive evidence to the facts of the case.[38] The purpose and limits of the evidence should always be explained to the jury.[39] The extent of judicial direction required depends on the facts and issues in the particular case.

[24] Appellate courts have held that judges must take care to direct juries that counter-intuitive evidence is not evidence of the complainant's credibility. In *M (CA23/2009) v R*, the Court of Appeal held that trial judges must tell the jury why the counter-intuitive evidence has been led and caution them that it "says nothing about the credibility of the *particular* complainant".[40] In *DH*, this Court held that it should be made clear that counter-intuitive evidence is based on generic studies and says nothing about the complainant's account.[41] It should also be made clear that those who compiled the evidence did not interview anyone involved in the case.

[25] The Court also stated in *DH* that counter-intuitive evidence should not be linked to the circumstances of the complainant. This was described as an important limitation, designed to ensure the evidence is not used in a diagnostic or predictive way.[42] The Court added that the judge must caution the jury against improper use of the evidence, such as reasoning that the complainant is credible because they behaved in one of the ways described in the counter-intuitive evidence:[43]

> Where counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant. The judge must caution the jury against improper use of the evidence, such as reasoning that the fact that the complainant behaved in one of the ways described by the expert witness

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37 See *DH*, above n 2, at [30(e)]; and *M (CA23/2009) v R*, above n 14, at [49].
38 *H (CA337/2021) v R* [2021] NZCA 547 at [43].
39 See *DH*, above n 2, at [30(e)]; and *M (CA23/2009) v R*, above n 14, at [49].
40 *M (CA23/2009) v R*, above n 14, at [32(e)].
41 *DH*, above n 2, at [30(d)–(e)].
42 At [30(b)].
43 At [30(e)] (footnote omitted).

> (for example, delayed in complaining) is itself indicative of the complainant's credibility or that sexual abuse occurred.

[26] Courts have sought to convey the limits to permissible use of counter-intuitive evidence in various ways, usually citing *DH*.[44] The evidence is commonly described as educative as opposed to diagnostic.[45] It is said to neutralise misconceptions,[46] restore the complainant's credibility to a zero or neutral balance,[47] or serve as a shield rather than a sword.[48] Juries are sometimes told that counter-intuitive evidence is not evidence of the complainant's credibility.[49] The same idea is often conveyed by saying that the counter-intuitive evidence neither proves nor disproves the complainant's allegations.[50] The point being made is that the counter-intuitive evidence is not about the case, and it is not evidence about whether the alleged offending occurred or not; rather, its purpose is that of correcting potential prejudice that some jurors may otherwise bring to bear on their assessment of a complainant's credibility.

[27] These descriptions and metaphors are intended to convey that (a) a given behaviour described in the counter-intuitive evidence of itself neither disproves nor proves sexual abuse in the complainant's case; and (b) the jury may not reason that the complainant is credible *because* they behaved in one of the ways described in the expert evidence. The first of these requirements meets the purpose of displacing misconceptions. The second ensures that the evidence is not misused. Both requirements must be made clear to the jury.

[28] The counter-intuitive evidence does not mean that the jury must put relevant behaviour by the complainant aside when reaching their verdicts. They should be told that they may find that delay (for example) detracts from the complainant's

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44 See also Te Aka Matua o te Ture | Law Commission, above n 28, at [C111].

45 See for example *Tovey*, above n 23, at [39], [43] and [54]. See also *K (CA267/2024) v R* [2026] NZCA 143 at [45].

46 See for example *[C] v R* [2024] NZCA 569 at [9].

47 See for example *Moore v R* [2025] NZCA 132 at [25] citing Te Aka Matua o te Ture | Law Commission, above n 28, at [C111].

48 See for example *[W] v R*, above n 5, at [23].

49 See for example *H (CA337/2021) v R* [2021] NZCA 547 at [40].

50 See for example *Paul v R* [2019] NZCA 390 at [19] and [25].

credibility. It is an error to direct them that such behaviours are irrelevant or prove nothing.[51]

Developments since *DH v R*

[29] This Court's judgment in *DH* was delivered in 2015. Since then there have been a number of developments. It appears that challenges to the admissibility of counter-intuitive evidence have become uncommon. We were told that counter-intuitive evidence is commonly presented in the form of agreed facts under s 9 of the Evidence Act, a practice encouraged by the Court of Appeal in *RA v R* and *M (CA23/2009) v R*, and by this Court in *DH*.[52] In 2022, s 126A of the Evidence Act was enacted to require judicial directions about misconceptions in sexual cases.[53] And a set of specimen counter-intuitive evidence directions has been developed for use by trial judges.[54]

[30] We discuss each of these developments below. We preface the discussion by emphasising that expert evidence is admissible only if it is substantially helpful to the fact-finder under s 25(1) of the Evidence Act.[55] For the reasons given at [17] above, this is also true of counter-intuitive evidence admitted by agreement under s 9. The judge retains ultimate control over evidence that the parties agree under s 9(1)(a) may be admitted, and is not obliged to admit it.[56]

Reduction of counter-intuitive evidence to agreed statements

[31] *DH* and *M (CA23/2009) v R* both addressed the admissibility of expert evidence that had been led at trial. Because admissibility was or might have been in issue, the experts deposed to their qualifications and surveyed the research literature

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51 See for example *[R] v R* [2025] NZCA 210 at [45]–[48]; and *R (CA32/2025) v R*, above n 5, at [79] and [83].

52 *RA v R* [2010] NZCA 57, (2010) 25 CRNZ 138 at [32]; *M (CA23/2009) v R*, above n 14, at [33]; and *DH*, above n 2, at [113].

53 By s 21 of the Sexual Violence Legislation Act 2021.

54 Te Kura Kaiwhakawā | Institute of Judicial Studies *Responding to misconceptions about sexual offending* (2023) [*Misconceptions*]; and Te Kura Kaiwhakawā | Institute of Judicial Studies *Criminal Jury Trials Bench Book* [*Jury Trials Bench Book*] at [7.7].

55 See *DH*, above n 2, at [28]–[29] and [110].

56 Scott Optican and Elisabeth McDonald (eds) *Mahoney on Evidence: Act and Analysis* (2nd ed, Thomson Reuters, Wellington, 2024) at [EV9.01].

on which they relied. That literature concerned cases of child abuse which had been reported but not always proved.[57]

[32] Where counter-intuitive evidence is admitted by agreement under s 9 of the Evidence Act, it is no longer strictly necessary for an expert witness to qualify themselves, catalogue the research literature on which they have relied and establish that it is sufficiently accepted among experts to be treated as reliable. The conclusions can be stated shortly.[58]

[33] It remains appropriate to explain that the agreed facts are sourced from research studies, and it is permissible to convey that the studies reliably support them. For example, it may be appropriate to say that the studies show that abused children often do not complain immediately (or at all).[59] But care is needed, because references to the frequency or probability of a given behaviour in the studies may encourage the jury to reason that because the reported behaviour is common or likely, the abuse complained of in the complainant's case is more likely to have happened. We return to this point at [84]–[86] below.

