NOTE: THIS TRANSCRIPT IS NOT A FORMAL RECORD OF THE ORAL HEARING. IT IS PUBLISHED WITHOUT CHECK OR AMENDMENT AND MAY CONTAIN ERRORS IN TRANSCRIPTION

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

SC 49/2019
[2021] NZSC Trans 17

PETER HUGH McGREGOR ELLIS
Appellant

v

THE QUEEN
Respondent

Hearing: 12-14 October 2021

Coram: Winkelmann CJ
Glazebrook J
O'Regan J
Williams J
Arnold J

Appearances: R A Harrison, S J Gray, B L Irvine and K D W Snelgar for the Appellant
J R Billington QC and A D H Colley for the Respondent

CRIMINAL APPEAL
[SUBMISSIONS]

WINKELMANN CJ:
Mr Harrison.

MR HARRISON:
Thank you, your Honour. The first matter that perhaps the Court may wish to hear on is section 5(3) and its application, whether we are looking at the application through the lens of the 2006 Act or whether the 1908 Act and the common law applies to the experts. That particular issue has been address by Mr Snelgar and if the Court wants to hear that particular argument first then I'd just ask him to come forward and address your Honours in respect of that or we could leave it to the end, whichever the Court prefers.

WINKELMANN CJ:
Mr Billington, you are on your feet.

MR BILLINGTON QC:
Yes, I am, but if it assists I was going to ask your permission to have Ms Colley address the issue at the start of my submissions. I know normally there's only one counsel speaks to the Court.

WINKELMANN CJ:
No, we allow both counsel, yes.

MR BILLINGTON QC:
You'll allow it? In any event, Ms Colley will –

WINKELMANN CJ:

And encourage it. It's encouraged. In fact, we've made statements that we encourage it.

MR BILLINGTON QC:

I understood that was the case. But Ms Colley will address it whenever is convenient and I was going to do it at the outset so it may well be helpful to do it now before Mr Harrison and I address you.

WINKELMANN CJ:

Are you suggesting that we deal –

MR BILLINGTON QC:

We deal with it now as a discrete issue, yes, by both counsel who are going to address you on it.

WINKELMANN CJ:

Seems like a good idea.

MR SNELGAR:

My preference was to go first in any event just to get this out of the way, so thank you.

WINKELMANN CJ:

Well, that's good for you then, Mr Snelgar.

MR SNELGAR:

Tēnā koutou.

WINKELMANN CJ:

Did you have anything in writing additional to the existing submissions or…

MR SNELGAR:

There is going to be a departure from the existing submissions, your Honour. The appellant's submission is that the 2006 Act applies. I will make some

brief submissions on why that is with reference to *R v Bain* [2008] NZCA 585 which should be part of your bundle of common documents.

So the starting point in my submission is that the Court is generally concerned with retroactive legislation where to apply retroactive legislation would harm the interests of a defendant. Certainly that's not the case in this situation. Here we have in my submission the 2006 Act which actually clarifies the status of the law is more consistent with the Bill of Rights and has resulted in the repeal of a piece of legislation, a section that we have talked at length about 23G.

So what law applies in this case in my submission the Court would benefit from looking at *R v Bain* which is the Court of Appeal decision.

O'REGAN J:
Court of appeal decision not the Supreme Court?

MR SNELGAR:
No, yes, the Court of Appeal. Does the Court have a copy of that in the bundle?

O'REGAN J:
But it was overturned, wasn't it?

MR SNELGAR:
Not this point as I understand which is to do with whether or not the 2006 Act applied. So in *Bain* the issue was in relation to a re-trial which I acknowledge is a different situation here so the Court found in that case that a re-trial is essentially a new entity. It's the beginning of a new process which means that the new Act would apply. So different to this case because this is the ultimate hearing, there is no re-trial and *Bain* helpfully goes through what the 2006 Act means, that there is a presumption that that Act would apply.

WINKELMANN CJ:
What paragraph are you at there?

MR SNELGAR:
Paragraph 6, your Honour. This is in reference to section 5(3) which provides that this Act applies to all proceedings commenced before on or after the commencement of this section except, so there are two exceptions, where there is a continuation of a hearing that's commenced and that word "commencement" will be the key issue for the Court, before the commencement of this section or to any appeal. So basically the Act is that there is a presumption with two carveouts for this to apply to all hearings that have commenced.

4(2) sets out what is the commencement of a hearing and that follows on to the next page. It's a hearing commences when the substantive hearing of the issues which are subject to the proceedings the party having the right to begin may waive an opening address and calls its first witness. So that definition is quite wide in my submission of what is commencement and in my submission the point I'm making is that the 2006 Act, which is more consistent with the Bill of Rights where there is a two separate regimes should be preferred in the sense that commencement should cover this hearing as the commencement of a new entity or a new matter.

So moving away slightly from *Bain* that this is not a re-trial this is an appeal but that a reading consistent with the Bill of Rights Act would see that a hearing like this which is some 30 years after the original appeal where there has been the repeal of a 23G and the codification of procedural rules to assist parties in the court procedure so essentially the Act is there to assist the Court with running hearings and that because the 2006 Act allows the Court more clarity that that is my submission for why it should be, why the Act –

WINKELMANN CJ:

So do you mean therefore that in determining whether the evidence should have been before the jury we should look at the Evidence Act 2006 putting to one side the expressed statutory permission in section 23G?

MR SNELGAR:

Yes, and so –

O'REGAN J:

So how could we – we are dealing with an appeal?

MR SNELGAR:

Yes.

O'REGAN J:

Section 5(3)(b) says any appeal be dealt with under the old law. I mean that's just as clear as day, isn't it?

MR SNELGAR:

Yes, and I accept that that is certainly one strong reading your Honour, so I'm not going to die in the ditch over this, it's essentially a matter for the Court, and indeed in *Pora*, and I won't' refer to the case, the Court really didn't clarify the position either way. It said that either under the common law or under the Evidence Act, either way, there are issues. So certainly either option doesn't hurt the appellant's case in my submission, but a 2006 approach the Court may think that that is a more consistent act with the Bill of Rights, and I'm not going to go into the detail of *Fitzgerald*, but that the Court has recently as it said, that there is a presumption of a rights consistent meaning to legislation and so in determining what commencement means, would a rights-consistent meaning of commencement mean that a commencement can include an appeal like this, that is some 30 years after the original hearing, and there has been significant change in the legislation as well as criticism of that 23G particular section in the case of *R v Jarden* CA51/03, 4 August 2003.

WINKELMANN CJ:

I don't know if the Evidence Act helps you there though. I mean because you're general approach to the application of the Evidence Act could be very problematic, couldn't it, because it would mean that evidence which was clearly admissible under the state of the law at the time, but that situation is changed by the Evidence Act. It could cause an unravelling of a whole lot of convictions which were perfectly legitimately obtained.

MR SNELGAR:

Yes, potentially your Honour, and that maybe – there are ways, of course, that the Court could limit it, but I accept that there are possibly wider issues of looking back and changing the application to a trial, but certainly part of this appeal was that things have changed substantially in the legal space, the science space, but again I'm not going to push this point. It's really just thinking about how the Bill of Rights might apply to two regimes and what would be the more consistent rights regime. Of course the Bill of Rights –

WILLIAMS J:

Don't we just have to read 23G consistently with the Bill of Rights? They were enacted in the same year?

MR SNELGAR:

Yes. Although there may be an issue whether that's possible and, of course, memory itself is probably outside the scope of behaviour that is consistent or inconsistent. So the central issue might fall within the common law rules but, yes, that's an option. The other point being that the 2006 Act expressly within the purposes of that Act says that this Evidence Act is going to be consistent with the Bill of Rights so again Parliament's intention is that this codification would be consistent with the Bill of Rights.

WINKELMANN CJ:

Well as I understand your appeal ground here it is that in fact the evidence that Dr Zelas gave was not soundly grounded on the science even at the time.

MR SNELGAR:

Yes.

WINKELMANN CJ:

That doesn't really turn on the application of the 2006 Act, does it?

MR SNELGAR:

No. So, yes, on that particular point the assessment is, the 23G point and whether or not the evidence went outside that, and my learned friend Ms Gray will address the Court more on that particular point. Perhaps I won't labour the point because this is maybe perhaps more of an academic point than what's helpful to the Court. Certainly if we're looking at 23G then I stand looking at that Act would be more helpful than the 2006 Act. So it's really just to highlight that there has been a significant change in the legislation, so what, and looking at Bain that there is the possibility to consider this as a new entity rather than the continuation of a trial, bearing in mind the change in the law, and on one reading the Court may think the 2006 Act is more consistent with the Bill of Rights although I'm not going to labour that point.

GLAZEBROOK J:

Can I just check with you, you're just talking about section 23G but I think in your written submissions you were dealing with perhaps differences in respect of the admissibility of evidence of experts in this appeal but also not dealt with in your submissions is whether you see there being any difference in respect of the matters that we're talking about for the complainant's evidence in terms of admissibility of that between the 2006 Act and the previous position under the Evidence Act 1908 which is effectively common law probably mostly?

MR SNELGAR:

Yes.

WINKELMANN CJ:

And particular case of *Wilson* in relation to –

GLAZEBROOK J:

Yes because obviously we have recently opined in quite a lot of detail in the Supreme Court vein as well as *Wilson v R* [2015] NZSC 189 dealt with issues in respect of admissibility under the Evidence Act and the more structured process certainly than under the common law?

MR SNELGAR:

Yes.

GLAZEBROOK J:

Do you want to make any comment on that or have you any comment on that?

MR SNELGAR:

No your Honour, no, no comment on that.

GLAZEBROOK J:

So the position is effectively that it would be the same whether it were under the common law just a more structured under the Evidence Act but effectively the same law applying?

MR SNELGAR:

Yes and I think the ultimate issue point which is –

GLAZEBROOK J:

Yes okay.

MR SNELGAR:

And what constitutes an expert or who can qualify as an expert as well might be slight difference, but again not major points, this is not a determinative issue for the appeal and I don't have anything else to add unless there are any other questions.

MS COLLEY:

Tēnā koutou e ngā kaiwhakawa, kei aku rangatira. Just on those broader issues that your Honour Justice Glazebrook just raised I note that Mr Billington will address those in our substantive submissions later in this hearing. On the matter of whether the Evidence Act 2006 applies versus the 1908 Act the respondent's position is that the wording in section 5(3) of the 2006 Act is plain. As my learned friend just referred to subsection (3) provides that this Act applies to all proceedings commenced before, on or after the commencement of this section except in two circumstances. First, where it is the continuation of a hearing but commenced before the commencement of the 2006 Act and any appeal from, review of, a determination made at a hearing of that kind. A hearing of that kind the respondency as being one that commenced before the commencement of the 2006 Act. The respondent submits this case falls within paragraph (b), it is an appeal from a decision made by the Court of Appeal in 1999 before the 2006 Evidence Act had come into effect. I would refer your Honours to the case of *R v R*, I will give you the reference for that as it's not in our submissions. So it's *R v R* CA 385/2008 and the neutral citation is [2009] NZCA 309 and I point your Honours in particular to paragraph [29] of that decision and we will provide a copy to the Court for you after today. Now in that case of *R v R* the appellant had been convicted at a trial which took place in March 2007 before the 2006 Act came into effect. It came into effect later that year in July, in August, sorry your Honour. The appellant appealed against his conviction to the Court of Appeal so while his trial took place in March 2007 the appeal was not heard until July 2009 and in determining that application the Court of Appeal observed at paragraph [29] that the 2006 Act did not apply to the appeal as the appeal was from a trial where the 2006 Act was not in force.

The respondent says this is similar to the present case. Not only are we dealing with a trial that took place in 1993 but this is an appeal from a Court of Appeal decision in 1999. Therefore applying section 5(3)(b), as the Court of Appeal did in *R v R*, the respondent says it is the 1908 Act that applies here.

Referring briefly to the cases, *R v Bain*, the Court of Appeal decision there that my learned friend cited, in that case the Court of Appeal was concerned

with a retrial commencing after the 2006 Act had come into force. Procedurally, that makes sense, that to a retrial that is a new proceeding, and so the 2006 Act, the current law would apply to that new proceeding. However, here this is not a new entity. We are dealing, as I have said, with an appeal from a 1999 Court of Appeal decision.

The respondent submits that the effect of the 1908 Act applying and also the common law at that time means that where the allegation of a miscarriage of justice rests on the admission or use of evidence at the appellant's trial, miscarriage must be compared against the 1908 Act and the relevant common law at the time.

In respect of whether the expert evidence, which was initially the point raised in memoranda, whether the expert evidence should be admitted before this Court, again the relevant common law would apply which was similar to the substantial helpfulness test now codified in section 25.

WINKELMANN CJ:
Doesn't the miscarriage of justice test in the Crimes Act apply?

MS COLLEY:
Yes, that is correct, your Honour. So the respondent's position is that consistently both when we're looking at the Crimes Act and the relevant provisions there and with the evidence law, it is the law in force at the time of the appellant's trial and the 1999 Court of Appeal decision that applies.

Unless your Honours have any further questions, that concludes our position on that matter.

WILLIAMS J:
What do you think "hearing of that kind" means?

MS COLLEY:

Your Honour, I would interpret "hearing of that kind" in paragraph (b) as referring to that in paragraph (a). So in paragraph (a) it says: "…a hearing that commenced before the commencement of this section;" and then (b). So an appeal from a hearing that commenced before the commencement of the section.

WILLIAMS J:

What about the words "the continuation of"?

MS COLLEY:

Your Honour, you could adopt that interpretation. *R v R* would point against that. *R v R* points to a straightforward – an appeal from a hearing that commenced before the commencement of the section.

There is a definition, as my learned friend referred to, of "a hearing" in section 4 of the 2006 Act. That provides that "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." So you could adopt two interpretations of hearing there, could either be when opening submissions began at the appellant's trial or when the appellant commenced delivery of its oral submissions before the Court of Appeal in 1999. On either interpretation the respondent's position is that that hearing occurred before the 2006 Act came into force and as we're dealing with an appeal from either of those hearings, whichever way you view it, it is the 1908 Act that applies there.

WILLIAMS J:

Yes, my point is really that one way of reading this is that the driver is continuation. Obviously, the Act applies before, on and after. Any proceedings commenced before, on or after, that's the start point. Two exceptions? Where a trial is continuing at the appointed date of Royal assent and any appeal from that. That's a much narrower group.

MS COLLEY:

It is a much narrower group, your Honour.

WILLIAMS J:

What do you say about that?

MS COLLEY:

Our position would be that it doesn't fit with the common principle that the law applies as in force at the time of the trial or the decision was made, does not square with that principle.

WILLIAMS J:

No, but that's already dealt with in the head note of section 5, isn't it? It's already clear that this Act is retrospective.

MS COLLEY:

Yes.

WILLIAMS J:

It says so.

MS COLLEY:

Yes, that is true.

WILLIAMS J:

Except for these –

MS COLLEY:

Except for these narrow circumstances, yes.

WILLIAMS J:

So you would read 5, is it (1), (2), I can't remember, as if it effectively negated the headnote, the head part, the chapeau of the section?

MS COLLEY:

No, not that it negates the headnote, your Honour, but that there are these particular narrow circumstances.

WILLIAMS J:

Yes, the chapeau of subsection (3).

MS COLLEY:

Yes, this Act applies all proceedings commenced before, on, or after. It doesn't negate the retrospective application of the 2006 Act but we say that this very scenario, an appeal from a hearing that had occurred prior, does fall within that interpretation in paragraph (b).

WINKELMANN CJ:

Isn't the point that you might make that that seems an unusual reading because why isolate that particular group of appeals from the application of the Evidence Act, why not also isolate appeals from cases that actually took place under the old legislation?

MS COLLEY:

Yes, that is correct your Honour. So why would appeals from continuing cases be any different from appeals that had been heard under the old legislation. They are, for all intents and purposes, the same because they were dealt with under the old legislation and it is that old legislation that should be judged by the continuing case or in this instance an appeal from an old case under the 1908 act.

GLAZEBROOK J:

And I suppose the other thing you could make that might be in contradiction by the point made by Mr Snelgar, not overly strongly as we accept, is that in fact you can't assume necessarily that the position will be more beneficial under the 2006 Act than it was under the previous Act are possibly more consistent in some aspects of the Bill of Rights but that mightn't be the case in all aspects and so there might be matters that actually go against a defendant

rather than for a defendant and effectively you couldn't pick or chose in respect of that.

MS COLLEY:

That is correct your Honour and my learned senior will address that but one of our positions is that indeed the similar fact evidence that was heard at this trial in 1993 arguably would have been a worst position for the accused, as he then was, under the propensity law today which requires more strict directions to be given when that evidence is called and also allows for a broader definition of propensity evidence as opposed to the narrow similar fact evidence at the time. So your Honour's point is correct and so that's why, you know, the respondent's position is to be consistent we should be looking at the law that applied at the time of the appellant's trial and also at the time in which the Court of Appeal in 1999 was judging that case.

WINKELMANN CJ:

And will Mr Billington address the relationship between that and miscarriage of justice because of course the issue of admissibility is one thing but the impact on a trial of evidence which has proven to be wrong or poorly based on the science at the time is another.

MS COLLEY:

Is another matter, yes your Honour, and Mr Billington will address that when discussing section 23G.

WINKELMANN CJ:

I guess one last point is the reason for a narrow carveout may be that these are the situations where the law changes midgame and so you've got to make a call as to which one applies.

MS COLLEY:

And that very much makes sense in the *Bain* context where we're looking at a re-trial. What you have there is a new proceeding, a new entity. You wouldn't judge that on the basis of the old law that the former appeals were dealt with,

that's a new proceeding, you don't want old procedural law applying to a trial and re-trial of that nature.

WILLIAMS J:
Yes, still the continuation word is not helpful to your –

MS COLLEY:
I agree, it's not helpful your Honour and I think, you know, it's not a particularly clear section.

WILLIAMS J:
No.

MS COLLEY:
But our position remains that the 1908 Act applies. Is there any further questions?

WINKELMANN CJ:
No thank you Ms Colley.

MS COLLEY:
Thank you your Honours.

MR HARRISON:
Your Honours, I would start with looking at the pre-interview contamination factors that we've heard about. Later on through this process I would ask that your Honours go and have a look at a couple of excerpts of the tapes. At that stage we'll have a change of counsel and Ms Irving will address you on the contamination factors from the interviews and the interviewing process, because there's two parts to that first argument, so I'm going to deal with the pre-contamination, pre-interview contamination factors, or parental contamination. Now the Crown –

WINKELMANN CJ:

What is Dr Irving addressing us on? What is your co-counsel addressing us on?

MR HARRISON:

She's going to address you on the issue of props, dolls and protocols, in essence, and the interviewing techniques at the time, and the work undertaken by Professor Hayne in terms of assessing how those interviews were. So I'm going to focus on the evidence of the pre-interview contamination, and what's changed in essence since 1993 in terms of the science that we understand about those risks.

So the Crown, I think at page 30 of their submissions, paragraph 74, say: There is nothing significantly new being presented to this Court." Now I would challenge that by looking at the work of Professor Hayne, Professor Howe, and indeed the summary from Professor Goodman where they talk about the research that has been done, and in particular where children have been able to overhear events in experimental studies, and then their evidence, their memory is contaminated.

WINKELMANN CJ:

Just before you go, can you tell us, you're not working from your written submissions at all, you're just doing –

MR HARRISON:

No I am. Sorry your Honour, I am, yes.

WINKELMANN CJ:

Because it just helps us to be orientated to where you are in your submissions et cetera.

MR HARRISON:

I'll try not to free-range so much. My learned friend wishes to be heard on whether or not excerpts of the tape should be played, so perhaps if we tidy that up first.

WINKELMANN CJ:

Right, Mr Billington.

MR BILLINGTON QC:

I'm not quite sure what's intended, and I don't deliberately interrupt over counsel, but I was informed this morning that it is, the Court's being asked to view some videos during the course of this submission.

WINKELMANN CJ:

Yes.

MR BILLINGTON QC:

And of those there is 17 minutes of playtime against a total of 24 hours.

WINKELMANN CJ:

Yes.

MR BILLINGTON QC:

Now I didn't understand from pre-trial discussions, and if I didn't understand maybe it's my fault, that there was any, firstly any capacity to play the videos, and secondly, if there was, I didn't understand there was going to be any videos played and then thirdly, if they are, I am concerned that playing 17 minutes of 24 hours is not going to assist. It opens up the prospect, which I will not avail myself of the invitation of doing, is to ask you to look at other aspects of them.

WINKELMANN CJ:

Well perhaps it might fore-shorten this discussion, Mr Billington, to say that we had discussed it and thought we should look at videotape interviews.

MR BILLINGTON QC:

Yourselves or with us?

WINKELMANN CJ:

Well, we are open to either, and it might be a good idea for counsel to discuss how we should proceed in that regard. We had thought ourselves –

MR BILLINGTON QC:

I think it's appropriate you do look at them, and we can provide you with references if you wish, I've been through the transcripts, my address will include references to statements, but to – I have little confidence that playing a few minutes in the course of addressing you today is going to inform you any better and it invites me, which as I say I resist the invitation to then say well look at some other passage or play those, I don't want to do it. But I'm very, very open to it, in fact I supported of the concept that you do look at as many of those videos as you choose to do so and I will give you references from passages that you may consider to be appropriate albeit they're quite limited. But to play them in the course of this is not something that I understood was contemplated, nor do I submit, with respect, it's very helpful to the exercise that we're on. But ultimately, of course, what helps you helps all of us so, but I thought I should make those points, thank you.

WINKELMANN CJ:

Thank you Mr Billington. We'll hear from you Mr Harrison and then we might just take a few moments to discuss it. But I should say that co-operation between counsel about what is appropriate, what we should view and we can safely not view would be wonderful, I'm not sure if it's too much to hope for. But anyway go ahead.

MR HARRISON:

What we're looking at is the use of dolls in the interview process. So we've taken two examples of that that we think that you need to have a look at, that's why they are – we ask that they be played because you've heard some evidence from Dr Seymour in terms of his view of the use of those tools to

assist interviewers and we think that it's important that you see those points and I understand my learned friend may wish to then have other parts of the tapes played. So perhaps if we have a discussion now with my learned friend and perhaps come back to the Court concerning that?

WINKELMANN CJ:
Well should we adjourn so you can have a brief or do you want to deal with it at the next adjournment, I don't know.

MR HARRISON:
Well perhaps if we do it now and then we both – we all know where we're at.

GLAZEBROOK J:
So it's a relatively confined point that you want to play the videos on?

MR HARRISON:
Yes.

WILLIAMS J:
And it's not a nice to have, it makes a point that can't be taken from the transcript?

MR HARRISON:
That's right.

WILLIAMS YOUNG J:
That's what you say?

MR HARRISON:
Yes.

WINKELMANN CJ:
Well we'll take a short adjournment and then just to give you a chance to discuss the issue of viewing of videotapes more generally. For myself I don't think there's any problem with looking at a small part if it's going to be within a

broader context but I take that once we've viewed, I take Mr Billington's point that of the dangers of just taking small bits.

MR HARRISON:

Absolutely but I don't want to give you 48 hours of tapes to view either.

WINKELMANN CJ:

I thought it was 24, they're growing?

MR HARRISON:

Feels like 48.

COURT ADJOURNS: 10.23 AM

COURT RESUMES: 10.30 AM

MR BILLINGTON QC:
As the court pleases, we have some clarity. What my friend proposes is that before the issue of (**inaudible** 10:31:00) and look at the short passages of video and I am not going to stand in the way of anything that assists the Court or the appellant in making their case. So I was aware of it only this morning and if that's what is proposed if you want to do it that way I'm certainly not going to resist that.

WINKELMANN CJ:
And we're happy to do that.

MR BILLINGTON QC:
In that case, thank you. Is there anything else Justice Glazebrook?

WINKELMANN CJ:
Yes, we still want some assistance from counsel about what parts of – whether it is necessary to view the whole of the video interviews or whether you could agree that this is a fair range of video interviews we should view and we think it would be helpful to us if counsel gave us time indications about parts they wanted us to look out for.

MR BILLINGTON QC:
Having just received this our proposal is now that we now know why it's been shown to you we will find other matters that we think may further inform you, at least in our opinion, that is what we will do and what I –

GLAZEBROOK J:
Is that more general because not just on the dolls and props we were looking for counsel to provide us with a list of the interviews they think we should watch and then an indication of the particular passages in those interviews that are of particular significance in counsel's view, so a more general

exercise and if that could be agreed between you that would be even better so that we have one document even if it's a document that says: “We don't think you should look at this,” which I'm sure wouldn't be the case in any event.

MR BILLINGTON QC:
No, what I –

GLAZEBROOK J:
So that we've got the balance –

MR BILLINGTON QC:
You've changed my thinking slightly because what I am going to do and it was to go through the evidence and after I had closed to give you the references to the cross-examination material. I will give some thought as to whether I can assist you further with regard to the interviews. I don't know that I can particularly except to say that I will try and find some parts that maybe will inform you further.

GLAZEBROOK J:
Well at least point us to the interviews that you would think as most significant in that –

MR BILLINGTON QC:
Yes.

GLAZEBROOK J:
We are going to watch the video interviews. I don't think we would wish to watch all of them.

MR BILLINGTON QC:
No.

WINKELMANN CJ:

For instance, could it be agreed that we should not watch child 5's fifth evidential interview because it was the last and not played to the jury. Would it be agreed that we need not watch child 6's fifth and sixth. They were two at the end and not played to the jury. Would it be agreed that we not watch child 7's second and third and because they were not played to the jury?

MR BILLINGTON QC:

Would it be more helpful if rather than occupy the time now that if we exchange memoranda on this because I'm going to tell you I haven't watched them deliberately. I've had a different approach as you will see. My learned junior has looked at them. We could direct your attention to those that we think would assist in the way that the Chief Justice has just asked us but I think it would be more useful if you gave us some time to do so.

WINKELMANN CJ:

Yes, we gave you the time to have a preliminary discussion about how you might work out a process so that's good.

MR BILLINGTON QC:

I wasn't thinking a few minutes I was actually thinking if we finish the case you will know what our respective positions are.

WINKELMANN CJ:

Yes.

MR BILLINGTON QC:

We will then exchange memoranda, see if we can agree or disagree as the case may be. You will get that within a timely period. I had hoped to go home and not do anymore but I don't think that's quite the case now but that would be –

GLAZEBROOK J:
It never quite works that way.

MR BILLINGTON QC:
Because I appreciate just the sheer volume of this is where do you look is actually one of the challenges.

WINKELMANN CJ:
So that's what we've been trying to say Mr Billington.

MR BILLINGTON QC:
We'll do that. Yes, I understand.

WINKELMANN CJ:
We need your assistance.

MR BILLINGTON QC:
We will do that and if we do that within probably 14 days, something like that, that would be more helpful to you, I think, than trying to do it on the run.

WINKELMANN CJ:
Well, maybe seven days because we want to get on and everybody wants this not to drag on.

MR BILLINGTON QC:
Yes, certainly. Yes, I understand. Seven days, within that period we'll come back to you and we'll circulate a memoranda. That gives it more thought and it's less reactive. In the meantime, if that's what you want to do today, I certainly am not standing in the way of anything like that.

WINKELMANN CJ:
And are you content with that course of action, Mr Harrison?

MR HARRISON:

Your Honour, yes, I am. The excerpts that we asked you to look at this morning are brief and they are pointed to one particular aspect that we just want clarification or for you to be able to ask knowledgeable questions, based on what you've seen, of Ms Irvine.

Now if I can perhaps, I'm really at page 13 of appellant's submissions where we're looking at the pre-interview contamination factors, and we have set out carefully some of those factors for the Court's consideration. Last week we put a number of interview points to Dr Seymour, in particular where it was a questioning or the initial questioning from a parent leading through to the first interview and the first substance of what the child had to say. There are more of those that are available and we will discuss those shortly.

GLAZEBROOK J:

Are you going to provide that in writing to us, the references in writing?

MR HARRISON:

Your Honour, yes, absolutely. So they are just a bit more complex. They are not as simple as those points that we raised.

WINKELMANN CJ:

Yes. Well, I mean as a general observation your case on this point is quite complex, based in part on Professor Hayne, but also I've – in reading in the previous appeals quite a complex case was put up setting out a narrative of what was said to be connected contamination events, but that's not in your written submissions?

MR HARRISON:

No. I think because we've had the research now, that indicates – it tells us what I would have thought would have been common sense but it's been tested in experimental studies, for example, that a child will listen more carefully to a parent and take on board what a parent is saying, especially when they are questioning them about an event, and that's what the Principe

studies, for example, show. So that wasn't before the jury, wasn't capable of being before the jury because that study hadn't been undertaken, wasn't available for the '99 appeal either. The Crown experts talked to us about the ecological validity of experimental studies as –

WINKELMANN CJ:
Well, before you move on, you're not really answering my question though, Mr Harrison. Are you going to give us a more detailed narrative of how you say – of pre-interview contamination affecting each child, or is it just going to be at the general, at the level that it's currently in your submissions?

MR HARRISON:
Well, there is the work done by Professor Hayne in her affidavit. There is the work undertaken by Professor Goodman at – she begins at 202.0532 through to 202.0581 where she goes through each and every child indicating those factors. I can distil those –

WINKELMANN CJ:
So what were the page numbers for Professor Goodman?

MR HARRISON:
202.0532 through to 202.0581, and that's where she has gone through each and every child and indicated her assessment of the contamination risk level and I think for 4, 5, 6 and 7 she rates it as high. For 3 she rates it as moderate and for 1 and 2 she rates it as low.

WINKELMANN CJ:
So you stand on those?

MR HARRISON:
I stand on those your Honour, what I would do is I will flesh out a couple more that weren't put to the experts last week and that's in respect of child 4 and child 3. Before I do that though I just wanted to look at this ecological validity argument that has been placed before the Court. Now my understanding of

what the experts are saying is that experimental studies can't replicate the intensity of emotion or the severity, the complexity and the reality of sexual abuse. Now that's absolutely correct, it cannot because it is repugnant to even begin to do so. But what experimental research tells us is that these factors have an impact on the malleability of children's memory and perhaps one of the ways to look at this is to look at child 5 and some of the impacts or the pressures on child 5. So I wonder if we could start with…

WILLIAMS YOUNG J:
Are you going to take us to the notes or to the EVIs?

MR HARRISON:
To the notes your Honour, not the EVIs. So this is the, I'll start with 406.2397. Now this has also been put in the bundle of documents that your Honours have the living document or the living bundle.

WINKELMANN CJ:
So this is in the bundle?

MR HARRISON:
Your Honour yes it is.

WINKELMANN CJ:
In this thing?

MR HARRISON:
It's 406.2397, it's just been placed before the Court this morning.

WINKELMANN CJ:
But did you say, it's in the living bundle though is it?

MR HARRISON:
Yes, the original bundle is 406.2383.

WINKELMANN CJ:

So we're looking at 406.2383?

MR HARRISON:

Yes that's the document and I refer you to 406.2397. Now this is a letter written by the parent to the police concerning a cancellation of an interview. Now ruling 9 is where we were stopped from cross-examining on that letter and the role of Dr Zelas in the cancellation of that interview. The point I make in respect of this is that the child or the parent records the child as talking about other events and those events include other crèches being involved, other staff from the crèche being involved. She also refers to the counsellor for the child wanting a Pamela Hudson brought across from Australia because she is an expert in ritual abuse.

WINKELMANN CJ:

Who wanted that?

MR HARRISON:

The parent was asking for that person to be brought across to New Zealand. That is at 4062399, last paragraph. The reason I raise this note is that it shows the level and intensity of questioning of this child which preceded the three previous interviews and in fact it does refer to those three previous interviews.

Now experimental studies would tell us that this level of questioning is unacceptable and raises an unacceptable risk. I don't think you can deny it by saying well those studies don't have any ecological validity when you start seeing what or the level and intensity of questioning that was undertaken by this particular child.

WINKELMANN CJ:

Was this letter in evidence?

MR HARRISON:

It was in the depositions but not the trial. Ruling 9 says that we were not to question the parent concerning Zelas' role and the Judge raised his eyes at the relevance of other material because it is post the – the points we were wanting to raise were post the interviews which the jury had before them.

WINKELMANN CJ:

The raising his eyebrows is not in his ruling though, that's your recollection.

MR HARRISON:

Well I think in the last paragraph I think you will see a warning shot across the bow.

WINKELMANN CJ:

Okay.

O'REGAN J:

Why does this show the ecological validity of the studies?

MR HARRISON:

Well because they keep telling us that ecological validity cannot replicate the trauma or the stress of abuse but it also here what we're seeing is inappropriate questioning by children which we say is producing unsafe material which experimental studies are telling us occurs. So it actually reinforces the importance of those experimental studies in terms of assisting a Court and understanding what can –

O'REGAN J:

But if they don't apply to traumatic events like sexual abuse why does this (**inaudible** 10:48:43) traumatic events in that situation.

MR HARRISON:

I'm sorry, your Honour, I'm having just a wee bit of difficulty hearing you.

O'REGAN J:

Well if the criticism of the studies is that they're not relevant or at least they don't translate across well to children who have experienced trauma like sexual abuse why does this information tell us that's wrong?

MR HARRISON:

Because if we're in a courtroom situation where we have allegations of abuse, not sexual abuse full stop but allegations, experimental studies tell us of the risks and I think they're trying, well, it seems to be an attempt to stop the experimental studies informing a jury on the basis of ecological validity. The ecological validity argument has to start on the basis that the abuse has occurred otherwise it makes no sense and the reality is for us we live in a country that begins with the presumption of innocence and an allegation of abuse. We don't start with the presumption that the abuse has occurred and we have to prove our innocence and if you take that ecological validity argument to the nth degree what you're doing is reversing an onus of proof in essence.