[34] It is customary for counter-intuitive evidence to record its purpose and limitations. That is appropriate if only because it will be with the jury in written form during their deliberations.[60]

Section 126A

[35] Section 126A of the Evidence Act provides that:[61]

> **126A Judicial directions about misconceptions arising in sexual cases**
>
> (1) In a sexual case tried before a jury, the Judge must give the jury any direction the Judge considers necessary or desirable to address any relevant misconception relating to sexual cases.

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57 *DH*, above n 2, at [41]; and *M (CA23/2009) v R*, above n 14, at [17(b)] and [67(a)].
58 This was the course adopted in this case and *TW v R*, above n 3.
59 See *DH*, above n 2, at [45(a)], n 21.
60 See *Moore*, above n 47, at [15]–[17].
61 See also Evidence (Video Records and Very Young Children's Evidence) Regulations 2023, r 59(3).

(2) Misconceptions relating to sexual cases (all or any of which the Judge may consider relevant in the case) include, but are not limited to, misconceptions—

(a) about the prevalence or features of false complaints in sexual cases:

(b) that a victim or an offender in a sexual cases has, or does not have, particular stereotypical characteristics:

(c) that sexual offending is committed only by strangers, or is less serious when committed by a family member (including, but not limited to, a spouse, civil union partner, or de facto partner) or by an acquaintance:

(d) that sexual offending always involves force or the infliction of physical injuries:

(e) that, in a sexual case, a complainant is less credible or more likely to have consented, or a defendant's belief in consent is reasonable, based solely on the complainant—

(i) dressing provocatively, acting flirtatiously, or drinking alcohol or taking drugs:

(ii) being in a relationship with a defendant, including a sexual relationship:

(iii) maintaining contact with a defendant, or showing a lack of visible distress, after the alleged offending.

(3) This section does not limit or affect—

(a) section 127 (delayed complaints or failure to complain in sexual cases):

(b) any regulations made under section 201(1)(m) (warning or informing jury about very young children's evidence).

[36] We observe that:

(a) Section 126A(1) extends to "any relevant misconception" in sexual cases.

(b) Subsection (2)(b) establishes that such misconceptions may extend to the characteristics of offenders. It must extend to behaviour that evidences such characteristics.

(c) The trial judge must decide whether any misconception exists and whether a direction about it is necessary or desirable in the particular case. If so, such direction must be given.

[37] Section 127 is also relevant. It provides that where it is suggested that the complainant delayed complaining or did not complain, the judge may tell the jury that there can be good reasons for delay or non-disclosure. In practice, directions under s 126A may expand upon this direction by identifying reasons why sexually abused people may not take the first opportunity to complain.

[38] In its second review of the Evidence Act, Te Aka Matua o te Ture | Law Commission expressed the hope that directions under s 126A may eliminate or reduce the need for expert counter-intuitive evidence.[62]

Specimen directions

[39] Specimen directions about counter-intuitive evidence have been developed for use and incorporated into the *Criminal Jury Trials Bench Book*.[63] These are consistent with *DH*. They explain that research has shown, for example, that it is not uncommon for victims of sexual abuse to delay reporting or to not report abuse. They identify the purpose of counter-intuitive evidence, namely to correct any misconceptions along the lines that a child complainant would tell a trusted adult at the first opportunity; and they emphasise that the evidence (or agreed facts) does not relate to the complainant's credibility or strengthen the complainant's evidence. The specimen direction for cases when counter-intuitive evidence is given by an expert witness records that the expert did not interview any of the parties, that none of the expert evidence is about the facts of the case and, in particular, that the expert evidence is not an opinion about the complainant's evidence or what the jury's verdict should be. It states in simple terms that the jury must not use the counter-intuitive evidence to "strengthen" the complainant's evidence.

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[62] Te Aka Matua o te Ture | Law Commission *The Second Review of the Evidence Act 2006 | Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) at [12.46].

[63] *Misconceptions*, above n 54; and *Jury Trials Bench Book*, above n 54, at [7.7.3].

Counter-intuitive evidence led orally

[40] Counter-intuitive evidence may not be substantially helpful where the trial judge intends to give a direction under s 126A.[64] However, expert evidence is in principle admissible if a relevant misconception is in issue on the facts and the misconception is controversial or directions may not adequately address it in the particular case.[65] The Law Commission suggested that directions are appropriate where there is general agreement about the relevant misconception.[66] The corollary is that expert evidence may be substantially helpful if there is controversy about the existence and extent of a misconception or any explanation for particular behaviours. Where that is the case the Crown may lead it (provided of course that it meets other admissibility requirements), and the judge will need to adapt any directions subsequently given when summing up.

Conclusions

[41] In *DH*, this Court concluded that it was not appropriate to be prescriptive about the ways in which erroneous beliefs or misconceptions are addressed in criminal trials.[67] We remain generally of that view. It is always necessary to consider whether a misconception exists and may be at work in the particular case and if so, how it is appropriately addressed. It is reasonable for the Crown to anticipate misconceptions that may arise on the facts when preparing counter-intuitive evidence. Directions given by the judge during the trial and in summing up will depend on whether and how the defence makes use of a given misconception.

[42] By way of illustration, in a case of alleged intra-familial abuse, the question will arise whether the jury should be told that it is a misconception to assume a family member would not behave in that way. The trial judge will need to assess whether that misconception may be at work and if so, how it should be addressed. It will be necessary to consider any risk of stereotypical reasoning by the jury in

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64 But see *B (CA764/2024) v R* [2025] NZCA 95 at [18]; and *K (CA286/2024) v R* [2024] NZCA 504 at [29].
65 See *DH*, above n 2, at [111].
66 Te Aka Matua o te Ture | Law Commission, above n 62, at [12.49].
67 See *DH*, above n 2, at [110].

relation to both the complainant and the defendant. The directions given in the summing-up will depend on any use that the defence actually makes of the misconception.

[43] It may be advisable to caution the jury against stereotypical reasoning *before* the complainant gives evidence. That may be done by the prosecutor in opening where counter-intuitive evidence is to be offered or by the judge at an appropriate juncture.

The trial

[44] The trial turned on C's credibility. She and MB were the only witnesses to what had happened between them. She explained that she met him because she was going through emotional turmoil at home. She continued to associate with him after he had begun to abuse her. She explained that she did so because he criticised her family in an attempt to separate her from them, and he coerced her once the abuse had begun. She had not disclosed the abuse to the police or her parents when she was uplifted from the apartment or for some years afterwards. She explained that she did disclose the abuse to her boyfriend with whom she began a relationship later in the same year, but that disclosure was taken no further, and she did not complain subsequently because she experienced shame and feared he would use the photos and videos to harass her, and was not confident that anything would come of a police report. Her boyfriend at the time confirmed the disclosure and the jury heard evidence from her parents.

[45] The defence case was that C was lying. MB admitted associating with C but sought to explain it as an attempt to help her and one that he went to no trouble to disguise. Trial counsel, of whom no criticism is made, contended that, among other indications of unreliability, C would have complained earlier had her account been true, and she would not have gone to live in an apartment where she knew she would be abused.

The counter-intuitive evidence

[46] The statement of agreed facts is appended to this judgment.[68] We summarise it here. Passages used in cross-examination or in closing are quoted below at [54]–[65].

[47] The statement explained the nature of the evidence (conclusions from review of a comprehensive body of research literature), its purpose (educative evidence to correct misconceptions about the behaviour of children and adolescents who have been sexually abused) and its limitations (it does not prove or disprove sexual offending in this case). The caution that it did not prove or disprove abuse was repeated at the end of the statement.

[48] Paragraphs 1.5–1.6 dealt with delayed reporting, stating that "more often than not" a child or adolescent does not disclose abuse during childhood.

[49] Paragraphs 1.7–1.11 dealt with a victim's failure to report when presented with an opportunity to do so, explaining that they may fail to do so, or may disclose incrementally, and concluding that whether a complaint is reported in full or incrementally does not, of itself, assist in determining whether the complaint was true. It recognised that one reason for delay may be that sexual abuse did not occur. It then set out other reasons why a child or adolescent may not disclose sexual abuse immediately.

[50] Paragraphs 1.12–1.13 dealt with grooming and normalisation behaviours. Paragraphs 1.14–1.15 referred to control through various means, including threats or bribes.

[51] Paragraphs 1.16–1.20 dealt with the significance of caregivers and adults, explaining that there may be many reasons why a child or young person does not disclose sexual abuse to such a person, including expectations that the reaction may not be supportive.

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68 See below at [111].

[52] Paragraphs 1.21–1.22 identified other factors that may influence delay in reporting, including shame and embarrassment. Lastly, paras 1.23–1.24 explained that an abused child or young person may maintain contact with the abuser and described that behaviour as "not uncommon".

Use of the counter-intuitive evidence at trial

[53] The counter-intuitive evidence was not mentioned in the prosecutor's opening address or the Judge's opening remarks. It was read to the jury after the witnesses of fact had given evidence and before the officer in charge of the case produced a number of documentary exhibits at the close of the Crown case.

The prosecutor's cross-examination of MB

[54] The prosecutor then deployed the counter-intuitive evidence in MB's cross-examination, which he concluded by taking MB to the statement of agreed facts. He referred to para 1.12, which stated that:

> Grooming can be defined as follows: (1) the use of a variety of manipulative and controlling techniques; (2) with a vulnerable subject; (3) in a range of interpersonal and social settings; (4) in order to establish trust or normalise sexually harmful behaviour; and (5) with the overall aim of facilitating exploitation and/or prohibiting exposure.

[55] A number of questions were put to MB about this paragraph:

Q. If you just turn to 1.12.

A. Yes, I've got to 1.12.

Q. It says: "Grooming can be defined as follows. The use of [a variety of] manipulative and controlling techniques." I'm going to suggest that you were using such techniques to gain [C]'s trust and then look to make her dependent upon you?

A. That's definitely not the case.

Q. So the second one is with a vulnerable subject, I think we can both agree that she was a vulnerable person?

A. I think, I think she was a vulnerable person, yes, I totally agree with you there. She was vulnerable, you know, she was looking to commit suicide so that puts her in a very vulnerable situation.

Q. Through a range of interpersonal and social settings and you guys met up both in the car, you took her to hotels and then to an apartment?

A. No I don't agree with that at all.

Q. Four, in order to establish trust normalise sexual behaviour. You started off with touching and then you ended up raping her?

A. I did not.

Q. With the aim of facilitating exploitation and that is ultimately what you were doing with [C] wasn't it?

A. No, it is not.

[56] The prosecutor then referred MB to para 1.15, which stated that:

> Offenders may try and manipulate a child or adolescent by using bribery or incentives, or threats, or acts of intimidation, to engage the child in the sexual abuse and prevent the child or adolescent from disclosing the abuse to others.

[57] The following questions were put to MB:

Q. If you turn over to [para] 1.15 and this is obviously general but I want a comment on it in relation to the facts here. Offenders may try and manipulate a child or adolescent by using bribery or incentives and we know that you were both making an apartment available to her, you were providing her with drugs and alcohol, don't we?

A. I didn't make the apartment available to her. My wife did.

> Q. Or threats or acts of intimidation and we know that you threatened both her family and in terms of you know where she lives and you also threaten that you've got these photos of her, don't you?
>
> A. How the hell are you going to threaten [them]? My lord.
>
> Q. By making their child feel like they can't talk to them and that she has to continue engaging in sexual conduct with you.
>
> A. That is absolutely absurd.

[58] At no time did defence counsel or the Judge intervene in this line of questioning.

The prosecutor's closing address

[59] In closing, the prosecutor summarised the evidence and emphasised that credibility was the key issue and the Crown case stood or fell on C's shoulders. He then turned to a series of reasons why her evidence should be believed. He acknowledged that the agreed statement was an educative document:

> So what are some helpful starting points for examining the evidence? The Crown says that perhaps one document that could assist as you go out and start to deliberate would be to look through the agreed facts document and to make sure that you're not carrying or holding potentially assumptions about what someone should or shouldn't have done, and we know that this evidence is about the behaviour generally of children or adolescents who've been sexually abused, the dynamics of that.
>
> It doesn't tell us anything about this case in particular, only talks to us as an informative, educative document, but we know [from] 1.5 for instance, that more often than not, adolescents do not tell anyone about sexual abuse during childhood. We know that reviews of literature indicate that only one third of adults who were victims of sexual abuse as adolescents and children ever report the sexual abuse to anyone during childhood, and for those who do, many delay reporting.