O'REGAN J:

That's a generic point, it's got nothing to do with this particular witness, what this particular witness says. I mean if that's right that's just a generic point that there is ecological validity because we don't know whether there's been sexual abuse or not in any trial do we until we get a verdict?

MR HARRISON:

Yes, the other, the second part to that was Dr Zelas was saying that she would have, that suggestibility itself she seemed to suggest that it would be unlikely that a child could give the detail or the information that this child provided or that the children provided.

ARNOLD J:

This is child 5?

MR HARRISON:

Yes.

ARNOLD J:

And that's one of the children that Dr Zelas addressed in the letter?

MR HARRISON:

Yes, ah, yes.

WINKELMANN CJ:

Yes it is.

MR HARRISON:

And I think well and the reason I put it before the Court is that the child is, when we're talking about the reinforcement if you like or the overlaying of an initial allegation and the, I guess we would refer to it as positive reinforcement of maintaining that mind or that memory or that position. When you see the level of involvement one starts to understand how that could be possible when you see what the questioning and the intensity for this young fellow through leading up to trial.

WILLIAMS J:

So your submission is really ecological validity is all very well but take a look at the level of suggestion and tell me that couldn't have any impact, that's what you're saying isn't it?

MR HARRISON:

Yes.

WILLIAMS J:

Nothing more clever than that?

MR HARRISON:

No I'm very simple.

GLAZEBROOK J:

And I suppose you might say that in the ecological studies there was actually a lower level of suggestion that was applied which I think is a point that a number of the expert witnesses made?

MR HARRISON:

Yes, yes so I think that ecological argument is something of a red herring and I'm just trying to put it to bed really. There was one further factor in respect of this and I'm just not putting my finger on it immediately but there is a reference in here where the counsellor had been showing the child, and I accept that this is well after the interviews that we're initially looking at, it's page 406.2441.

WINKELMANN CJ:

Same child?

MR HARRISON:

Same child, all of this bundle of documents is for one child. But at 406.2441 there's a note: "Bob attached are copies of satanic symbols, child 5's counsellor asked child 5 if he could recognise any. He recognised four marked with X." So my concern is that you also have counsellors are involved in this in terms of providing suspect material to a child.

WINKELMANN CJ:

So can you just explain to me what this document is?

MR HARRISON:

Sorry your Honour.

WINKELMANN CJ:

Is this the counsellor's notes we're looking at at the moment?

MR HARRISON:

No this is the parent's notes, this is child 5's mother's notes.

GLAZEBROOK J:
So notes of what sorry, just of?

WINKELMANN CJ:
Discussions with the counsellor.

MR HARRISON:
And the – well that was, I don't know who Bob is but. And the importance of all of this is that if you read through there and you see what they are noting the child is now saying, after that the child gets interviewed again and none of this appears.

O'REGAN J:
So when was this in relation to the evidential video interviews?

MR HARRISON:
Some of these documents are the day before, or the night of, the night. So there's three interviews. In August –

O'REGAN J:
But this incident involving the counsellor, it doesn't, you don't know when it was, or do you know when it was or not?

MR HARRISON:
I would imagine, your Honour, that that is before the 2nd of October.

WINKELMANN CJ:
How do we know that? Just from the date of this document? How do we know it's before the 2nd of October?

MR HARRISON:
Because underneath that note is Friday 2nd October, so I'm saying it's before the 2nd of October, if it follows a chronological order.

GLAZEBROOK J:

Can we go back to page 2 please.

MR HARRISON:

Perhaps if I start again. If we start at page 1, 406.2383. This is the night before the first interview – sorry, the second interview for this child, but the first interview where an allegation is made.

WINKELMANN CJ:

Yes, I think you had confused us about the chronology. This is helpful I think.

MR HARRISON:

Yes, so it then follows on through –

WINKELMANN CJ:

So this is the night before the first interview?

MR HARRISON:

Yes.

WINKELMANN CJ:

And what is it that you wanted us to look at in this document?

MR HARRISON:

Well what I wanted firstly to look at is I imagine that this is why someone noted to, or asked Dr Zelas to review the tapes and pause the next interview after the three interviews one after the other.

WINKELMANN CJ:

Well that's speculative. Do you have any basis for that?

MR HARRISON:

I guess what I'm relying on is the letter –

WINKELMANN CJ:
Dr Zelas' letter?

MR HARRISON:
Dr Zelas' letter, but also the letter in here that is –

WINKELMANN CJ:
Can you just step back, Mr Harrison, and give us a broad narrative that you say, and then take us to how you pin it to the documents?

MR HARRISON:
Right. So this bundle of documents are notes taken by child 5's mother. They record interview – information that is taken from the child. They start on Monday the 3rd of August 1992, which is the day before the child's second interview, on which the appellant was convicted of three charges arising out of that interview. They then follow the continuing questioning of the child through the next two interviews, or the nights of the next interviews, and then we come to a letter written to the police expressing concern that the next interview with the child had been cancelled, and this is where the letter refers to Dr Zelas being involved, which I think ties in with her letter of the 28th of, 26th of August. 26th or 28th of August.

WINKELMANN CJ:
So document 406.2383, is that the night before the first interview?

MR HARRISON:
Yes.

O'REGAN J:
The first few pages of it.

WINKELMANN CJ:
Right, so they don't start the night before the second interview, they actually start the night before the first interview?

MR HARRISON:

Yes, and someone's helpfully typed them, but then you'll see at 406.2390 which is the day of the first interview, that's on 406 –

GLAZEBROOK J:

What date did you say again, sorry?

MR HARRISON:

It says Wednesday, the 4th. So that's the night, I presume, of the – after the first interview.

WINKELMANN CJ:

Can we be clear, this range of documents starts from the night before the first interview and carries through?

MR HARRISON:

Yes.

WINKELMANN CJ:

And they start on what date?

MR HARRISON:

The 4th. So the first interview is the 4th, the second is the 5th, the third is the 6th.

WINKELMANN CJ:

The 4th? 4th of August?

MR HARRISON:

Yes.

ARNOLD J:

So there's no disclosure in that first interview but there is in the second?

MR HARRISON:

No. First, very first interview, was in May and that was the –

WINKELMANN CJ:

Okay, so if they actually start before the second interview then…

MR HARRISON:

Yes. Sorry, yes.

WINKELMANN CJ:

Yes. You've said two things, that they start before the first interview, and then you say they start before the second, but you mean the second?

MR HARRISON:

Yes. It's the first of the three.

WINKELMANN CJ:

Right, got it. So what happened in the first in time?

MR HARRISON:

The first in time, the young fellow talked about getting changed on the changing table and having his – he referred to "wobbling the dick" and he explained that that was cleaning up around his genitalia. Ultimately, there was not a charge in respect of that at trial, and you may recall last week I put to Dr Seymour the questioning by the mother leading up to the May disclosure where she asked the child once or twice a week whether his rude bits had been touched or his bottom had been touched prior to that May disclosure.

O'REGAN J:

Page 406.2390 is not very readable in the copy we've got. Is there a better copy available?

MR HARRISON:

Sorry, your Honour, I am having difficulty.

O'REGAN J:

Page 406.2390, the one you just took us to.

MR HARRISON:

Yes.

O'REGAN J:

It's handwritten. It's been copied multiple times. It's very hard to read. Is there a better copy?

MR HARRISON:

Not that I have been able to find, your Honour. They had typed some of this material out but I don't know that they typed all of it out, I'm sorry.

GLAZEBROOK J:

Is it possible to get it typed out?

MR HARRISON:

Yes.

WINKELMANN CJ:

Is it also possible to give us the document references per child that you rely on? It's just quite confusing. I'm trying to keep a note of it myself but it's…

MR HARRISON:

So in terms of as I take your Honours through…

WINKELMANN CJ:

Well, generally in respect of –

GLAZEBROOK J:

Afterwards. Afterwards would be useful.

WINKELMANN CJ:

Yes, afterwards perhaps. Afterwards. Not – you know, if you could do this afterwards. Perhaps one of your juniors could be taking a note of and making a note of all the ones you, documents, particular documents you want us to look to per child, organised in a per child basis.

MR HARRISON:

Yes.

WINKELMANN CJ:

I'm trying to keep a note of it myself. So…

GLAZEBROOK J:

And also why you want us to look at the documents, so refer us to the particular passage typed up would be useful.

WINKELMANN CJ:

It would be very useful. So Mr Harrison, was this child the one who made the initial – an initial disclosure to a sibling?

MR HARRISON:

Yes. Your Honour, in fact there is some further typed notes starting at 406.2406 but it doesn't appear to be date – 406.2408 would appear to be the typed version of page 406.2390.

WINKELMANN CJ:

What we've discussed would be very helpful to us because as we read through this it's very hard for us to know what these documents are so if we could be given that assistance it would be very helpful to us.

MR HARRISON:

I wonder your Honour if I just take a brief break now and reorganise this so it's a bit easier?

WINKELMANN CJ:

Well it would certainly help us and it would speed it up if you were a little bit more organised on this point. So, what, just a few moments or five minutes?

MR HARRISON:

Yes, five minutes would be sufficient.

WINKELMANN CJ:

Because we're still going to take the break at 11.30. Okay, we'll do that.

COURT ADJOURNS: 11.06 AM

COURT RESUMES: 11.22 AM

WINKELMANN CJ:
Mr Harrison.

MR HARRISON:
Thank you your Honour. I've had a discussion with my counsel and we will endeavour to perhaps get a little series of documents if we're referring to each particular child and have them put together for the Court.

WINKELMANN CJ:
What we were just discussing that, whilst we were adjourned in thought, we were going to suggest it but then thought well actually a lot of it's already probably been done in various places and it might be possible to do it quite quickly. But what would help us is a sheet per child which says, gives us all of the notes of references for witnesses who relate to that child including expert – including Dr Zelas, parents, child, expert evidence and then also the expert evidence references that are relevant and finally, the documents that are relied upon because I think what wasn't apparent to us initially was the extent to which there are documents that are relevant.

MR HARRISON:
Yes, thank you.

WINKELMANN CJ:
But we don't want to place undue burden on counsel so.

MR HARRISON:
I do have the A team with me your Honour so it's not too difficult. I also mentioned a child name earlier and I just want to apologise to the Court and to the families concerned about that.

WINKELMANN CJ:

We appreciate that that was inadvertent.

MR HARRISON:

Thank you.

WINKELMANN CJ:

And we will ensure that the transcript does not contain, that is being edited immediately and I remind everyone who's in the courtroom but also who's viewing the proceedings on VMR that names of all of the complainants are suppressed.

MR HARRISON:

The purpose of putting that letter in front of you was to indicate that the process by which child 5 had been readied, if you like, for interview continued on and it was only stopped because Dr Zelas was brought in because of concerns. The child was referring to other crèches being involved and ritual abuse. It highlights, in our submission, that the level of parental contamination pre-interview here, particularly for this child, was extremely high and I think it blows out of the water the suggestion that parental child conversations are appropriate because when you look at the level here it's unreal that such a level could be done with a young person without the risk of contamination of what the child has to say. What's really important is that when they stopped that interview the information the parent was expecting the child to disclose doesn't come out in the last interview which is in October. So either the child is disclosing accurate information or is being fed information by the manner in which the child was being questioned because if the child is correct that means that the Christchurch Police in 1992 did not investigate two other crèches where abuse was said to be occurring.

So when we come back and look at what our experts have to say my submission is that there is ample evidence of parental contamination of the children's interviews. If I perhaps just refer you to, firstly, Professor Hayne's material and at page 203.1057, if we could perhaps have that up on the

screen, she's indicated a summary of external factors that could have contaminated the children's reports. So for child 5 we have parental cross-talk, air of accusation, child/parent conversations so that sounds pretty innocuous until you see the level of the conversations. The other concern that's listed in Professor Hayne's report is therapy and of note is that in August they're asking for a ritual abuse specialist be brought across to deal with their child and that request is coming from the counsellor who, a couple of months later as we read it, is showing satanic symbols to a child in therapy.

WINKELMANN CJ:
So this is the counsellor for child 5?

MR HARRISON:
Yes. Sorry I'm still on child 5 in respect of that. The other point I would make from that letter I was referring to is the comment that the parent refuses to not talk to a select few parents. In other words my reading of that is that she will talk to any parent was my understanding.

GLAZEBROOK J:
Sorry there was a double negative in there that I've slightly missed out on.

MR HARRISON:
Yes. Yes and refused to not talk.

WINKELMANN CJ:
Is that from the Dr Zelas letter?

GLAZEBROOK J:
Refused to refrain from talking, is that…?

MR HARRISON:
Yes.

WINKELMANN CJ:
Where does that come from?

MR HARRISON:

That's 406.2401 and it's the last paragraph on that page. In terms of parental contamination at 203.1058 Professor Hayne in her affidavit sets out her by table form, her indication of contamination factors. So, for example, she has for child 2 the Knox Hall meeting, the child/parent conversations, the air of accusation which you may recall I put to Dr Seymour last week and then the safe education programme and she has done that for each and every child. Now unfortunately what she has not done is put the red numbers in her table which she was unable to do because the case on appeal hadn't been established when she put this together but we can –

WINKELMANN CJ:

Well again you've got the A team who should be able to do that.

MR HARRISON:

That's right. So I'm not going to take you through child by child by child in respect of this table but I refer your Honours to it because it sets out I think quite graphically the pre-interview contamination in respect of the children that we're looking at.

Now in Professor Goodman's document she begins at page 202.0550 and she undertakes her own assessment of the contamination factors and it's entirely a matter for the Court as to their view of Professor Goodman but I would say that she is reasonably conservative when she comes to considering such matters but she is absolutely firm in respect of the contamination factors here and interestingly, she then gives us an indication of how she sees the overall possibility of contamination in respect of each child and that's at page 202.0581 and 202.0582.

The point I would make in respect of the pre-trial contamination factors becomes more significant once we get to the information from the experts which is ground 2 but the point I would make is that in respect of each child there is an abundance of information available that shows that these contamination factors are present. What we could never do is show the

causal connection that Dr Blackwell referred to when asked about this matter. The point I would make in respect of that is that is practically impossible to do and that –

WINKELMANN CJ:
Although you don't you take it so far as to say that we could infer that there was a causal connection in terms of how the interviews were conducted and how they developed over time?

MR HARRISON:
Absolutely, a very strong inference, but I think that's why Dr Blackwell could not indicate to us what evidence of contamination would look like when she was asked on the Monday that we began this process.

ARNOLD J:
It would be relevant, wouldn't it, to look at particular allegations that were made, specific events the children said had occurred, and in some instances one may be able to trace that back to a very leading question from a parent? In other cases, however, the nature of the activity described may have no foundation in the parents' talk that's emerged in evidence.

MR HARRISON:
Well, that is, I think, where Professor Hayne and Dr Blackwell may well disagree because it's not just put in product A, feed it through the child, come out at the end with product A. The air of accusation, the ability for children, they're not concrete little creatures, they can think for themselves and they can create for themselves, so if you feed enough information you may well end up with something that doesn't look like what exactly was fed in. I think that was the other point that Professor Hayne was making. So product A in/product A out, we have examples of that. Where we don't have a very clear example of that, you still have that risk of that air of accusation, the questioning of the child which may well lead to product B appearing in terms of a complaint. So I think that –

ARNOLD J:

One of the things that slightly concerns me, and the air of accusation is a good example, because presumably a child being interviewed will know what they're being interviewed about in a general sense, and it then gets, I was going to say too easy, but it's not necessarily appropriate to say that therefore there's an air of accusation.

MR HARRISON:

Well, the air of accusation –

ARNOLD J:

It's a term that one has to use pretty carefully, it seems to me.

MR HARRISON:

The air of accusation is before the child gets to the interview. It's the reasons why the child is eventually taken in for an interview. It's the air of accusation, I think child 2 is a good example where they said Peter, the police have said that Peter has done bad touching, or something like that. That's the air of accusation. Now that's before the child gets to the interview.

ARNOLD J:

But to some extent there is going to be something of that sort as part of an inquiry process. I don't quite see how you can avoid it.

MR HARRISON:

Your Honour is correct there's – how do we avoid? What would have been the appropriate way to examine the complaints that arose concerning Peter Ellis in 1991 because once you had a cabal of parents who were –

WINKELMANN CJ:

Don't use that word, Mr Harrison. A group of parents.

MR HARRISON:

– a number of parents who were of the view and belief that abuse was widespread at the crèche then it's almost as, well, it could be seen to be as contaminating as the Delta virus really.

WINKELMANN CJ:

Your point is that this is an unusual circumstance because in most circumstances you don't have the group nature of the allegations?

MR HARRISON:

Yes.

WINKELMANN CJ:

Well, I think we're going to take the morning adjournment at this point but one thing I'd like you to address is I know that Mr Billington is going to say, well, where's the evidence of contaminating events before first interviews, and I think he did mention that in his preliminary remarks at the beginning of last week, so I would like to hear you on that.

MR HARRISON:

Yes.

WINKELMANN CJ:

Mr Billington?

MR BILLINGTON QC:

Can I offer something, and I'm happy to be told to sit down, but you were asking for a schedule?

WINKELMANN CJ:

Yes, and I know you've done something.