[60] However, the prosecutor then invited the jury to use the counter-intuitive evidence when examining the evidence.

[61] He referred first to para 1.7, which stated that:

> Many people may think that a child or adolescent would report sexual abuse when asked, or when they are given an opportunity to report the sexual abuse. Despite being presented with an opportunity to report the sexual abuse to others, a child or adolescent may be reluctant to tell anyone about the offending and may not report the sexual abuse.

He then said:

> … we know that despite being presented with the opportunity to report sexual abuse … as a child, adolescent, may be reluctant to tell someone about the offending, may not report it. You might say: "Well, police show up to the Remuera apartments. Why didn't you tell them straight away?" and C talked to us in her evidence about how at that particular point in time she didn't feel like she could, for the reasons that she explained.

[62] The prosecutor later referred to para 1.12, which we set out above at [54], as well as para 1.13 and what must have been para 1.14, which stated that:

> 1.13 Many sex offenders select and identify vulnerable children or adolescents and their families and then use that vulnerability to initiate a "friendship" as an avenue to eventually sexually abuse a child or adolescent, often with increasing physical contact over time.
>
> …
>
> 1.14 An offender may employ a range of controlling or manipulative strategies in order to gain access to a child or adolescent, gain their compliance and maintain secrecy to avoid disclosure of sexual offending.

The prosecutor said:

> 1.12 talks about grooming, which the Crown says the definition, as I spoke to [MB] about yesterday, that fits with what it is that took place here. 1.13, many sexual offenders identify vulnerable children and use that vulnerability to initiate a friendship as an avenue to eventually sexually abuse the child or adolescent, often with increased physical contact over time.
>
> The general facts about sexual abuse; the Crown says that sadly, it has taken place here, again, a matter for you about what you decide. 1.13 [sic], an offender may employ a range of controlling or manipulative strategies to gain their compliance and maintain secrecy or avoid disclosure. They may try and manipulate or threaten someone by using bribery or incentive or threats, acts of intimidation, and obviously the Crown says, as I put to [MB], that some of those were at play here. There's alcohol and drugs that are provided and there's an apartment that's provided, that there's threats of what's going to happen with these photos if there's not ongoing compliance.

[63] The prosecutor did not specifically mention paras 1.16–1.20, which dealt with the significance of caregivers, but must have been referring to them when he went on to say:

> A consistent finding in research studies is that a child or adolescent's expectations of the likely reaction from a person to whom they report the sexual abuse is central, and we know in this particular place, as [C]'s talked

> to us, that she wasn't close with her parents. That means that for whatever reason, that relationship had broken down.

[64] He then referred to what must have been para 1.21, which stated that:

> A child or adolescent may experience a range of different emotions as a result of sexual abuse. Shame, embarrassment, self-doubt, lack of acknowledgment by the offender and a fear they will not be believed can make it difficult for child or adolescent to disclose abuse. A fear of the consequences of telling about the abuse and anticipated negative reactions from family members can also inhibit disclosure by child or adolescent.

The prosecutor said:

> 1.12 [sic], a child or adolescent may experience different ranges of emotions as a result of sexual abuse; shame, embarrassment, the fear they will not be believed, and we heard the evidence from [C] about saying: "Well, it was just my word versus his."

[65] Finally, the prosecutor summarised what must have been para 1.23, which stated that:

> Although some people may think that a child, or adolescent, who is being sexually abused would resist the offender, call out for help, or try and avoid the offender, this does not take into account the dynamics that surround child or adolescent sexual abuse. It is not uncommon for a child or adolescent to continue having contact with someone who has abused them sexually.

The prosecutor said:

> 1.12 – sorry, 1.13 [sic], some people may think someone who is sexually abused would resist the offender, call out for help, try and avoid; that does not take into account the dynamics that surround child or adolescent sexual abuse. It is not uncommon for a child or adolescent to continue having contact with someone who has sexually abused them. This document, of course, is not able to speak to this case but it is an educative document, the Crown says, perhaps helpful to start with. A matter for you.

It will be seen that the prosecutor did not link this paragraph to C's evidence, and he concluded this part of the closing address by reminding the jury that the statement was an educative document which was not able to speak to this case but nonetheless perhaps helpful to the jury.

Defence counsel's closing address

[66] Defence counsel delivered a long closing address which we need not summarise. Generally, counsel sought to exploit details of the evidence to suggest that MB's account was credible while C's was not. He challenged C's credibility by reference to delay in complaining and continued association with MB.

[67] Counsel dealt with the counter-intuitive evidence briefly, contending that it showed only that people who have been abused do not complain readily. To some extent he sought to make a virtue of the counter-intuitive evidence by suggesting that a delayed complaint was less likely when the alleged abuser was a stranger like MB, rather than a family member or authority figure. We observe (in passing, because no point was taken about it) that it is not clear why this evidence was in the agreed facts in the first place.[69] MB was not a family member, so no risk of the jury assuming that he was for that reason less likely to have abused C arose.

The Judge's directions

[68] Judge Gibson gave the jury directions about delay and counter-intuitive evidence. He stated:

> [39] You also heard questions about delay in complaint. You heard questions put to the defendant about that. [MB] himself when he gave evidence took up some advocacy on that and said: "Well, why didn't she [complain] to the police when they came around to collect her after they found she was living in the apartment?" and she was asked questions about why there weren't complaints made to her parents and to the police. She had a brother-in-law who was a policeman. Her response is on pages 83 to 86 of the notes of evidence, but what really helps you on that, of course, is the counterintuitive evidence, which is agreed, and there are several passages there beginning at 1.5 on delayed complaints and non-reporting.
>
> [40] There are often in the Court's experience, and also, of course, your own common sense will tell you, good reasons why a victim of the type of offending alleged delays making a complaint or even fails to make a complaint in respect of the offending. Some people make a complaint straightaway. That does not necessarily make it any more true than it is untrue. You have to look at whether you accept the complaint. Others delay making a complaint. Again, the delay does not mean it is anymore untrue than it is true. People have different reasons for not making an immediate complaint and the counterintuitive evidence, which effectively is the distillation of evidence compiled by psychologists and psychiatrists who

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69 See above at [12(b)].