MR BILLINGTON QC:

If you know that it's appendix –

WINKELMANN CJ:

Well I mean that's why we didn't –

MR BILLINGTON QC:

Whether that helps you now I'm not sure but if it does it's got most of what you asked for in it but my friends may want to change it or add to it.

WINKELMANN CJ:

And it might be that the respondent should simply start with that and add the extra material they wish us to look at into it I think.

MR BILLINGTON QC:

It may save time because I won't then go through it with you if it's been addressed but again I'm in your hands.

WINKELMANN CJ:

Right, we'll take the adjournment.

COURT ADJOURNS: 11.40 AM

COURT RESUMES: 12.02 PM

THE COURT ADDRESSES COUNSEL – MICROPHONES (12:02:31)

MR HARRISON:
Your Honours, in terms of the contamination factors, if I can take you to 203.0162, which is Professor Hayne's affidavit.

WINKELMANN CJ:
So what page, sorry?

MR HARRISON:
203.1062. In fact, if we go to 1059 first. So down the bottom of that page, so this outlines the start of the contamination issue, so the Knox Hall meeting in March, child 3's mother attended. If you go over the page to 1060, now in respect of child 3 which we're looking at now, that –

WINKELMANN CJ:
So we've now moved on to child 3?

MR HARRISON:
Yes, and that first interview is the 3rd of –

GLAZEBROOK J:
Can I just, what was the – so when you were saying the Knox Hall meeting, we're looking at that for child 3, are we? Is that…

MR HARRISON:
Yes. So if you look at page 203.1059, this is table 8 of Professor Hayne's affidavit which is evidence of exposure to external factors that could have contaminated the children's reports and she notes it's a non-exhaustive list. So we're starting out with child 3. The mother attends the Knox Hall meeting in March. I'm just going to make the comment that child 3 was interviewed on the 3rd of April 1992. Now you will see that on page 203.1060 the first three

questions are from the child under cross-examination. So it has to have that caveat attached to it. Child 3's mother says that she questioned him on Thursday or Friday, asked "what games did Peter play", and then she says: "I decided to ask him for one last time. I said some of the children have said Peter pulled down their pants and touched their bottoms, do you think that is true, something like that." So that just continues through. I could read them out to your Honours but –

WINKELMANN CJ:
Yes, but I don't think – you don't need to.

MR HARRISON:
Yes. So it just basically indicates the questions and the level of questioning, and also indicates the peer cross-talk, the therapy, parent meeting, the informal support group, the parent cross-talk, the air of accusation, and scene reconstruction.

Then we go to child 4 and that's at 203.1062. I think one of the problems of this case is just the volume of material and how we distil it down without losing something from it. Now, and as your Honours watch or read through child 4, the Knox Hall meeting, the child/parent conversations, the –

WINKELMANN CJ:
So when was the first interview of child 4?

MR HARRISON:
First interview of child 4 was the 1st of May '92, and that is one of the tapes that we're asking your Honours to look at briefly in terms of props and dolls.

So again we have the booklet, well, in this instance we have the booklet construction, the simulation that the mother reported, the parent cross-talk, the informal support group and the therapy. Child 7 has the parent meeting in December 1991.

WINKELMANN CJ:

Sorry we're on to child 7?

MR HARRISON:

Child 7 yes and that first interview is the 9th of March 1992.

WINKELMANN CJ:

What date in March sorry?

MR HARRISON:

Apologies your Honour?

WINKELMANN CJ:

It's all right.

MR HARRISON:

And one point to note, your Honours, is that at 203.1067 under the heading of parent cross-talk, child 7's mother refers to be one of the early supporters of the original parent who had raised concerns from the crèche. We then go to child 5 on 203.1069 and that is first interviewed on 14 May 1992, and again we have the Knox Hall meeting, the parent cross-talk, child parent conversations, ear of accusation, peer cross-talk in formal support group, therapy, scene reconstruction.

ARNOLD J:

So something like therapy that is a potential source of contamination but whether anything happened in the therapy that might have contaminated is not known?

MR HARRISON:

Except to a certain extent in respect of this particular child because we know that they were, by October I believe or September, showing satanic symbols to the child.

ARNOLD J:

Right this is stuff we went through earlier?

MR HARRISON:

Yes and there was also the suggestion that Ms Hudson be involved because she is involved in satanic abuse and that came from the therapist to the parents is my understanding.

ARNOLD J:

I guess my point is that therapy, for example, the books, the sex education books, may have some potential for contamination but it really does depend on content of the therapy or the content of the book and the books in this case are relatively benign as I understand the evidence.

MR HARRISON:

Well I would imagine, your Honour, those books are perfectly fine where you are sitting down without a specific concern but I think that where there is a specific concern if that concern is placed to the children then they read such a book that again that is that air of accusation that may perhaps produce a contaminating factor.

ARNOLD J:

Some of these books have been read on earlier occasions. I mean they are part of the child's sex education growing up. I mean one of the things that troubles me about this I can certainly see the force of a proposition that some events and the ones that Dr Zelas mentioned in that letter had a strong potential contamination but some of these things seem to me to be right at the periphery unless you can show that, for example, the books dealt with some kind of sexual practice that later shows up in the stories but the idea that a child getting basic sex education might contaminate in this context I think is quite difficult to address because you end up saying, well, should we not give children sex education, basic sex education.

MR HARRISON:

I think your Honour the point is that they are a source of information. In the normal course of events they would not be of concern but I think in this particular situation where you have this high level of concern in the community then the use of them may possibly contribute or reinforce what's happened but I don't –

WINKELMANN CJ:

Can I just ask you, I mean they're not sex education books, aren't they keeping yourself safe type books?

MR HARRISON:

Yes, *Katey's Yucky Secret* I think was the name of one of them. *What's Wrong with Bottoms?* was another. *Megan's Secret* I think those were the names of them.

WINKELMANN CJ:

Well Justice Arnold's point is that, you know, that it doesn't help us much just to have a sort of a vague reference to therapy or to these booklets. Is there something in the narrative, apart from the fact that they might be problematic in a wider context generally, is there something in the narrative that raised particularly concerns in respect of any child, that's what you're really being asked.

MR HARRISON:

Right, and what I would say, your Honour, from memory I don't believe that I could tag something written in one of those books to being a piece of the child's evidence in terms of an act, I don't think I could say that.

WINKELMANN CJ:

Well is there anywhere in the evidence you want us to look because I think there was some testing of those concepts, wasn't there, in cross-examination about the significance of this?

MR HARRISON:

I will check but I don't believe so. I think it's put there for the sake of completeness in respect of all matters and the reinforcement depending on when the child reads the book. I was at child 6, did I give your Honours the date of that interview?

WINKELMANN CJ:

No.

MR HARRISON:

So 27 February 1992 again we have the child/parent conversation, parent cross-talk, peer cross-talk, scene reconstruction and formal support group. So those are the defining if you like points and we will get those drafted and with red numbers on them for ease of access. So, your Honours, the point is that unlike a lot of cases there was adequate evidence, or an abundance of evidence of contamination of the children, of all of the children to a certain level, and we say that that created an unacceptable risk. I turn to this once we go to the experts, and I perhaps propose now that we ask your Honours to consider the interviews, especially in respect of child 4.

WILLIAMS J:

Just before you do, you say that there's contamination in respect of all children, or at least the opportunity for that.

MR HARRISON:

Yes.

WILLIAMS J:

Some product A in/product A outs, you say. The suggestibility point would be present in most cases, even with fewer complainants than this, wouldn't it, because every parent has to, at some point, deal with their fears about the child and if it's in a daycare centre, or a crèche, or a kindergarten or a kōhanga, they're going to discuss that with other parents, there's always going to be this kind of opportunity for contamination, isn't there?

MR HARRISON:

Your Honour, as a part of life, and children's interaction with the wider world, every concerned parent is going to keep an eye on their child.

WILLIAMS J:

Sure.

MR HARRISON:

This is different and it's different because from the outset we had involvement of government agencies.

WILLIAMS J:

Why would that be different? If there were allegations in an early childhood context of this, Oranga Tamariki and probably the police would be there fairly quick smart.

MR HARRISON:

Well I think the point I took from what you were saying was just general life. We're always looking out for our children and –

WILLIAMS J:

Yes, no, my point is this. You say, and understandably, that every single one of these complainants had the opportunity to have their memory contaminated by a parent, by a therapist or by other children, so on and so forth. So my point is that will be so whenever you've got multiple complainants arising out of a single social setting, sometimes that will be an extended family or a whānau, sometimes it'll be an early childhood centre or whatever. There's nothing particularly distinctive about that compared to this. So where would you – where that takes you is all convictions in the absence of corroborating evidence are problematic where they rely on the evidence of children. Where would you, and I presume you're not saying that, in which case where's your line on contamination that sets your case apart?

MR HARRISON:

The line on contamination has to be where the level is such that there's just – let me rephrase it. First, I have difficulty accepting that now, nowadays we would have this same scenario occur, because –

WILLIAMS J:

I'm not talking about this scenario.

MR HARRISON:

No.

WILLIAMS J:

This is clearly a sentinel event, but –

MR HARRISON:

Yes, in this case –

WILLIAMS J:

Why is this case different from those others, so that agreeing with you in this case won't lead to complainants never being able to achieve convictions in circumstances where the evidence relied upon is the evidence of children?

MR HARRISON:

Well I think it comes down to a question of degree in each particular case, and the point I would make is in this particular case the line has been crossed, and it's obvious that the line has been crossed, because of what we know now about the risks contained in those pre-interview contamination factors. They weren't known at the time. The research hadn't been done. Now we know of the risk and we can assess that risk. That couldn't be done when the Ellis case came through the system. So…

WILLIAMS J:

That's not quite an answer to my question though. That's about what we know of these situations now but it doesn't negate the point that produces this

rhetorical question: what's different about this case compared with the scenario of three or four complainants from within a single whānau or three or four complainants from within a small crèche in a rural setting. You know what I mean? What's the distinction?

MR HARRISON:
Well, the distinction will be when you look at the evidence and you look at what's happened with those children because the alternative then is to say we can never challenge children.

WILLIAMS J:
Of course.

MR HARRISON:
And that's clearly wrong because they are subject to contamination, innocent or otherwise, that is a risk. So you're always going to have to look at, well, what's happened here, how far has this gone, and I would say that if you had the same factors here in your crèche now or your extended whānau now in terms of what's happened with the children you would say that this is an acceptable risk, and it's got to be on each case. I'm not saying that children can't give accurate evidence, incapable of giving good evidence, but we have to take into account that risk factor because of the very way in which children present. That's the…

WILLIAMS J:
I get your point. Do you say really there's no dodging a careful sifting of the facts?

MR HARRISON:
Yes. That would be my point.

WILLIAMS J:
So when can we be sure or more particularly when can a jury be sure, because whatever we come to in this case is sure as eggs going to be picked

over in relation to future cases? When can a jury be sure despite your concerns?

MR HARRISON:

Well, I think they can be sure if there's an absence of the level of contamination that we have here and the interview process has been appropriately done, and as Associate Professor Brown said, we're still learning about those but we wouldn't be – and we will still evolve from where we are now but we wouldn't be going back to interviewing them the way we did in the past. We are getting better and better at these processes.

WILLIAMS J:

Doesn't that back you into the corner of undermining all similar convictions in recent memory?

MR HARRISON:

No, no, because –

WILLIAMS J:

Or done the same way?

MR HARRISON:

Well, that's one aspect. It's only one aspect and it's looking at every factor concerned here and the point I would make is that there's been a lot of comment made by the children in this case that should be capable of corroboration and there is no corroboration there. Lots of times when we're doing these cases there is corroboration, we do see corroboration coming in, and so I mean I'm not saying that without corroboration this material shouldn't be before the Court but what I'm saying is it's very rare that you don't have the corroboration.

WINKELMANN CJ:

Well, don't you take that submission further than no corroboration? Don't you actually say that in fact when you cross – there is in fact material which contradicts the accounts?

MR HARRISON:

Sorry, your Honour, I missed the…

WINKELMANN CJ:

Do you not say you take it further, don't you, than no corroboration? I understood from your written submissions that you took it to the point where you said in fact when you do get details then there is evidence which contradicts the accounts.

MR HARRISON:

Yes. Yes, and what I'm referring to, of course, is the lack of medical evidence and the lack of supporting evidence from other crèche workers who are –

WINKELMANN CJ:

But isn't there also, however, the fact that one child referred to the appellant driving them in his car and he didn't have a car and didn't drive and…

MR HARRISON:

Yes, and also the fact that his mother was involved, and a whole variety of other people.

WILLIAMS J:

The problem is that those forms of peripheral potential confabulation are the sorts of peripheral details that the experts, at least some of them, say are not likely to be the focus of the child, I realise there's controversy about that proposition now.

MR HARRISON:

Yes.

WILLIAMS J:
It used to be orthodoxy but not so much anymore.

MR HARRISON:
Well the thing I would make is, the point I would make in respect of that is it's the child, what they pick up on is what's central not what we observing from outside looking in. So a child may be distracted by a colour of a particular shirt while something else is happening and that may be the central detail for the child, the central detail for the other person looking at the event may well be what's happening to the child at the time so –

WILLIAMS J:
In this case the primary corroboration was the propensity/similar fact of the multiple complainants and the behaviours?

MR HARRISON:
Yes.

WILLIAMS J:
That was what was primarily relied upon in –

MR HARRISON:
23G.

WILLIAMS J:
Exactly.

MR HARRISON:
Yeah and the point I would make is that 23G could bolster where there was nothing else. So the credibility of the child was increased with the 23G evidence, where they acquitted it could well be because they would have expected to see some more corroborating evidence and it wasn't there.

WILLIAMS J:

If you come down to we need an adult corroborating, ie, a co-worker at the crèche or we need medical evidence you've got problems with that haven't you because there is agreement that medical evidence is not necessarily going to be available and this is, you'll have done enough trials to know that a lot of this happens in secret and the only individual that does know anything about it other than the alleged perpetrator is the complainant?

MR HARRISON:

Yeah except that's not what they're saying here. What they're saying here is that these children left in groups from crèche, there were other people involved, other adults involved, that there was injury sustained which they brought back to the crèche itself but are not reported by parents. You can't place a burning piece of paper up a child's bum and think that that's going to be hidden and that's where Professor Elder's evidence, perhaps, comes into play. So it's those sorts of factors that come into play. The other point is that if you follow that argument to a logical conclusion that these children are to be believed where do you stop in terms of what they went on to say and at what stage does that become the defining moment? So, for example, why wasn't Ellis charged with being involved in multiple counts of sodomy against child 5 as a party, why isn't he not charged with that? It's between the two, there's three interviews that the fourth, fifth and sixth, it's in the fifth interview that the child refers to that, that's not before the Court.

WILLIAMS J:

Child?

MR HARRISON:

Five.

O'REGAN J:

A number of the children made allegations that are very similar. The information in Professor Hayne's affidavit deals with each of the children one by one.

MR HARRISON:

Yes.

O'REGAN J:

I mean I know she talks about cross-talk but is your case that the degree of contact between the parents meant that one child's allegation became another child's allegation and that explains the similarity, is that the point you make?

MR HARRISON:

That's one of the factors in respect of this yes, that there was, whilst we can't put every single thread together what we can do is show where, it's almost like a domino effect that one allegation comes in, it goes to a second parent and then onwards from there. So there is that aspect to it.

WINKELMANN CJ:

Is there any other factor, you said that's one of the factors?

MR HARRISON:

Well there are examples of the children playing together but we don't know in every instance what they were saying but there are those factors.

O'REGAN J:

Is there anywhere in the material that you've provided us that takes us through those threads from one child to the other?

MR HARRISON:

I started with some of that in the cross-examination of Dr Seymour. We will put that together. It comes down to one parent, who is not a complainant parent, and her role in the dissemination of the information.

WINKELMANN CJ:

Because Ms Ablett-Kerr and presented that to Sir Thomas Eichelbaum and also in the Court of Appeal.

MR HARRISON:

Yes, so we can replicate that.

WINKELMANN CJ:

It's a chronological narrative is what she did although Sir Thomas Eichelbaum made the point that not all of it was pinned into the evidence.

MR HARRISON:

Yes.

O'REGAN J:

But is it your case that all of the allegations by all of the children can be explained by contamination?

MR HARRISON:

Your Honour, yes, or that there is an unacceptable risk that we weren't aware of or the extent of that risk, how much of a risk it was. So Professor Goodman says well there's a low risk in this particular case, she doesn't say there is no risk in this particular case and the one thing I can't replicate or put before the Court is the environment of Christchurch at this time.

O'REGAN J:

But in relation to say a low risk child that would seem to indicate that that probably doesn't provide a reason to – if there were no other complainants, if that was the only complainant that you would go behind a jury verdict.

MR HARRISON:

Except to the extent that in respect of child 2, for example, when she talked about her – the incident she referred to the deaf children.

GLAZEBROOK J:

She referred to what sorry?

MR HARRISON:

The deaf children and she was attending a deaf children school. Now some people might say well that's peripheral but it was central to her because she described where they were when this incident occurred, so it raises the issue of transference.

O'REGAN J:

Yes I know, but I'm just dealing with contamination.

MR HARRISON:

Yes, sorry Sir.

O'REGAN J:

I mean the written submissions you've given us are very much an all or nothing. You haven't gone through each, you now have today but what I'm trying to get to is are you saying that even when there's a low risk a conviction in relation to that child is suspect because of all the other cases that were before the Court at the same time?

MR HARRISON:

Yes.

O'REGAN J:

Is that the argument?

MR HARRISON:

Yes.

WINKELMANN CJ:

Do you accept Professor Goodman's assignment of that risk value?

MR HARRISON:

I don't. I'm grateful to the work that she has done. I think it could be said to be somewhat higher in respect of the two lows that she refers to but I'm not going to –

WILLIAMS J:
You didn't cross-examine her on that.

MR HARRISON:
I didn't cross-examine her on that.

WINKELMANN CJ:
Mind you, people weren't cross-examined on every point in this case, were they, I think it was just –

MR HARRISON:
I have to say that it's – to cross-examine an expert on a point and then move on is very difficult and I found that and there was also a pretty good steer. There was instance response from the Tribunal which assisted in us not wasting your time really.

WINKELMANN CJ:
Well I'm not sure that's a correct assertion, Mr Harrison.

MR HARRISON:
Well, you know, I was the one standing here but what I would say is that I found it a very good system but if you're going to cross-examine an expert of that standing you really do need a day or a day and a half because you're going to go very carefully through a great deal of material and it's not just the one point so unless they are collaborative you're not going to get too far. So I wonder, your Honours, if I could perhaps ask you to view those excerpts now.

WINKELMANN CJ:
Yes, and we shall come back after the luncheon adjournment, 2.15 pm.

COURT ADJOURNS: 12.40 PM

COURT RESUMES: 2.18 PM

WINKELMANN CJ:
Ms Irvine.

MS IRVINE:
Your Honours. Professor Hayne, Associate Professor Brown, and Professor Goodman have all given evidence to this court that even best practice interviews, in their opinion, cannot reverse the contamination that already occurred with these memory reports. They talked about that it didn't matter that the interviews were good, bad or neutral, because by the time the children were interviewed about the alleged events, there was this real and plausible risk that the children's memories had been contaminated, as we have traversed this morning. But notwithstanding that, it is the appellant's position that the evidential interviews still fell well short of best practice, both at the time, and more importantly, in terms of what the scientific literature tells us now. So as we have heard over the last week, we have much better evidence about the nuanced impact that suggestive questions can have on children's memory reports, as well as the other factors that can impact on accuracy. So the aim of my submission is to try and help the Court by synthesising some of those opinions that we've heard in relation to these evidential interviews.

WINKELMANN CJ:
Now is this, are you taking us to your written submissions, or have you got any supplementary submissions?

MS IRVINE:
I'm just going to take you to the written submissions, your Honours, so that's on page 16 of our submissions, starting at paragraph 50. So what I intend to do, your Honour, if it suits the Court, is to work through the two aspects of the protocols that we have talked about in reference to the various bits of evidence that were heard before moving on to the props and dolls section.

But before I get into the written submissions, your Honour, I note that the respondent has raised an issue with the applicability of the scientific knowledge that I'm about to traverse in the appellate context and they state that, and I quote, "best practice is constantly shifting as new knowledge and research is gained". Now it's the appellant's view that this proposition cannot be sustained because we acknowledge that the scientific knowledge will continue to improve as to the way that evidential interviews will be carried out but at no point has any of the experts who have given evidence in this case suggested that the interview practice would revert to a number of the problematic methods that were employed in this case. In fact, Associate Professor Brown went as far as to say that she would never want to see an interview conducted in that way. I'd like to –

WINKELMANN CJ:
I think the point is, however, that in 10 years' time all the interviews that are being conducted today will be subject to attack because we learn new material about what form does a question have, the impact forms questions have, and that's, I think, the gravamen of the Crown's position.

MS IRVINE:
I agree, your Honour. The point I would make is that some of the techniques that we see and I'll try and point you to, such as the suggestive questions, the absence of these ground rules, the experts' view is that we'd never revert back to that state of play that was happening in 1993. So I think Associate Professor Brown also talked about the fact that we continue to improve in terms of monitoring and looking at practice, but I think there's an agreement amongst the experts that some of these are core things that they wouldn't return to.

And I was thinking of an analogy to the DNA evidence and just thinking about in terms of what we're seeing with these evidential interviews is that the scientific knowledge is helping to improve, I guess, the sensitivity of these evidential interviews in ensuring that we're getting the most accurate and

reliable reports from the children as we've seen with DNA across the years improving in terms of sensitivity.

So if I move you through to the guide, I guess, today in terms of how we are eliciting children's reports through these interview techniques, and so there's been various discussion about the different types of protocols that have been used internationally but it was our view that there really was consensus amongst the experts as to these recognised elements of good interviewing. So as we know that today the interviews are informed by the child specialist interview guide and as I sort of explained before that Associate Professor Brown described that today the interviewer's practice is frequently evaluated as a national accreditation process and it's through this process that she would argue it's not without design. So as an acknowledgement that interviewing children about forensic matters is complex and there's an achieve – a standard that they need to meet to ensure that we're getting these reliable accounts.

So in terms of this model that she talked about, she explained to the Court that really it was a flexible guide so it sat over top and they turn back towards the literature to sort of as a tool to how to evaluate interviews that have occurred and she referred to the PEACE model and there are –

WILLIAMS J:
Doesn't the flexibility – what underlay her flexibility point was that we still haven't got it right? She acknowledges that?

MS IRVINE:
And they continue to – she did acknowledge that, that they're continuing to evolve and to get better and that was to ensure that this guide could incorporate the new scientific knowledge as it came through.

WILLIAMS J:
That takes you back to the grounds point, I guess, that if we still haven't got it right how do we know we're not going to be back here?

MS IRVINE:

Yes, although again, your Honour, I did think that the expert view were some of these practices they wouldn't revert to, such as using the suggested questions that we see in the high level.

WINKELMANN CJ:

But that's not really the point, not that we wouldn't revert to them, because no doubt in 10 years' time the experts will be saying: "Well, we wouldn't revert to that practice that was used then." It's really, it's the point the Crown makes which is things may not be perfect but that's not the issue for us. Things may not be perfect against current thinking but that's not the issue for us.

MS IRVINE:

Sorry, in terms of?

WINKELMANN CJ:

Well, it's not the issue as to whether it's exactly perfect. In terms of what current thinking is, the issue is whether it has led to contamination of the evidence.

MS IRVINE:

Yes and I would, the experts –

WINKELMANN CJ:

Or a failure to get a good account of the evidence.

MS IRVINE:

And those various techniques that they refer to are the sorts of ones. I guess we refer to these models as a bit of a guide to help us evaluate what did go on. But we can, so for example, if I take you to page 203.1030 of Professor Hayne's evidence. So this is a table where Professor Hayne, so if we deal with first of all, the pre-substantive phase of the interview and this is the phase of the interview in which we set out the ground rules of what has happened or what is going to happen within an interview to give the child, orientate them to

what's going to occur. And so Professor Seymour in the notes of evidence at page 366 if that's helpful, he acknowledged that there were some ground rules, for example, the children were understand truth, lies and promised and the instructions to tell the truth in they overall performed to a good standard, the paragraph there. So that was Professor Seymour's view of these ground rules but if we go back to Professor Hayne's table. Here we can see where she's analysed by a child and by interview the types of things that the scientific literature tells us is important to help set up the interview so that we get the most accurate and complete reports from the children. So she talks about, apologies on an angle looking there, where they're given permission to say "I don't know", permission to say "I don't understand", permission to correct the interviewer. There is a number of factors there and Associate Professor Brown pointed out why these particular factors are important. So she talks about that an evidential interview is contrary to everything that a child has previously learnt. So, for example, they're taught to provide summaries, to rely on adults to help fill gaps and that they shouldn't give "I don't know" as a valued response and they should not guess and that's in page 272 of Professor Brown's in the notes of evidence. So if we look back at this table we will see there are a number of the factors that have now been identified in the science literature were missing from these interviews. And the impact of that was that they didn't really understand what was going to go on and they didn't understand that they had this permission to say "I don't know" and to correct the interviewer and they weren't given practice about how to provide a narrative of an event.

WINKELMANN CJ:

So is your submission then it doesn't matter, your point is not so much that they're not meeting present day best practice, your point is that when you look at the deficiencies those particular deficiencies led to a risk of incorrect evidence – an incorrect account being captured?

MS IRVINE:

Absolutely. The risk of the children's memory, the reports, is a high risk that they're inaccurate.

ARNOLD J:

So if, as has happened in some of the interviews during the course of the interview, the interviewer said to the child “if you don't know then just say so”, you would still say because that did not occur in the opening part it’s not sufficient?

MS IRVINE:

There is a risk in that period leading up to it. I think also the cumulative impact during that interview they’re sometimes, it is correct that they were told in some interviews that they could say “I don't know” but it was in response to a particularly, I guess a challenge – in a way they’re challenged to what the child was saying and so the child may have narrowed it to that particular phrase, that point of that interview and they didn’t understand that really it was across all of the interviews that they had that permission to say that. Professor Hayne does include this reference to the Wolfman study which potentially the Court is not that interested in terms of the current practice but it does provide an illustration of what is occurring now so there is a standard benchmark or in 2016 about all of these different factors that are included within these interviews.

So if the Court had no further questions about the ground rules, I was going to move on to the questions that the children encountered during these interviews. So Professor Hayne has assessed these complainant evidential interviews using a very comprehensive coding scheme, which she sets out in her interview. If we go through to page 203.1034. So through this section here Professor Hayne sets out some of the findings that she found in response to this quantitative exercise that she undertook, and in fact what she found is that on average the children were asked 964 questions, and they were also asked 290 questions per interview. If we keep scrolling through, if you keep going down to another table, sorry Charlie, if you go back up, it’s a good analysis there of that table. So if we’re just looking at the dark blue lines, that really sets out the types of questions that Professor Hayne observed that the children were being asked. So of concern is those direct closed, those direct choice and the suggestive questions of particular concern.

As you can see there is a high number, if we keep scrolling through there's a number of tables. I think table 2. There's a summary there for each child, that overall the absolute number of these types of questions that they were encountering. Now of particular concern are those questions of suggestive nature, and the types of, there was a high number, of average the children were recounting 39 of those abuse-related questions that Professor Hayne coded as being related to the allegation in some way, whether it was crèche, and 18 of those non-abuse related suggestive questions. Of also concern is the number, the really high number of direct closed questions that the children were recounting. Now Professor Hayne – sorry Associate Professor Brown, she talked about the concern with these types of questions because what it was doing for the child was creating a real interviewer-led type interview. So she observed that the interviewers had this questioning strategy that topic-hopped and it wouldn't address these omissions and contradictions, and the other problem of really leading the interview with these direct closed questions, is that she was, the children were in a place that they weren't able to provide their own narrative of what had happened, it was very dictated by what the interviewer saw as being important.

So Professor Hayne in a number of tables walks us through the different types of analyses that she does, it gives this overall picture of the types of questions that the children were asking. Now Dr Blackwell and Dr Seymour have conducted their own analysis. They refer to it as a somewhat of a qualitative analysis of the interviews.

WINKELMANN CJ:
They were also critical of the coding?

MS IRVINE:
Yes, they are critical of the coding. Professor Hayne responds to that critique in great detail at 203.1127. So she responds to, she walks through from paragraph 257 onwards, she walks the way through the criticism, or the approach that Dr Blackwell and Dr Seymour takes, and she raises concerns with the qualitative data. I think in her evidence that she gave last week she

raised a real concern about this concept of one-to-one mapping, and this is talked about this morning, this concept that a suggestion can come in at point A and come out looking like point A from the child. She referred us to her own research in the notes of evidence, which I can provide reference for. It's 349 to 350, and she talks about a study of Gross, Hayne and Poole 2006 where children were interviewed about events and it did involve drawing, but they were misinformed about two false events and what she found is that 71% of these children reported one or either, but importantly for this discussion, she also found that 50% of the information that they were reporting was not new. So, this was information that had not been discussed by the adult to the child and it came out as a spontaneous new detail in that recollection. So she talks about the impact this one-on-one mapping has, is that actually children can take these, I guess, kernels of information and they can elaborate on it and they can provide further information and further details. So while it may come in at A, come out looking like B, the fact that that is the risk of suggestive questions and that is the reason why these protocols do not encourage, well, explicitly exclude that type of questions from the evidential interview.

WINKELMANN CJ:

Well, that wasn't the full extent of criticism though, was it? Because the criticism extended to the fact that the coders had included quite innocuous things as direct closed questions or suggestive question.

MS IRVINE:

Yes, so if I keep walking you through, your Honour, if we keep moving down, sorry, if you keep scrolling down, they talk about reliability, we come to a table where they respond to a number of the criticisms about these types of questions that they suggest is not suggestive and they explain why they include –

WINKELMANN CJ:

So, who's "they" because you're using –

MS IRVINE:

Sorry, Professor Hayne and her coders. So they provide a detailed response in terms of child 2 to the particular paragraphs to explain the robustness of the method that they adopted.

O'REGAN J:

So whereabouts are you in Professor Hayne's –

MS IRVINE:

Sorry –

WILLIAMS J:

270.

WINKELMANN CJ:

Is that 203.1007?

O'REGAN J:

Yes, I know that. But what page are you on? You're referring to a table.

MS IRVINE:

Yes, so 203.1139 and it's table 9

WILLIAMS J:

1131.

MS IRVINE:

Yes, 1131.

O'REGAN J:

Thank you.

MS IRVINE:

So they do walk through and I note Professor Hayne wasn't able to speak to this, but she does walk through and explain and things that I guess, there was a lot of conversation about what is peripheral and central to the children and also I revert back to Associate Professor Brown's comment about the danger of these suggestive questions in shaping the child and how that they respond in these types of interviews. So while they may be innocuous to the event, it's shaping how they were giving their recollection and that increased the risk that it was unreliable.

ARNOLD J:

Sorry, I haven't followed you. Shaping? Run it through again?

MS IRVINE:

So Associate Professor Brown gave evidence, and it might be useful if we take you to her particular affidavit, and she talks about – sorry, if we go to 20, so 201.0458, and at paragraph 40, now she did not systematically interview, sorry analyse these interviews, she was asked to comment on a different point. But she did make a broad comment about her concern with this use of these focused, option-posing questions which Professor Hayne was calling those direct closed questions. And the reason why the guidelines are, where if they are used, you return to these broad, open-ended invitations is that it helps narrow the child's response and it shapes the way in which they give their, how they, I guess, how they're giving their evidence is dictated by the questions that they interviewer thinks is important, as opposed to asking a broad question that allows the child to provide a response that is important to them about what they experienced.

She expands on that if we go down to paragraph 41 and she talks about this in terms of getting these broader episodic accounts of events and focusing on these broad questions and she links it down towards the end of that paragraph about the importance of the coherence and that not focusing the child in the interviews. So that's that broader danger with I guess suggestive

questions but the more focused questions that we saw a high number of in the interviews with these complainants.

WILLIAMS J:
I guess the answer would be that you have to see those questions in their context to see whether they transgress Professor Brown's guidelines about opening up as quickly as you can if you do ask a closed question.

MS IRVINE:
And to see so –

WILLIAMS J:
Well that's really the point.

MS IRVINE:
Associate Professor Brown.

WILLIAMS J:
Well statistical information is interesting in its own right but in a forensic context only of limited assistance because in the end you've got to follow the scent on each one you can't do this by percentages.

MS IRVINE:
That's fair your Honour. I guess the broader comment that Associate Professor Brown was making is that she was seeing that there was opportunities that where they could stop and have gone out and let the child convey the information that was relevant to that specific question that they asked. So, for example, if you asked a question, you know: "Were you in this particular room when it happened?" And then say: "Were you in the toilet when a bad thing happened to you?" You might get a yes response to that and then you go back out: "Well tell me everything that happened to you?" Rather, or: "Tell me about the bad thing," and keep narrowing the child in and focusing on –

WILLIAMS J:
So what we don't have is the coders saying closed question followed by open question?

MS IRVINE:
No, we don't have that level of detail in the coding. So we've just got the sheer number of questions.

WILLIAMS J:
Right, so we don't actually know whether Professor Brown's guidelines have been breached or not?

MS IRVINE:
No. She has reviewed and watched all of the interviews and had that broad comment to make about it and I guess if we compare, go back to the earlier table of Professor Hayne where she's comparing to the number of questions that were asked which – sorry, that's table 2 and it's on page 203.1039 and if we go back to that sheer number and I believe she also compares to – sorry, if we move through to table 3 which is 1041. Here again we have this comparison to this Wolfman study that she provides as a benchmark and so if we look at the sheer number of questions that the children in this case were encountering which is in that top line 268 on average per interview those more closed questions versus what we see is 109 in the Wolfman study is a relative, and again we've got that significant difference with the suggestive question. So while we don't have that direct coding that you refer to, your Honour, there is I guess a proxy measure so under best practice now what we see based on this guideline is there is a lot lower number of those questions.