> practice in these fields, and it is accepted by the parties and is accepted generally, and accepted by the courts these days, tells you why it is that people delay making complaints.
>
> [41] There is nothing I would suggest to you to be read into the fact that there was a delay in making the complaint. You simply have to assess whether you accept the complainant's account or not and whether that account is sufficient to prove the allegations beyond reasonable doubt, taking into account all of the other evidence, including the defendant's own evidence.
>
> [42] As I have mentioned to you, the counterintuitive evidence is evidence that is distilled from evidence compiled by persons who are experts in their field and an expert is entitled to give evidence of an opinion in the same way that other witnesses are not. Non-experts can only give evidence about facts they saw or heard. Experts, however, can offer their opinions on matters if their opinion is based on their field of study and is drawn from recognised literature and their own professional experience and that of others.
>
> [43] None of the experts who might have assisted in the compilation of that agreed evidence gave evidence here because it was rendered in the form of agreed facts and they have not seen either the defendant or the complainant. What that evidence is there for is to help you so that you are not misled by any common misconception that can arise in sexual cases such as delayed reporting of sexual abuse or the way in which persons who have been alleging sexual abuse can be expected to behave. There are topics on coercion and control as you can see in the report and other issues and they are all topics that are set out in that agreed summary of facts, but remember, even though this effectively is evidence brought about by experts, this is a trial by jury. The parties accept this evidence and agree on it but it is still a matter for you as to whether you accept it, as with any other evidence.

[69] It will be seen that the Judge noted that delay was in issue, along with the reasons for it. He told the jury that delay was in itself neutral, and the counter-intuitive evidence was an accepted account of why people delay. He explained that the counter-intuitive evidence was compiled by experts who had not seen the defendant or the complainant, and they might disregard it if they did not accept it. He directed the jury that they had to decide whether they accepted the complainant's account and whether that account proved the allegations beyond reasonable doubt.

The Court of Appeal decision

[70] The Court of Appeal concluded that the prosecutor did not err by referring to the counterintuitive evidence in his closing address.[70] He did not rely entirely on the counter-intuitive evidence, and he used it to explain or counter the delay in reporting. In circumstances where the prosecutor was countering a defence attack based on delay, it was not improper to link the evidence in the case to the statement of agreed facts in this manner. Overall, the prosecutor's use of the agreed facts restored the complainant's credibility to neutral. Further, the prosecutor's remarks were preceded and followed by statements that reminded the jury the counter-intuitive evidence was not about the facts of the case.

[71] Nor was there error in the prosecutor's use of counter-intuitive evidence during cross-examination of MB.[71] The Court noted that there did not appear to be another case of a prosecutor's use of counter-intuitive evidence in cross-examination of a defendant being challenged on appeal. The prosecutor's use during cross-examination in this case was more problematic than his closing address. But the substance of the line of questioning was legitimate. The Court considered that the counter-intuitive evidence was not being used to suggest the complainant was more credible or to diagnose abuse. The Court did not accept that the prosecutor's use corresponded to the logical fallacy described in *M (CA23/2009) v R*, which we summarised above at [20]–[21]. It distinguished several decisions in which the Court of Appeal has held that counter-intuitive evidence was used diagnostically.[72] It added that there was no reasonable likelihood of a miscarriage of justice arising from the short passage of evidence.

[72] The appellant criticised the summing-up for failing to correct the prosecutor's diagnostic use of the counter-intuitive evidence. The Court of Appeal having concluded that the prosecutor did not misuse the evidence, that criticism largely fell away. The Court noted that the Judge did give a direction about the purpose of the

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70 CA judgment, above n 6, at [39]–[45].
71 At [46]–[54].
72 *Bruce*, above n 5; *[J] v R*, above n 5; and *[W] v R*, above n 5.

evidence, and the purpose was explained in the statement of agreed facts and by the prosecutor.[73]

Submissions

The appellant

[73] For MB, Mr Carruthers invited the Court to hold that judges must direct juries that they may not reason that a complainant's allegations are more likely to be true because the features of the alleged offending align with what research has revealed about the circumstances in which sexual offending can occur and how victims can react to it. Such a direction was made mandatory in *DH*, but it is seldom given in practice. It directly and unequivocally addresses the risk posed by counter-intuitive evidence. To tell juries that counter-intuitive evidence is educative and says nothing about the particular allegations is to say nothing about how they may and must not use it. The natural temptation is that, having been educated, they will apply the lesson to the case before them.

[74] Further, counsel submitted that prosecutors should be prohibited from linking counter-intuitive evidence to the facts of the case. Prohibiting linkage properly focuses on meeting the risk posed by counter-intuitive evidence. It cannot be assumed that juries will draw the fine distinction between legitimate and illegitimate use for themselves. Prosecutors may refer to counter-intuitive evidence when closing, to remind jurors of why it was offered and the myths it seeks to combat, but they should not weave examples taken from the evidence at trial into their discussion.

[75] In this case, counsel submitted, the prosecutor clearly linked the counter-intuitive evidence to C's evidence, making clear that he intended to comment on it in relation to the facts of the case. He did so by putting to MB similarities between the complainant's allegations and the counter-intuitive evidence. And by pointing out similarities one by one, he was essentially using the research to diagnose MB as a sexual offender. The prosecutor's use of the evidence can also be viewed as a form of propensity reasoning—many years of comprehensive research

[73] CA judgment, above n 6, at [55]–[61].

into many sexual offenders tells us about how they behave, and because MB acted in those same ways he is therefore likely to be a sexual offender. This was done in both cross-examination and the closing address.

[76] Mr Carruthers submitted that the Judge needed to give the jury clear directions on how the counter-intuitive evidence must not be used, by warning them against engaging in the sort of comparative exercise that the prosecutor had undertaken. Instead, the Judge largely left the jury to their own devices.

The Crown

[77] For the Crown, Ms Pridgeon did not accept that directions to juries about not misusing counter-intuitive evidence are seldom given. She acknowledged that there are a number of Court of Appeal decisions dealing with appeals from trials in which a direction was omitted, but those cases reach the Court of Appeal for a reason; they are not a representative sample. In the absence of evidence on the point, it should be assumed that judges follow this Court's instruction in *DH* and also rely on the *Criminal Jury Trials Bench Book*.

[78] Counsel supported the reasoning of the Court of Appeal. She argued that while the prosecutor referenced the counter-intuitive evidence in cross-examination and in closing, he did not use it to bolster C's credibility or to diagnose abuse in MB's case. The counter-intuitive evidence was mentioned briefly in the closing address to dispel misconceptions that the defence repeatedly relied on during trial. The prosecutor repeatedly reminded the jury that the evidence was educative and not about the facts of the case. The Judge's summing-up covered everything necessary, telling the jury that counter-intuitive evidence was drawn from relevant literature and experience, that it was not about MB or C and that it was admitted to address misconceptions. It must have been obvious to the jury that the evidence was not specific to this case. The jury were thoroughly warned about its purpose and proper use by the statement of agreed facts itself, by the prosecutor and by the Judge.