While we are comparing to Wolfman I would just like to make a comment in response to another criticism of Drs Blackwell and Seymour is that the Wolfman study doesn't provide a very good comparison because of the difference in ages between the two groups so of course with the children we're dealing with in this study they were on average about six years old

whereas in the Wolfman study they were older and they were on average 12 years old although there was the range but what we would note is that two things that none of the evidence has suggested differs as a function of age is the use of those ground rules. So the ground rules are the same irrespective of your age and is also the use of those suggestive questions which are the same irrespective of the age. So in our submission, your Honours, it does still provide a very useful comparison.

GLAZEBROOK J:
Well, I suppose you'd say anyway that in terms of suggestive questions the older they are, the less suggestible, I think, was the evidence, wasn't it?

MS IRVINE:
Although still…

GLAZEBROOK J:
Still suggestible but…

MS IRVINE:
To a degree, your Honour. Another interesting analysis that Professor Hayne has provided to the Court is that she actually looked at the questions that the children encountered prior to the first allegation that they made. So if we move through to page 203.1045 and I refer you to table 5, and because there has been discussion about the importance of that first interview, but again if we look at – so we can look at the interviews up to particularly for child 2, 3, 4 and 5 because those were the particular interviews where their convictions – actually, I think we have the not guilty signals where there was the not guilty, and what we find is in those early counts the children were still exposed to a high level of these questions. So all of them are exposed to suggestive questions. So child 7 encountered 27, child 3 encountered three, child 4 encountered three and child 5 encountered 15, and these are these abuse-related questions. So we do know from this analysis that these children were exposed to the suggestive questions prior to the first disclosure that they were making.

So your Honours, that was all I was going to speak to the questions, unless you had any further –

WINKELMANN CJ:
Sorry, was that table…

MS IRVINE:
Table 5 which is on page 203.1045.

WINKELMANN CJ:
So this table is actually in relation – before each allegation, isn't it, as opposed to the first allegation?

MS IRVINE:
Yes, for all of them. Sorry, your Honour. I just referred to, say, for example, with child 3 if we look at child 6, sorry, count 6.

WINKELMANN CJ:
So in relation to child 1 it's 46 abuse-related before the first allegation which led to count 1?

MS IRVINE:
Yes, and I do understand she does – Professor Hayne explains her methodology in the earlier paragraphs 85 to 87 but when we look at these numbers, say, for example, if we look at child 1 with the 46, 60 and 64, that's accumulative of the number of suggestive questions. So the difference between the first and second count was another 26 suggestive abuse-related questions.

WILLIAMS J:
And so the 46 in each case is directly related to count 1?

MS IRVINE:
Yes, or it was prior, no, sorry, your Honour.

WILLIAMS J:
Prior to count 1?

MS IRVINE:
Prior to count 1.

WILLIAMS J:
Not necessarily related?

MS IRVINE:
Not necessarily. So now I'd like to move towards the props, dolls and the other tools that we've been talking about last week. So as we've heard, there's a number of tools that were used during the interviews. These included things like playdough, there was lists, there was dolls, there was body diagrams, there was drawing and there was anatomically detailed dolls. So the experts have traversed the benefits or otherwise of these particular aids and they've talked about their research when they've been using these particular aids, that – and see the impact on the children's reports. So Associate Professor Brown, she talked about one of her studies where using a body diagram elicited reports of a forensically relevant touch in 7% of children. They talk about that as being evidence that it increases the risk of incorrect details, some of which are forensically concerning.

So that is why Associate Professor Brown explained that during interviews while the guide provides for using these dolls they are explained that it's preferable to use them and they should be towards the end of the interview where appropriate. Dr Blackwell has also viewed these videotapes. She acknowledged at times that the room did appear cluttered and it might have contributed to a play like atmosphere impacting on the gravitas of the interview, and she also commented that the use of props and dolls capable of generating inaccurate information if used inappropriately. But her and Dr Seymour were ultimately of the opinion that the use of dots and poles and drawing is not inherently problematic and risky. Whereas Associate Professor Brown was particularly concerned about this frequent in the early use of these

aids and particularly when she thought was what a, talking about serious matters and it was more of a playful time during the interview.

So if I take you back to Professor Hayne's affidavit and I'm going to take you to table 6 which is at 203.1050. There is a useful summary there for your Honours of just some of the types of factors that were present in relation to these allegations prior to the allegations and again Professor Hayne explains her methodology for using these and I thought it was a useful reference point going forward. But we have asked you to review two particular interviews prior to this hearing. They, I'd hoped, I'd like to speak to you about the sorts of things that we picked up when we were reviewing those particular interviews.

So the first I'd like to speak about is the first interview of child 4. Now just for your reference in case it's helpful the particular section of the interview transcript is 407.2837, sorry 407.2837. Now with respect of child 4 Dr Seymour in his notes of evidence talked specifically about this child and he commented that figurines were used on some occasions for the purpose of demonstrating previously reported abuse. On the first occasion more detail of the abuse was provided but not a new abuse event. While the interviewer, not the child, was holding the figurines in position and being directed by child 4. Now we have referred you to an eight minute clip that we believe that particular comment related to and we have made the following observations that if you were to review this tape again might be useful. So at 15.27 that was the initial disclosure made by this child and the disclosure was that if you went into the middle of the toilet you had to drink some wees. Now the child for the next section talks about it happening to two other children and it's not to 16.37, at this point she has not referenced herself prior to this disclosure and what she says is "did you have to drink the wees or not?" So if you keep, it's that bottom line.

WILLIAMS J:
16.37?

MS IRVINE:

At 16.37.

WINKELMANN CJ:

That's a timestamp?

MS IRVINE:

Timestamp sorry.

O'REGAN J:

Where is that in the transcript?

MS IRVINE:

Just coming up there. Now at 16.41 again in the timestamp she indicated that she had but she closed her mouth. And at 17.13 –

WINKELMANN CJ:

Can you slow down a bit thanks.

MS IRVINE:

Sorry your Honour.

WINKELMANN CJ:

So up to 16.37 the child had not referenced herself in relation to this drinking wees allegation?

MS IRVINE:

No your Honour.

WINKELMANN CJ:

And that's when she referenced – and then she's asked by the interviewer, can you just go through that again?

MS IRVINE:

Yes so the timestamp is at 16.37 and the particular question is: “Yeah right. So did you have to drink his wees or not?” So at that point, in our submissions, she is suggesting to that child that she is involved in that particular allegation.

Now 17.13, now we have a reference to the book to explain what happened. Now this was a pre-prepared book that the child had constructed with her mother and during that she acknowledges that the child, her mother had drawn some of that and it was about trying to ascertain where it happened. So she was referring to this extreme material to ascertain that it was happening in a middle toilet. And it’s not entirely clear always on the transcript that that was the book that she was referring to because she picks it up.

But 18.15, you might have noticed that the child, sorry, I think if you stay where you are, the child makes a statement where she says, she was trying to explain how this particular allegation happened and how he wees in, on her mouth, and at 18.15 she tries –

WINKELMANN J:

It’s an earthquake?

WILLIAMS J:

You’re not even noticing that, you’re so focused, are you?

MS IRVINE:

Well, I am. Is that an earthquake?

WILLIAMS J:

That’s impressive.

WINKELMANN J:

Right, well I think we’re all right. Carry on.

WILLIAMS J:
Not many lawyers can say they had that effect on the Supreme Court.

WINKELMANN J:
So, there was an earthquake whilst you were making your submissions. I think we're all okay, and you were saying, the child is asked to explain how this event occurred.

MS IRVINE:
And she makes the statement: "He was sitting on the toilet," but when you look at her at 18.15 she seems to be self-correcting her own implausible response –

WILLIAMS J:
Did you say 15 or 50?

MS IRVINE:
18.15. That he wouldn't be able to fit in there. Now around that point, the interviewer appears to be confused about what the allegation, and that's when she brings in the dolls, so these are these figurines. So that at 19.15, sorry, 19.40, at this point you can see the child is always explaining that it's, Mr Ellis was sitting when this allegation occurred and then the question came from the interviewer: "Does he always sit down when he does wees?" And she responded: "Yes." "Or does he sometimes stand up?" And the response was: "He stands up." Again, it is our submission that this was the first time the information that he was standing up when this occurred was put to her by the interviewer.

At 19.50, at this point we have the dolls and when trying to explain what happened, you'll notice that the child is always explaining that with the doll that the child's head was in the toilet and so she was always pointing to the child's head being in the toilet, which was inconsistent with – it's suggested that the child was drinking the wees from the toilet.

So at 20.23, the interviewer is again asking for clarifications where her mouth was. So, she's says at this point, despite the child always indicating that the child's mouth was in the toilet, says: "Show me on the doll where you had put your mouth?" In response to that, the child again indicates that the mouth was in the toilet.

At 20.54, the child's description changes where she explains that the wees was coming from Peter's bottom. So at this point, at 21, the interviewer now introduces a body outline to try and clarify what the child is describing and it's our submission that it's notable that she tries to clarify that boys have a penis. So at 21.52 we have the question: "Where did your mouth have to go? On the bottom or the penis?" And the child responds at this point: "Penis because that is where the wees comes from." So again, at this point the suggestion as to where the wees comes from was directed by the interviewer.

Again, if you turn to look at how the child is navigating these dolls, at 22.18 the child now confirms that, in fact, Mr Ellis was standing and turned the doll round to say that he was facing her and then at 23.35 she indicates that the wees went all over her mouth. So across that eight minute clip, which was the first point of disclosure for this particular child in her very first interview, we see the use of dolls, the child's book, a body map in conjunction with what we would submit was suggesting questions, all knitted together to create the narrative that resulted in that allegation.

Associate Professor Brown again talks about this impact of these layering of suggestive influences on each other and they can have a cumulatively negative impact. So this particular allegation led to count 9, which was an allegation that the appellant was convicted of.

If your Honours have no questions about that particular portion of the tape that we showed you, we also referred you to child 6 and we invited the Court to look at three different little portions of the tape. Now, again, I've got the references for the interview transcripts for your record, that might be useful though I'm not going to directly speak to it. If you'd like me to provide those.

The first section is in interview 2 at 24.40 minutes and that reference is 408.3263. We then move you forward to 33.35, and that reference is 408.3270. And then we invited you to watch interview 4 at 26.20 and the reference was 408.3323.

The purpose of showing you these little portions of this clip was with this particular child, child 6, that there was use of the anatomically detailed dolls. And as you've observed, I think, all of the experts agree that anatomically detailed dolls are no longer used in these evidential interviews. But Professor Seymour was of the view that exposure to these dolls was not problematic because it did not lead to any reported new abuse and, therefore, not having a significant impact. Again, the appellant's position is, we need to look at the broader holistic picture of these interviews and how these dolls, in particular, were used during these particular interviews.

So we know from the literature that the use of these dolls increases the report of incorrect information. And the areas that we ask you to look at were for the following reasons. So if we look at the first part which stated at 24.40, you'll notice that child 6 was interested in these dolls and, in fact, she stuck her finger in the doll's vagina. The concern from the literature is that these particular dolls encourage this inquisitive play or exploration with these particular dolls.

At 33.35 of that same interview, the interviewer now introduces a male anatomically detailed doll and she uses this doll to try and elicit more information about that particular disclosure. She uses repeated questions and she's encouraged to refer to that doll in order to try and give more details about that particular disclosure that she had made.

In interview 4 at 26.20, what we note is that the child was naïve as to the presence of pubic hair on the male anatomically detailed doll. Again, it speaks to how the inquisitive and exploration play that the child is engaging with. So what the appellant's observations of these particular interviews was that she was she was extremely interested in the body parts, she was naïve

as to the pubic hair and she was engaging with these dolls in play-like behaviour at occasions and, more significantly, they were used to ask about new information about the allegation which the child was then talking about and providing. So this allegation led to a conviction of count 21.

Associate Professor Brown again in her affidavit that she has provided to the Court particularly from paragraph 19, so the reference is 201.0452 which is from paragraph 19. Now I don't intend to talk through all of these various things but in this particular affidavit Associate Professor Brown points out these broader risk factors that she was concerned with when she observed the interviews. So she acknowledged that the interviewers did use a consistent style and they did have an attentive and supportive demeanour, however, she was concerned about this game like atmosphere particularly with the large number of dolls that was often present in the interviews. She was particularly concerned that this play was integrated into the substantive portion of the interview when there was disclosures being made and while the child was distracted what she observed was that there was often repeated questioning about that same topic so again framing that interview.

There was reference to parents' knowledge. The interviewer often needed to self-correct their questions. There was questions about developmentally inappropriate topics and there was a large focus on the monitoring that was going on by the interviewer and asking to see the questions and all of those sorts of things. So on their own or together all of these things create the risk that they had an impact on the child's reports.

So the appellant acknowledges that the science is still evolving but it is our position that these suggestive questions were never encouraged nor would the play like environment that was going on and nor would we suggest that we would return to these methods of lots and lots of closed questions because they had an impact or a possible impact on the accuracy of the children's reports about what happened. So the science can now tell us that there is an unacceptable risk that children's reports may not be accurate when they are interviewed in this way.

O'REGAN J:

She does say in 19 though that there were no highly problematic behaviours that were consistently demonstrated in each of the interviews that on their own would pose a threat to the reliability of the children's evidence.

MS IRVINE:

Apologies your Honour. I think when she then talks through them later she talks about it. Sorry, I will have to – if we go through to – I think following on from 19 she then talks through all the particular things that she had concerns about and talks about at 42 there were a number of components that were not present as well relating to the preparation. I think her final paragraph at 46 talks about the presence of these many factors even at lower levels raise the likelihood of the testimony being unreliable.

WINKELMANN CJ:

Where does she say that?

MS IRVINE:

At paragraph 46 which is, the red number is 201.0459. At that point she broadens back out and she is also talking about these other factors as well external to the interviews.

WILLIAMS J:

It's not clear to me what she means by *behaviour* there, is it demeanour or is she talking about the entire way the interviewer is acting?

MS IRVINE:

Sorry, what line are you referring to?

WILLIAMS J:

Well the heading is "Interviewer's Behaviour" and then the second sentence is as indicated by Justice O'Regan. It's just not clear to me what –

MS IRVINE:

What she's referring –

WILLIAMS J:

What she means by "behaviour"? She's quite critical of some of the things that the interviewers do and obviously that's not behaviour otherwise she wouldn't have written that sentence.

MS IRVINE:

My interpretation, my reading of it was that she was referring to how the interviewer gauged their behaviour in the interview so asking I guess, introducing dolls she saw as a behaviour rather than just the demeanour with the children.

WINKELMANN CJ:

Isn't she saying that there's no consistent poor behaviour that just on its own you can say well that places it at risk, she's saying you have to look at the interviews themselves and the interaction is what my understanding is.

MS IRVINE:

Yes your Honour.

WINKELMANN CJ:

That's why she says: "On their own." I mean it is, I have to say it's quite confusing and perhaps the best reading is what she says at 46 where she is really saying don't look at the interviews on their own look at the whole thing.

MS IRVINE:

Holistically, my words. So your Honours, that was all I had prepared to speak to you about this particular topic and unless you had any questions in relation to any of this information.

WINKELMANN CJ:

No, thank you very much.

MS IRVINE:
Thank you.

WINKELMANN CJ:
Mr Harrison, where to now?

MR HARRISON:
Your Honour, we thought that section 23G would be – Ms Gray would present the 23G aspect of the argument.

WINKELMANN CJ:
And is she ready to go or does she want us to take a short break? Ready to go? Good.

MS GRAY:
E Te Kōti Mana Nui. The evidence given pursuant to section 23G of the Evidence Act 1908 by Dr Zelas is to the clusters of behaviours which indicate sexual abuse of the complainants were scientifically erroneous. It was highly sympathetic to the complainants. It was highly prejudicial to Mr Ellis but of even more serious concerns there's the appellant is that it was of low if not negligible probative value.

As Dr Blackwell said, we cannot know what impact it had on the jury but that is beside the point. The evidence of Dr Zelas was repeatedly emphasised by the Crown solicitor in his closing address and the jury were directed on it by his Honour Justice Williamson. Then for the deliberations the jury were provided with a chart of the behaviours said to indicate sexual abuse referred by Dr Zelas in her evidence. With respect, the appellant says the risk this evidence posed is undeniable.

The evidence of Dr Le Page on section 23G was also scientifically wrong in parts. Other aspects of his evidence the appellant says was irrelevant. Mr Billington, my learned friend, seemed to be suggesting through cross-examination that as Dr Le Page's evidence was in contrast to Dr Zelas it

effectively mitigated it. The appellant's response is two wrongs don't make a right and such a suggestion, if indeed it is made, with respect, rather ignores the fundamental principles of the burden and standard of proof.

The appellant submits the evidence of Dr Zelas amounted to a miscarriage of justice on four grounds. The first. The repeated reference to clusters of behaviours by the complainants were scientifically unsound. Secondly, Dr Zelas spoke to the sexual knowledge of the complainants which the appellant says was not permitted by section 23G and effectively went to the ultimate issue, namely, that the sexual abuse occurred. Thirdly, Dr Zelas commented on the credibility of the complainants. And finally, the appellant says, her role as an expert was compromised as Dr Zelas was invested in the investigation and in the interviewing processes.

Turning to each of those grounds, the first being that of the clusters of behaviours. I was going to refer your Honours to a number of references that were made by Dr Zelas in her evidence to the clusters, if that would be of assistance?

WINKELMANN J:
Yes, thank you.

MS GRAY:
So page 401.0370, line 1. "What tends to be apparent from studies of children who have been sexually abused, however, is that some 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."

Page 401.0375, line 15. "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."

Page 401.0408, line 15. We've now moved into cross-examination of Dr Zelas. "Anxiety in a child can be caused by a multitude of things." And Dr Zelas replies: "Yes, and that is why the importance of looking at the full spectrum of the behaviours in the child and why those behaviours or behavioural symptoms are less commonly associated with other causes, such as the various sexualised behaviours, become particularly significant."

I just have two more to refer to. 401.0409, line 1. "Where you have a child displaying a cluster of behaviours at best, that can be said to be indicative of anxiety of the child," is the question." Dr Zelas answers: "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 symptoms of anxiety in the child."

And the final reference, 401.0436, at line 17. Question by Mr Harrison.

WINKELMANN CJ:
Just pause for a moment.

MS GRAY:
I'll find that and I'll check that over the break. I don't know why I've got that down.

WINKELMANN CJ:
Did you want us to take a break because we normally just would sit through but we could take a short break if you wanted to find that?

ARNOLD J:
What's the page of the transcript, is it 416?

MS GRAY:
It's 417 so that's my error, yes, and it's line 17, thank you for that. In relation to tantrums that also can be consistent with other matters other than sexual abuse. Yes it can. And again that is why one has to look at the whole

constellation of behavioural symptoms a child presents rather than looking at them in isolation.

As your Honours have heard, there is clear consensus between the Crown and appellant experts on this issue. The evidence given by Dr Zelas had no scientific value now nor in 1993 at the time of the trial.

The experts, Dr Patterson, Dr Seymour and Dr Blackwell agree that the symptoms associated with child sexual abuse are varied and can result in a wide range of behaviours. Importantly, there is no one symptom or group of symptoms that can characterise the majority of sexually abused children. Furthermore, the experts agree a large proportion of children who have been sexually abused are non-symptomatic. Sexualised behaviour in and of itself does not confirm that a child has been sexually abused and these findings were all included in a consensus statement issued in 1994 by a group of international leading child sexual abuse experts which actually included Professor Gail Goodman.

WINKELMANN CJ:
Did we get that reference?

MS GRAY:
It's referred to at 203.0948. If it assists the Court I can provide a copy of that consensus statement. It's not actually in the casebook on appeal.

WINKELMANN CJ:
That would help. What year was it issued, 1999?

MS GRAY:
It’s 1994 but the consensus, the work on it began in 1993, the year of the trial. But on that topic your Honours, Dr Patterson you will recall gave evidence that she had undertaken extensive research on whether or not there were behavioural indicators that are indicative of sexual abuse through the 1980s and the research established that there wasn't. Dr Seymour himself said

under cross-examination he knew of no study at any time that has said or supported the contention by Dr Zelas that a group of clusters indicated sexual abuse.

The appellant says the emphasis this evidence received in the trial cannot be understated.

WINKELMANN CJ:
Overstated?

MS GRAY:
Cannot be overstated. Firstly, as indicated, it was highly sympathetic in nature. Secondly, a large portion of Dr Zelas' evidence was devoted to this topic and she goes through each complainant child individually. I conservatively calculated that as about 29%, 27 pages of the 94 pages.

But even more importantly was the scarce acknowledgement that Dr Zelas paid to other possibilities for that behaviour and I'm sure you will recall Dr Patterson's evidence on this topic and the extensive analysis of the evidence that she undertook which she then converted into a percentage table.

Dr Zelas accepted an alternative reason for the behavioural symptoms a proportion of only 4% of her total evidence. With respect the appellant suggests this degree of slanted thinking stretches credibility when you actually look at some of the behaviours of the complainants who were preschool ages at the time these things are said to have happened which were said to indicate sexual abuse in the absence of full assessment. They include such things as a fear of spiders, clothing problems, tantrums. The Crown closing made much of the evidence unsurprisingly perhaps because it was evidence the Crown said could corroborate the victim's accounts and bolstered their credibility. At page, please, 402.0694, sorry if we can just scroll down I'm looking for the sentence beginning: "The Crown says," from memory it's at the bottom of the page, thank you. No further down.

WINKELMANN CJ:

Does is start that?

MS GRAY:

It does. No I've made another error so I'll have to, oh, there it is sorry, yes it is down the bottom. The Crown says: "That it does not solely rely on behavioural indicators at all but says in combination with the testimony of the children and their parents the behavioural indicators are important pieces of supportive evidence that cannot be underestimated," the Crown says and that is not the only reference in the closing address. Notably however, his –

WINKELMANN CJ:

I think they've got that around the wrong way too haven't they, "should not be underestimated" I think they meant.

MS GRAY:

Yes. And notable his Honour Justice Williamson as he was required to do, of course, also directed the jury on section 23G but at 301.0193 you can see that it's towards the end, the last sentence of, I think, the third paragraph. "The relevance of the behaviour is this. If a child says that she 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 in which a lot of children of the same age group who have been sexually abused have also shown."

Fortunately this direction was not balanced by the consensus findings, namely that there isn't one symptom or a group of symptoms which cannot be attributed to sexual abuse. The appellant says that this was a fundamental omission which meant the jury were completely unaware of the significant limitations of the evidence of Dr Zelas. Any impact that Dr Le Page had could have made on this issue was diminished when the Judge in his summing up directed the jury that Dr Le Page did not understand the New Zealand legislation of section 23G. The appellant says the reality is in the absence of a full assessment of these children this evidence should not have been led at

all, and as Dr Patterson says a full assessment entails a comprehensive exploration of family medical genetic or developmental history child aged characteristics and life events experienced is necessary.
At 301.0194 his Honour further said in relation to the evidence of Dr Le Page and that appears at the end of paragraph 2, in effect what he is saying is 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. With respect, it could be argued says the appellant that in fact Dr Le Page was correct.

Turning now to the second ground. Dr Zelas spoke to the sexual knowledge of the complainants which the appellant says was not permitted under section 23G. As your Honours are aware section 23G of the Evidence Act permitted an expert witness to give evidence on: a), the intellectual attainment, mental capability and emotional maturity of the complainant. The witness' assessment of the complainant being based on examination of the complainant before the complainant gives evidence or observation of the complainant giving evidence.

The appellant submits this does not extend to sexual knowledge and yet Dr Zelas repeatedly made reference to it with respect of all of the complainants except for one.

WINKELMANN CJ:
Does any case at the time deal with that?

MS GRAY:
Not that we are aware of, your Honour. It was frequently made in submission by the Crown how would a child be able to relate these things unless they'd happen but I'm now aware of any case where an expert gave that evidence.

WINKELMANN CJ:
I mean did any Court of Appeal case deal with the admissibility of this kind of evidence?

MS GRAY:

No, not that we're aware of, your Honour. So at page 401.0367, line 18.

WINKELMANN CJ:

Just pause for a moment.

MS GRAY:

It's page 349 of the notes.

WINKELMANN CJ:

What is the page again sorry Ms Gray.

MS GRAY:

That's it and it's line 18. If a child is able to give detailed information –

WINKELMANN CJ:

This is the Crown closing, is it?

MS GRAY:

No, this is evidence.

WINKELMANN CJ:

I'm sorry.

MS GRAY:

Is a child is able to give detailed information that one would not expect a child of that age to know about then that is a very important point in validating the child's account.

GLAZEBROOK J:

What do you say was wrong with that?

MS GRAY:

By implication it goes to the ultimate issue in that if a child has that sexual knowledge it validates their account of what occurred whereas in fact sexual

knowledge of these children could have come from anywhere and no full assessment was undertaken of the –

GLAZEBROOK J:
So it might be wrong but you're saying it's inadmissible, aren't you?

MS GRAY:
Well it's not – I am, yes. It's not permitted under section 23G.

WINKELMANN CJ:
Which is about behaviour. Is that about behaviour, is that point, not knowledge?

MS GRAY:
Yes.

WINKELMANN CJ:
I'm pretty sure there's a lot of caselaw on this point but have you looked for it? You have? You've not found –

MS GRAY:
Briefly, but we could look again.

WINKELMANN CJ:
It might be an idea.

MS GRAY:
Okay. I won't take your Honours then through the –

GLAZEBROOK J:
Can I just get the point? You say it's the ultimate question but you also say it's not under 23G because it's knowledge not behaviour, is it?

MS GRAY:

Correct, and it doesn't go to – she is allowed to comment on the emotional maturity if you have a look at that section, mental capability and intellectual attainment.

WINKELMANN CJ:

Does it have to be under the section if it's relevant evidence?

MS GRAY:

No not necessarily but I'm not sure how an expert could say that the only reason by which these children would have that knowledge is because it happened to them.

GLAZEBROOK J:

The evidence that we're given during the hearing was that evidence of sexual knowledge that is outside of the normal age range would be something that would raise some alarm bells and therefore would mean that there should be further investigation, as I understood the evidence. So even today that would actually be something that would at least merit further investigation, it wouldn't be conclusive obviously but it would mean further investigation, that was my understanding of the evidence.

MS GRAY:

Yes well with respect I think I would challenge any comment by an expert that said that that validated, that was proof that an account occurred.

GLAZEBROOK J:

Well that might have been wrong but you're saying it's inadmissible.

MS GRAY:

It's because she goes further than just saying, and she doesn't really need to comment on the sexual knowledge, I mean that's obvious to the jury if a child has even had sexual knowledge beyond their years.

WINKELMANN CJ:

So she's actually commenting on the sexual knowledge displayed in the videotape?

MS GRAY:

Yes.

WINKELMANN CJ:

And you're saying that she didn't need to comment on that, it was before them and she was just corroborating –

MS GRAY:

It's before the jury and it's what they make of it but it's not for an expert to come along and says that validates their account. Certainly it's a fact that –

WINKELMANN CJ:

Well see the authorities under section 23G do say the expert is not allowed to give evidence which has the effect of bolstering, which directly bolsters credibility. So it might be an idea for you to have a look at the section 23G authorities. Did parents give evidence, my recollection is they did about whether or not there is alternative sources of this knowledge or were they questioned about it?

MS GRAY:

No I don't recall that, I can certainly check it over the break. My recall was, of course, there was plenty of questions about reasons for alternative behaviours such as tantrums and the like but not for the children's sexual knowledge as such.

WILLIAMS J:

There are a couple of cases that deal with this.

MS GRAY:

Thank you your Honour, well we'll –

WILLIAMS J:
At least one of them involving Dr Zelas and perhaps another one too.

WINKELMANN CJ:
Several involving Dr Zelas but yes.

WILLIAMS J:
And they seemed to take opposite views at the Court of Appeal, it's probably not a lot of help.

WINKELMANN CJ:
Well it's a very fact specific area.

MS GRAY:
Yes.

WINKELMANN CJ:
But your point is it was really for the jury, it was a common sense point.

MS GRAY:
It's for the jury, it's for the jury, it's a common sense thing, how would they know that.

WILLIAMS J:
It's a fine line though isn't it, I mean?

MS GRAY:
It's a fine line but when you have an expert coming along it says it validates the account when they have…

WILLIAMS J:
But if an expert comes along and says tantrums are consistent but I'm not allowed to talk to you about sexualised behaviour it's a little artificial.

WINKELMANN CJ:

This is not sexual behaviour.

MS GRAY:

No this wasn't sexualised behaviour, it was sexual knowledge.

WILLIAMS J:

Sorry sexual knowledge then, it seems a little artificial.

MS GRAY:

Well I mean in today's, I mean I guess if we were looking at today it could come from the Internet or wherever but, in the school yard.

WILLIAMS J:

Quite, I'd be surprised if they didn't know these days.

MS GRAY:

Exactly, in the school yard, but back then it could be from older siblings, in the school yard, pornography, older siblings, I mean there's so many potential sources.

WINKELMANN CJ:

But your point is that this crossed the line –

MS GRAY:

It's crossed the line.

WINKELMANN CJ:

– into direct corroboration of what was being said in the interview, it wasn't talking about behaviours that had been reported?

MS GRAY:

No, their sexual knowledge.

WINKELMANN CJ:

As displayed in the interview, it's not on the chart though is it?

MS GRAY:

No it's not. But she talks about them as being, for example, precocious and knowledge of perverse sexual activities, things like that.

GLAZEBROOK J:

Well all I come back to is that the experts today would say that that would be something that would warrant further investigation.

MS GRAY:

I don't necessarily –

GLAZEBROOK J:

Well it seems odd that you'd say it wasn't admissible. I can understand the comment about commenting on the ultimate issue, but.

MS GRAY:

That's right, I don't –

GLAZEBROOK J:

So is that the only point, commenting on the ultimate issue really?

WINKELMANN CJ:

Because I suppose you'd say that they might warrant further investigation, if you were a psychologist looking after that child, but whether or not you could – that means you could give evidence about the content of the interview and say that's unusual sexual knowledge, is a different thing.

MS GRAY:

Exactly, that's the point I'm trying to make.

WINKELMANN CJ:

Well, we're going through to 4.30, you need to look at those authorities under section 23G, will you be taking us through to 4.30, do you think?

MS GRAY:

I've probably got, your Honour, not too much more, probably 10 minutes.

WINKELMANN CJ:

I'm not rushing you.

MS GRAY:

No, no, 10 minutes.

WINKELMANN CJ:

All right. We might just take a 10 minute break.

COURT ADJOURNS: 3.41 PM

COURT RESUMES: 3.53 PM

WINKELMANN CJ:
Before you get underway Ms Gray I will just deal with a couple of housekeeping matters. Somehow we've been cajoled into sitting longer hours even though we've got no witnesses but tomorrow we will resume our ordinary sitting hours which are 10 to 4 and today we have to finish at 4.25.

MS GRAY:
Yes, I will be finished by then your Honour. I'm relieved to say that over a quick afternoon adjournment search we couldn't find any cases on the sexual knowledge point. I'm making the distinction between sexual behaviours and sexual knowledge. There was one case where the Crown prosecutor made much of it in his or her closing address that the sexual knowledge of the complainant must only have been because they had experienced it and it appears to us that that was one of the grounds upon which the Court of Appeal actually overturned the decision and that citation is *G v R* CA414/03, 26 October 2004. I've just been told it's in the Crown bundle, tab 66.

WINKELMANN CJ:
Crown bundle tab?

MS GRAY:
66, your Honour.

WILLIAMS J:
That's *R v G*?

MS GRAY:
It is, or *G v R.*

WILLIAMS J:
I've got it as *R v G*. It will be the same, did you say 414?

MS GRAY:
Yes I did. So as I say, with all the complainants except with respect to complainant number 2 Dr Zelas makes comments about their sexual knowledge.

Ground 3 is Dr Zelas made comments directly related to the credibility of the children under the Evidence Act 1908 of course this was not permitted however the appellant says it would not be permitted either under the 2006 Act and collectively we know of no case where it has been considered acceptable for an expert witness to comment on the reliability and credibility of a complainant making an allegation of a sexual nature.

I have already referred your Honours to this reference but I repeat it again under this ground where Dr Zelas stated at 401.0367: “If a child is able to give detailed information that one would not expect a child of that age to know about then that is a very important point in validating the child’s account. Another example, 401.0395 this is child 6, this child was said to have poor physical skills and at line 9 Dr Zelas said: “In this instance it would appear that the emotional factors associated with having been abused have contributed to the delay in her physical skills.”

WILLIAMS J:
In chief or in cross?

MS GRAY:
I believe this is in chief.

WILLIAMS J:
What's the first reference 0367 what child is that?

MS GRAY:
Yes, 401.0367.

WILLIAMS J:
What child? Is it not child specific?

MS GRAY:
No, I don't have a reference to a child. In relation to child 5 at 401.0390 I have line 28 if he could discriminate between his understanding of the event was at the time it occurred and now at the time of recalling and describing the event.

WINKELMANN CJ:
Where are you sorry, line?

MS GRAY:
Line 28. Perhaps from the beginning of the sentence: “For instance…” Mr Harrison is just suggesting I should start at line 22.

WINKELMANN CJ:
What about the bit down the bottom?

MS GRAY:
Sorry, your Honour, which line are you referring to?

WINKELMANN CJ:
Line 36.

O’REGAN J:
It doesn’t go to credibility.

WINKELMANN CJ:
No, have you taken us to this before: “That is consistent with a child’s behaviour as being sexually abused at that age”? Have we seen that before? You might have already taken us to that.

MS GRAY:

No, I haven't.

WILLIAMS J:

(**inaudible** 16:00:43) training point.

MS GRAY:

And another example, 401.0407, line 7.

O'REGAN J:

Does this relate to any particular child?