Assessment

[79] We turn to the use made of the counter-intuitive evidence in this case. As just explained, the argument before us focused on whether the jury were invited to treat the counter-intuitive evidence as probative of C's credibility, Mr Carruthers contending that the prosecutor misused the evidence by linking it to C's allegations and that the Judge failed to correct him.

Directions as to the purpose of the counter-intuitive evidence

[80] We did not understand counsel to argue that the jury were unaware of the purpose of the evidence. They were told that its purpose was to address misconceptions they might hold. They were also told that the counter-intuitive evidence was derived from research studies that were independent of the case and it neither proved nor disproved that C had been abused. These points were made in the statement of agreed facts itself and the Judge's directions:

(a) The statement explained at the outset that the evidence was based on research that was independent of the case and designed to address misconceptions about the behaviour of sexually abused children and adolescents. It stated there, and repeated at the end, that the evidence did not prove or disprove sexual abuse in this case.

(b) The Judge explained that the evidence was there to ensure the jury were not misled by common misconceptions about, for example, delay or the behaviour of people who have been sexually abused. He added that delay in complaining of itself neither proved nor disproved the truth of the complaint. The jury simply had to assess C's account and decide whether it sufficiently proved the allegations. He confirmed that the experts who compiled the evidence had not seen the complainant or the defendant.

Misuse

[81] We turn to whether the counter-intuitive evidence was misused.

The prosecutor's use of the counter-intuitive evidence

[82] We agree with the Court of Appeal that the prosecutor's use of the counter-intuitive evidence in cross-examination was problematic. He asked MB to comment on the counter-intuitive evidence "in relation to the facts here". The evident purpose was to highlight for the jury a high degree of consistency between the counter-intuitive evidence and C's behaviour. The prosecutor also put to MB that he had behaved in ways attributed to abusers in specific paragraphs of the counter-intuitive evidence. Specifically, he suggested that MB manipulated C to gain her trust and make her dependent upon him; that he normalised sexual behaviour through increasing physical contact over time; that he manipulated her by supplying drugs, alcohol and an apartment; that he used threats and acts of intimidation against her; and that he conditioned C to think she could not talk to her family.

[83] In his closing address the prosecutor took the jury back to the counter-intuitive evidence. Although he correctly identified its purpose as that of correcting misconceptions, he again linked specific paragraphs to C's evidence. We think it clear that he invited the jury to reason that C's evidence was more likely to be true because of the similarities it bore to the counter-intuitive evidence. That was to misuse the counter-intuitive evidence by linking it directly to the circumstances of the complainant, contrary to what this Court said in *DH*.[74] It was no answer to this to acknowledge that the research literature was independent of the case before the jury.

[84] The prosecutor also highlighted the frequency of some behaviours described in the counter-intuitive evidence, telling the jury that "more often than not" adolescents do not report sexual abuse during childhood, that "only one third" of adults who were abused as children ever report the abuse during childhood and that it is "not uncommon" for an abused child to continue to have contact with the abuser.

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[74] *DH*, above n 2, at [30(b)].

[85] As indicated earlier, it is permissible for counter-intuitive evidence to refer to the strength of the findings disclosed by research literature.[75] The jury may need to be persuaded of the falsity of some misconceptions. But as this Court suggested in *DH*, the evidence should not be emphasised more than is necessary to correct the relevant misconception.[76]

[86] As explained above at [21], the Court of Appeal stated in *M (CA23/2009) v R* that care must also be taken to avoid giving the jury permission to reason that: most or many abused children behave in a particular way; the complainant behaved in that particular way; therefore the complainant was abused.[77] We consider that the prosecutor in this case clearly invited the jury to adopt that reasoning.

[87] The prosecutor's use of the counter-intuitive evidence as to grooming was also problematic. In *DH*, this Court expressed reservations about use of that term in counter-intuitive evidence.[78] The Court's concern was that it may be used in a diagnostic way to label manipulative conduct aimed at persuading a child to agree to sexual activity. On the facts in *DH*, use of the term was considered acceptable because it was not used in a manner diagnostic of offending; rather, it could explain why a victim might come to regard the conduct as normal and might continue to show affection towards an abuser. The Court stated however that "grooming" should not be used to describe conduct of that kind in future cases.

[88] In this case, the counter-intuitive evidence referred to grooming and normalisation of abuse, effectively treating the two as near-synonymous, and it defined grooming as (in short) manipulative or controlling techniques aimed at normalising sexually harmful behaviour to facilitate exploitation.

[89] As noted, no objection was taken to this terminology on appeal. But the prosecutor did not confine his use of it to a general explanation of why victims may come to regard offending as normal. By putting the definition to MB in cross-examination and inviting the inference that it matched his behaviour, he

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75 Above at [33].
76 *DH*, above n 2, at [100].
77 *M (CA23/2009) v R*, above n 14, at [32(e)]. See also above at [22].
78 *DH*, above n 2, at [62]–[63].

unmistakeably deployed "grooming" in a diagnostic way. It is difficult to envisage circumstances in which counter-intuitive evidence could be used in cross-examination of a defendant (or when leading evidence from a complainant) without inviting diagnostic use by the jury.

The Judge's directions as to misuse

[90] As indicated, in his summing-up the Judge stated that delay made a complaint neither more nor less truthful. He directed the jury that delay was neutral and the question for them was whether they found C's account proved the charges beyond reasonable doubt.

[91] The Judge did not direct the jury that they must not reason that the fact that C behaved in a particular way described in the counter-intuitive evidence was itself indicative that abuse had occurred. *DH* required that he give that direction.[79] The omission to do so was an error. It assumed greater significance in this case because of the agreed statement's use of probabilistic language and references to the behaviour of abusers, and the use that the prosecutor made of the evidence.

[92] A judge's failure to give that direction is not invariably fatal. Appeals have been dismissed because information about proper use was before the jury in another form,[80] or the directions did not follow *DH* exactly but conveyed substantially the same idea.[81] It is also possible an appeal would be dismissed where the counter-intuitive evidence was not relevant to a live issue in the case, or where the error was not sufficiently material to affect the result on the facts.

[93] In this case, the prosecutor's use of the counter-intuitive evidence clearly risked a miscarriage of justice. The Judge ought to have intervened when the prosecutor used the evidence in cross-examination. Having failed to set necessary limits during the evidence and before counsel delivered their closing addresses, in summing up he had not only to explain the purpose and limits of counter-intuitive

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79 At [30(e)].

80 See for example *Paul*, above n 50, at [25]; *Nancarrow*, above n 23, at [57]; and *Moore*, above n 47, at [26]–[27].

81 See for example *Heke v R* [2021] NZCA 34 at [53]–[54].

evidence but also to firmly correct the prosecutor. It would not have sufficed, on these facts, to give the standard *DH* direction.

[94] The Judge's failure to intervene or to direct the jury appropriately was an error that was likely to affect the result of the trial. The Crown did not argue that this Court could be sure that the jury verdicts were correct.

[95] The Judge also erred by telling the jury in his summing-up that nothing should be read into the complainant's delay. The defence was entitled to use delay as a foundation for doubt, and its probative value was a question of fact for the jury.[82] But he immediately went on to say that it was for the jury to decide whether it accepted C's account or not. We are not persuaded that the error is likely to have affected the outcome.

Permissible use of counter-intuitive evidence by prosecutors

[96] Mr Carruthers invited us to hold that prosecutors should not be permitted to link counter-intuitive evidence to evidence in the case. He accepted that they might remind juries of the counter-intuitive evidence in closing, but submitted that they should refrain from weaving into their discussion examples taken from the evidence offered at trial. They should separately address the merits of their case on the evidence offered. He accepted that the same would apply to defence counsel.

[97] As indicated earlier, this appeal and *TW* were argued together and we are delivering separate judgments on the two appeals. It is convenient to record here that Mr Olsen, counsel for the appellant in *TW*, supported Mr Carruthers' argument but went further, contending that the risk of misuse is such that prosecutors should be prohibited from referring to counter-intuitive evidence, beyond leading or reading it, following which it should play no further role in the trial.

[98] Ms Pridgeon responded that it cannot be impermissible for a prosecutor to refer to evidence in the case, including counter-intuitive evidence. There can be no objection to that if the prosecutor also tells the jury of the purpose of the evidence.

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[82] See above at [28].

[99] We accept that it is permissible for a prosecutor to address the substance of the counter-intuitive evidence, and to explain its purpose and limits when addressing the jury in opening and closing addresses. However, the prosecutor must not convey the suggestion that factual similarities between behaviour described in the counter-intuitive evidence and the complainant's behaviour make it more likely that the complainant is a credible or reliable witness.

Judicial directions

[100] Judges should direct juries consistently with the principles set out above so far as they apply in the case before them. They should not rely on the prosecutor or the counter-intuitive evidence itself to explain the purpose and limitations of the evidence.

[101] Juries are sometimes told that the counter-intuitive evidence is intended to restore the complainant's credibility to a zero balance.[83] This metaphor is intended to convey that jurors must rely on the evidence of fact to decide whether they believe the complainant. It also conveys the sense that it is fair to use the counter-intuitive evidence for that limited purpose. However, it links the counter-intuitive evidence to the complainant's credibility and for that reason we discourage its use in future. It is better to say, as this Court did in *Kohai v R*, that the evidence allows fact-finders to assess credibility free from the influence of misconceptions.[84]

The second ground of appeal

[102] We can deal briefly with this ground of appeal, which concerned the prosecutor's decision to lead C through details of specific allegations after her evidential video interview (EVI) had been played, using leading questions to orient her to the relevant part of her evidence. Mr Carruthers contended that this was contrary to ss 85 and 89 of the Evidence Act, which respectively require a judge to disallow needlessly repetitive questioning and generally prohibit leading questions from being asked of a party's own witness without leave. He also argued that it was

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[83] See above at [26]. This terminology was used by the Law Commission in its 1999 commentary on the draft evidence code: Te Aka Matua o te Ture | Law Commission, above n 28, at [C111].

[84] *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833 at [18(a)].

contrary to "the spirit of" ss 103 and 105, which allow a judge to direct that a complainant's evidence be given in an alternative way.

[103] The Court of Appeal found some of the questioning unnecessarily repetitive but did not accept that it was unfairly leading or impermissible; it introduced nothing substantive that was new, and the use of leading questions would not have given the jury a false impression of C's knowledge, accuracy or veracity.[85] The Court observed that neither trial counsel nor the Judge, both of whom are very experienced, took exception to the questions.[86]

[104] The further questioning was extensive, running to some 20 pages of transcript. We take the point that extensive leading of oral evidence may be contrary to s 105, which allows "the evidence of a witness" to be given by EVI. Repetition means that the Crown gets the benefit of both the EVI, which can be relied on to bring out the details, and the jury impact of an account given viva voce. We accept that it may be needlessly repetitive or unfair.

[105] However, we are not persuaded that the prosecutor's conduct was unfair on this occasion, still less that it occasioned a miscarriage of justice. The leading questions that he asked were evidently designed to orient C to the topic he wanted to question her about. Having done that, he asked her open questions. The technique of using topic sentences to take the witness to something already in evidence is normally unobjectionable.[87]

[106] Nor was it objectionable for the prosecutor to elicit relevant fresh detail, such as (in one instance) that there had been skin-on-skin contact. As Ms Pridgeon pointed out, the prosecutor did not yet know what MB's defence would be. That may also explain several passages in which the prosecutor asked C to confirm that the behaviour she had described in the EVI happened and was non-consensual. It could not be assumed that MB would not advance a defence founded on consent.

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85 CA judgment, above n 6, at [62]–[64].
86 At [64].
87 *Smith v R* [2022] NZCA 448 at [25].

Disposition

[107] The appeal is allowed.

[108] The convictions are quashed and a retrial is ordered.

[109] Any bail application should be made to the District Court.

[110] For fair trial reasons, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant until final disposition of retrial pursuant to s 200(2)(d) of the Criminal Procedure Act 2011.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

Appendix: statement of agreed facts

[111] We set out here the relevant section of the statement of agreed facts:

1 Psychological evidence of the behaviour of sexually abused children/adolescents

1.1 The evidence is regarded as educative expert evidence that is designed to correct any misunderstandings that may be held about the behaviour of children and adolescents who have been sexually abused and those with whom they interact. This is because while some people may possess accurate knowledge about aspects of sexual abuse, some may not. Misconceptions about sexual abuse have been shown to be held by some members of the public at large and some jurors.

1.2 The purpose of this evidence is to correct any misunderstandings that may be held about the behaviour of children and adolescents who have been sexually abused. This is because what some people may intuitively think would be a typical or expected response by a child or adolescent who has been sexually offended against may be incorrect. The purpose is to assist the jury with understanding why, for example, a child or adolescent may not disclose sexual abuse immediately when this might seem incongruent with what might be expected from someone in such a situation.

1.3 This evidence relies on a comprehensive body of research developed over nearly forty years. It does not prove or disprove that sexual offending has occurred in this case. Rather, this evidence is about the behaviour of child or adolescent who have been sexually abused and the dynamics of sexual abuse of children/adolescents.

Reporting

1.4 There is no typical pattern for the reporting of child/adolescent sexual abuse. Reporting may be immediate or delayed, and it may be purposeful or accidental.

Delayed reporting

1.5 Some people may think that a child or adolescent would tell someone immediately after they had been sexually abused. However, more often than not children or adolescents do not tell anyone about sexual abuse during childhood. Reviews of the literature consistently indicate that only one third of adults, in the research sample who were victims of sexual abuse as [a] child or adolescent, ever reported their sexual abuse to anyone during childhood, and of those children or adolescents who do report, many delay reporting.

1.6 Child or adolescent sexual abuse may involve one incident or many incidents over a number of years. Review of the literature indicates that from the onset of child or adolescent sexual abuse, reporting

may be immediate or it may be delayed by weeks, months or even years.

Non-Reporting

1.7 Many people may think that a child or adolescent would report sexual abuse when asked, or when they are given an opportunity to report the sexual abuse. Despite being presented with an opportunity to report the sexual abuse to others, a child or adolescent may be reluctant to tell anyone about the offending and may not report the sexual abuse.

1.8 Children or adolescents may not report that they have been sexually abused to others, such as family members, or professionals, such as counsellors or Police, even when asked. Children or adolescents may be highly avoidant of discussing the sexual acts that have occurred, and may even deny that they have been sexually abused despite compelling evidence indicating otherwise.

1.9 While clinical experience and the available research literature tells us that disclosure of child or adolescent sexual abuse can be delayed, the timing of a complaint (whether it is immediate or delayed) does not, of itself, assist us in determining its truthfulness because, just as an immediate complaint may be untrue or true, a delayed complaint may also be untrue or true.

1.10 Whether a child or adolescent does, or does not, report sexual abuse when provided an opportunity does not, of itself, assist us in determining the truthfulness of the complaint. When provided an opportunity a child or adolescent may not report sexual abuse because they are reluctant to disclose the sexual abuse. Another reason may be that sexual abuse did not occur. Whether a child or adolescent provides a complete account of sexual abuse or provides details incrementally over time also does not assist us in determining the truthfulness of a complaint. A child or adolescent may provide a complete account of sexual abuse during their first reporting, or may provide details of the sexual abuse incrementally over time.

1.11 Despite being the victim of sexual abuse, a child or adolescent may choose not to tell anyone immediately about the sexual abuse for a number of reasons. Some of those reasons are set out below.

Grooming and the normalisation of sexual abuse

1.12 Grooming can be defined as follows: (1) the use of a variety of manipulative and controlling techniques; (2) with a vulnerable subject; (3) in a range of interpersonal and social settings; (4) in order to establish trust or normalise sexually harmful behaviour; and (5) with the overall aim of facilitating exploitation and/or prohibiting exposure.

1.13 Many sex offenders select and identify vulnerable children or adolescents and their families and then use that vulnerability to initiate a “friendship” as an avenue to eventually sexually abuse a child or adolescent, often with increasing physical contact over time.

Control through coercion, violence, threats and intimidation

1.14 An offender may employ a range of controlling or manipulative strategies in order to gain access to a child or adolescent, gain their compliance and maintain secrecy to avoid disclosure of sexual offending.

1.15 Offenders may try and manipulate a child or adolescent by using bribery or incentives, or threats, or acts of intimidation, to engage the child in the sexual abuse and prevent the child or adolescent from disclosing the abuse to others.

The availability of protective and supportive caregivers/adults

1.16 Some people may expect that a child or adolescent who has been sexually abused would immediately report the sexual abuse to a parent or caregiver and in many cases, non-offending parents, especially mothers, are often the recipients of a sexual abuse disclosure by children or adolescents.

1.17 There may be a number of reasons why a child or adolescent may choose not to immediately report sexual abuse to a parent or caregiver. For a child or adolescent who does not live with their parent or caregiver, there may simply be a lack of opportunity to report sexual abuse to a parent.

1.18 A consistent finding in research studies is that a child or adolescent's expectations of the likely reaction from the person to whom they report sexual abuse is central. For a child or adolescent to be able to report sexual abuse to a parent or caregiver, the child or adolescent needs to trust that their caregiver will be willing, and able, to provide the necessary support, and comfort, to them following disclosure.

1.19 A child or adolescent's prior experiences of how able or willing their parent/caregiver is to protect and support them may influence their decision to report the sexual abuse to the parent/caregiver. When a child or adolescent's family has required support from social service agencies, or when there have been care and protection concerns surrounding a child or adolescent's care within their family, a child or adolescent may come to view their parent/caregiver as not having the ability to protect or support them around a report of sexual abuse.

1.20 A child or adolescent may consider that a caregiver, may be unwilling to believe or support them around a disclosure, if a close relationship is perceived to exist between the caregiver and the offender. Anticipated reactions from a parent or caregiver, such as fear or shame, have also been shown to influence a child or adolescent's immediate disclosure to that parent or caregiver, of losing love and support from others has been shown to strongly inhibit disclosure.

Other factors that may influence delay in reporting

1.21 A child or adolescent may experience a range of different emotions as a result of sexual abuse. Shame, embarrassment, self-doubt, lack of acknowledgment by the offender and a fear they will not be believed can make it difficult for child or adolescent to disclose abuse. A fear of the consequences of telling about the abuse and anticipated negative reactions from family members can also inhibit disclosure by child or adolescent.

1.22 In a New Zealand study, reported reasons that had prevented immediate disclosure included expecting to be blamed, embarrassment, not wanting to upset anyone, expected disbelief, not bothered by abuse, wishing to protect the abuser, fear of the abuser and wanting to obey adults.

Continued contract with offenders

1.23 Although some people may think that a child, or adolescent, who is being sexually abused would resist the offender, call out for help, or try and avoid the offender, this does not take into account the dynamics that surround child or adolescent sexual abuse. It is not uncommon for a child or adolescent to continue having contact with someone who has abused them sexually.

1.24 Due to the nature of their relationship with the offender, children or adolescents who have been sexually abused can have ambivalent or mixed feelings toward the offender, and can feel both affection as well as hate.

Conclusion

1.25 This agreed evidence does not prove or disprove that sexual offending has occurred in this case. Instead, it is intended to provide information about the behaviour of children and adolescents who have been sexually abused and those with whom they interact.