MS GREY:

No, I don't believe it does, your Honour, and this is cross-examination. "Children of the age of which the children we are dealing with also at this age have the ability to create, to a certain extent, scenarios," that's a question, and then the answer is: "Yes, they can only create scenarios on the basis of information that they have from their general knowledge and life experience. They can't create information out of nothing."

WINKELMANN CJ:

Well, that's not wrong in itself, is it?

MS GRAY:

It's not, I agree, it's not as blatant.

WILLIAMS J:

It reads like a fair answer to the question.

MS GRAY:

Those are examples that the appellant says, though, in the context –

MS GRAY:

Those are examples that the appellant says, though –

THE COURT: GLAZEBROOK J ADDRESSES COUNSEL – MICROPHONE ISSUES (16:02:40)

MS GRAY:
So the references are some examples of where we say a boundary was crossed and is an absolute no-no in a trial from an expert or any witness, actually, but that it has more effect when it comes, or potentially have more effect, when it comes from an expert certainly in the form of a child psychiatrist who had the experience Dr Zelas had.

WINKELMANN CJ:
And you go through this in detail in your written submissions?

MS GRAY:
In some detail, yes, your Honour. The final ground was, is the appellant's contention that Dr Zelas' role as an independent expert was compromised by her involvement in the investigation. And the risk, of course, is obvious, that Dr Zelas may have become invested in the outcome, either consciously or unconsciously. She may have tailored her evidence, consciously or unconsciously, or given emphasis to matters which were not entirely neutral and, in fact, stepped over the line into advocacy. Although my research indicates there wasn't a Code of Conduct back in 1983, it is clear from cases that independence and impartiality are key markers of expert witnesses. They cannot advocate.

The evidence in the trial established that Dr Zelas attended the Knox Hall meeting, she was involved in supervising the interviewers and giving advice to the police. An example, of course, is the letter by Dr Zelas attached to the affidavit of Professor Haynes dated 28 August 1992. And whether consciously or unconsciously the appellant says this letter, with respect, does contrast with her evidence or at the very least those strong comments in that letter were not reflected in her evidence at all. In conclusion, your Honours, it's respectfully submitted that section 23G in the trial of Peter Ellis was used as a vehicle to elevate the evidence of Dr Zelas much of it blatantly wrong as

a matter of science and law. Her evidence went too far. The appellant respectfully submits it's undeniable the fair trial rights of Peter Ellis were seriously compromised. The jury were misinformed but fortunately this court now has the benefit of extensive expert evidence on the issues of section 23G. Science has progressed, the law has progressed and this case can now be reconsidered by this court with the benefit of the extensive knowledge and expertise that your Honours have contained in the written submissions and heard in the course of last week. And unless the Court has any questions those are the appellant's submissions on section 23G.

WINKELMANN CJ:
Thank you Ms Gray. So Mr Harrison did you want to, you have got one section left have you, which is the general miscarriage of justice ground.

MR HARRISON:
We have also the section concerning the experts as well.

WINKELMANN CJ:
And who's handling that?

MR HARRISON:
I am.

WINKELMANN CJ:
So did you want to do it now or do it tomorrow morning?

MR HARRISON:
I'd probably do it tomorrow morning if we could.

WINKELMANN CJ:
Well we'd be happy to do that.

MR HARRISON:
It's been a day your Honour.

WINKELMANN CJ:

It has been a day. So I think we'll adjourn and we'll start tomorrow at 10. Do you think you'd be finished by when Mr Harrison?

MR HARRISON:

I think the expert evidence won't take too long. The fourth ground may take a bit of time, there may be one or two questions.

WINKELMANN CJ:

So the morning?

MR HARRISON:

Yes, at most.

WINKELMANN CJ:

We're still doing okay for time aren't we Mr Billington?

MR BILLINGTON QC:

Well I'm here, I'm not going anywhere your Honour so, I would like to, but I'm not, so I will just fit in with whatever works.

WINKELMANN CJ:

Good thank you very much, we'll adjourn now.

COURT ADJOURNS: 4.08 PM

COURT RESUMES ON WEDNESDAY 13 OCTOBER 2021 AT 10.02 AM

WINKELMANN CJ:
Mōrena, Mr Harrison.

MR HARRISON:
Mōrena. Your Honours, I was going to address the Court in terms of the use of experts.

WINKELMANN CJ:
And when you do so, you will have to speak into the microphone.

MR HARRISON:
Thank you, your Honour. Now this is covered from page 19 of our submissions. The argument looks at the decision of the Court in 1999 where the Court referred to the concerns associated with complainants' testimony were known to some degree, that the Court stated: "Our overall assessment is that the various matters of concern or substance now identified and emphasised were all identified in 1992 and covered at trial." The Court later went on to state: "The risk of contamination are matters to be taken in to account. That one or more of these risks is shown to have been present to some extent does not mean a complainant's evidence necessarily is to be rejected as untrue. So long as the evidence is assessed with awareness of the relevant risks, it is for the jury to decide whether it can be relied upon."

Now the two experts at trial were Dr Zelas and Dr Le Page. We challenge now whether or not the evidence given by them was substantially helpful. Professor Hayne has questioned whether the two experts could, in fact, rest their opinion on a relevant specialised knowledge or skill. Both were practising psychiatrists and not experts in memory, and I think Dr Zelas acknowledged that her expertise was on the basis of reading other people's research.

At page 21 at paragraph 64 Professor Hayne points to areas where both experts provided evidence that she says was incomplete or incorrect on matters that were centrally important to the trial. In particular, at paragraph 64, Dr Zelas stated that children are more likely to provide information when they are asked direct questions.

WINKELMANN CJ:
Is this paragraph 64 of what?

MR HARRISON:
Of my submissions. Page 21, paragraph 64, of our submissions.

WINKELMANN CJ:
Carry on.

MR HARRISON:
Dr Zelas stated that children were more likely to provide information when they were asked direct questions, when presented with props, anatomically detailed dolls, or allowed to play or draw; but failed to inform the jury that the increased detail comes at the cost of decreased accuracy.

Now Professor Hayne also has stated that Dr Zelas incorrectly told the jury that children were as good as adults at identifying the source of their memories, further that Dr Zelas incorrectly told the jury that it was rare for children to provide spontaneous and plausible accounts of events they have only heard about and further Dr Le Page provided the jury with incorrect information about memory. For example, he misdirected the concept of childhood amnesia, introduced the concept of repression, and claimed it was possible to retrieve accurate memories following head trauma by the use of hypnosis.

Now in terms of direct questions, if we could perhaps have number 401.0353 up on the screen, please, and it's about line 19. This is Dr Zelas at trial and she says: "In terms of their ability to answer specific questions in contradiction

to hypothetical questions, it is much easier for them to respond to direct questions and there is a substantial body of research evidence that shows asking children direct questions increases substantially the amount of detail or information they are able to give about a matter. And also the asking of such questions does not lead to significantly more inaccurate answers," and if we could just go now to 203.1016, that's Professor Hayne's affidavit at paragraph 24, the caveat I put on this is that we've tried to give the Court an agreement, so whilst Professor Hayne says: "On the basis of current research, memory experts would agree on the following," I think we got to four heading towards this point. "Children's responses to open-ended questions are more accurate than their responses to more focused questions. On a continuum, broad open-ended prompts such as free recall invitations yield the most accurate accounts with the fewest inconsistencies. More direct questions, such as what, when and where questions, direct closed questions that require a yes/no response and direct choice questions, elicit fewer details and more errors and inconsistencies. Suggestive questions are to be avoided as they have the potential to contaminate or alter the original memory. So I think that's probably one of the more contrasting details in terms of the evidence that was given at trial and the evidence that would be available to a jury today.

Another perhaps significant factor would be if we look at 401.0406 and we're at line 27 on that page and it reads –

WINKELMANN CJ:
Is this Dr Zelas' evidence?

MR HARRISON:
Sorry, yes, Dr Zelas' evidence at trial. That is taking a leading question in isolation. 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 may take on board part of the parent's emotions in the concept of the question, is that not correct? She replies: "That is possible." "If that is the case," and then there

are further questions asked “then it is entirely possibly for children of this age to develop a whole scenario based on the type of questioning undertaken by the parent.” And the answer is: “Only if as you say the whole series of questions as it were all leading questions so that all the information were 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 matter that is age appropriate and has the appropriate effect associated with it and is convincing.” Now that then has to be contrasted with Professor Hayne’s evidence at 203.1018 and 203.1021 paragraphs 27 to 31.

WILLIAMS J:
Can you give just me those numbers again please? Oh, I’ve got them, 203.1019?

MR HARRISON:
Yes. 203.1018 to 203.1021 paragraphs 27 to 31. This is Professor Hayne discussing the Principe literature. Paragraph 27: “One factor that has recently received considerable experimental attention is the potential impact of prior conversations on children’s reports of an event,” and she refers to the Principe and Schindewolf research paper 2012. She refers to these matters: “Conversations with important adults in a child’s life can provide children with a rich source of information about their past experiences,” and indicates that, “these same conversations can be a potent source of error in children’s subsequent reports especially when adults hold false beliefs about children’s experiences. That is, natural conversations with others about the past can change the way in which children remember their personal experiences, particularly when conversational partners differ in their beliefs about what happened.”

At paragraph 29 she describes the experimental study that was undertaken and indicates that when later interviewed about the event by a neutral third

party, children whose mothers were misinformed were much more likely to false claim to have experienced the suggested activity. In addition these children not only reported the basic activity that had been discussed, they also generously embellished their accounts with fabricated details in line with the suggestion. So what the science is telling us is that what Dr Zelas is suggesting is unlikely, is entirely possible. When we look at Dr Zelas' letter, which I've referred the Court to, she specifically indicates concerns, and if perhaps we could have that letter up please, 203.1227. So in that the, under "Credibility and Risk of Parental Influence" it's, in my submission, quite clear that Dr Zelas was highly concerned about the manner in which the parents had questions child 5 and child 6, and your Honours will recall that yesterday I passed forward a letter from child 5's parents concerned about a cancellation of an interview, which obviously this letter is referring to the concerns they had. It seems to be in contrast with the evidence that she is giving at trial, and if I refer you back to perhaps 401.0415, line 9: "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?" "Yes, that is correct." "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?" "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." Which seems to fly very much in the face of the letter she wrote to the officer in charge of the investigation.

O'REGAN J:

That letter, when did it become, when did the defence find out about the letter?

MR HARRISON:

My understanding of that letter was at pre-trial there was an affidavit from Dr Zelas. The affidavit had a large number of exhibits attached to it. When

that was received exhibit O and exhibit P were missing. My memory of the event is that O and P I think this letter was exhibit O, and I'm clear that I didn't see that letter, and I would imagine because it was filed at court, and I've looked at the rulings of Justice Williamson, that he did not see it either, although I'm aware that previous counsel in an appellate, in the Court of Appeal in 1999 was of the view that he had seen it, but I was asked about it prior to the 1999 appeal and it was brought to my attention then and my memory when that was brought to my attention is that I had not seen that letter and I imagine that had I had that letter in my possession, one or two questions may have been asked of Dr Zelas concerning the contents of that letter.

WINKELMANN CJ:
Has the court copy been checked to see that the exhibits are missing?

MR HARRISON:
I have looked at the trial papers that were in Christchurch. I don't believe I have seen that letter in those documents.

WINKELMANN CJ:
Well, is that common ground and it wasn't for the trial court, we don't know? You don't know if it is common ground?

O'REGAN J:
You're allowed to say I don't know.

MR HARRISON:
Thank you, your Honour. I don't know, your Honour. I don't know whether it's common ground. My view of the matter is that given what I have seen of Justice Williamson's rulings, there seems to be no particular mention of what I would see as a fairly important piece of information for a judge to have.

WILLIAMS J:
Wouldn't he only have referred to it if it had been raised as an issue and it's common ground that you didn't?

MR HARRISON:
Well, I'm absolutely certain I did not raise it during the course of the trial, but of course it's attached. It was originally an exhibit to Dr Zelas' affidavit to the Court on pre-trial matters. So, like I say, when I received that original affidavit, two parts of it were missing and I can't put my hand on heart and say how that resolved, but I am comfortable to say that I did not have that letter for the course of the trial and I didn't recall it when it came back to my attention by Ablett-Kerr, but I recognised the O as being part of that missing, you know, the annexures to that missing affidavit.

WINKELMANN CJ:
Was there commentary attached to the O, ie,: I attach exhibit O"?

MR HARRISON:
In her affidavit there is, yes.

WILLIAMS J:
What does it say?

MR HARRISON:
I can't tell you now what she said in that affidavit, but there was discussion I think in rulings 2, 3, 4 and 5 concerning the suggestibility of children and other factors which were raised throughout the course of that time. There was a 347. There was a 344A argument and it also, I think Justice Williamson in his summing up, made note that I was challenging Dr Zelas as being an unbiased expert.

WINKELMANN CJ:
As a biased expert?

MR HARRISON:

Yes.

WINKELMANN CJ:

Oh, you were challenging her status as unbiased expert?

MR HARRISON:

Yes.

WINKELMANN CJ:

Well, it would help us to know what the Crown's approach is to this issue. Does the Crown take issue with your statement that it was not before the trial court or available to you?

MR HARRISON:

Perhaps if I ask.

WINKELMANN CJ:

We should clear that up now I think but it might be that Mr Billington needs more time to answer it.

MR BILLINGTON:

I will look at it in more detail, but my understanding is I cannot inform you as to what happened to this letter, but I am instructed that the jury were aware that the interview that was to follow was cancelled and that's referred to in the transcript. So the narrative was understood, but I am not able to find out whether the letter was in existence, where it was and what's happened to it and I will give you the reference to the cross-examination as to the jury learning of the narrative because I think there were three interviews and then another one to follow, it was cancelled as a result of this letter and that's part of the record. And I'll come back to it, if I may.

WINKELMANN CJ:

Are you saying it's part of the record that the interviews were cancelled because of a letter?

MR BILLINGTON QC:

I don't know why. I need to give you more detail. They knew it was cancelled because of a matter of this type. I will give you more detail. I need to look at it more closely myself.

MR HARRISON:

Whilst we're addressing this issue, your Honours,, ruling number 9, which I supplied to the bundle of documents refers to the letter by child 5's parents to the police which I raised with you yesterday. And if I draw your attention to page 2, that's at 301.0118, if your Honours wish for it to be on the screen.

WILLIAMS J:

A better reference, is it? The one that's handwritten and then typed?

MR HARRISON:

Yes, yes, it's not the Zelas letter, no.

WILLIAMS J:

No.

MR HARRISON:

But Zelas is referred to in that letter. The handwritten and then typed one that I passed forward yesterday from child 5's parents.

WINKELMANN CJ:

So you were seeking to cross-examination Dr Zelas about the reasons for – whether she was involved in the decision to cancel?

MR HARRISON:

No, this ruling number 9 is, I was seeking to cross-examine the child 5's mother about the letter which would have then been a springboard to question Dr Zelas.

WILLIAMS J:

It seems from that paragraph that the Judge wasn't aware.

MR HARRISON:

That's my view, your Honour, looking back 30 years or 28 years.

WILLIAMS J:

I guess it may or may not be clear who that person is?

MR HARRISON:

Yes.

WILLIAMS J:

That caused the cancellation.

MR HARRISON:

Which would support my inkling that he didn't see the original Zelas letter, exhibit O, that it was perhaps attached to an affidavit and then removed once they realised what it was, as an internal document perhaps.

Now, there are other points that were challenged by Professor Hayne and your Honours will recall when we put forward the 10 points that Justice Williamson referred to in his closing, and that was, I'll just get that reference, Professor Hayne's comments are on the notes of evidence, 332 to 337 – and your Honours will recall that there were five points under Dr Zelas and five points he referred to from Dr Le Page, and Professor Hayne has gone through each of those points at those pages, saying which was accurate and which wasn't, and also that indicates the concern we have with the quality of

the expert evidence that was given at the time for the jury to consider. I could take your Honours back through that now if that would be helpful.

WINKELMANN CJ:
Yes, thank you.

MR HARRISON:
So if we could have the notes of evidence. Sorry, we'll start with Justice Williamson's summing up, 301.0184, and down the bottom of the page, please. Now Justice Williamson indicates at the second to last paragraph: "Dr Zelas, who counsel acknowledged had more experience with sexually abused children than Dr Le Page, made a number of points including these five," and he lists the five: "She said children of this age tend to think in concrete or literal ways because their minds have not developed sufficiently to comprehend abstract ideas. She said in a self protective manner young children may engage in magical thinking under which they may treat a toy or animal as though it is personified or human and this type of thinking makes it difficult for children to distinguish between what is a real threat or an impossible one made by an abuser. She said because of their stage of development it is easier for such children to respond to direct questions which can increase the amount of accurate detail that they give. She said children may have difficulties with appropriate language use and numbers, especially if an act has occurred to them on a large number of occasions. She said that children's memories of events may be incomplete but that over time retrieval of the memories will occur if they are given cues or motivation to remember."

Now perhaps if we address Dr Zelas' matters first and if we go to page 332 of the notes of evidence. Perhaps if we just continue on down. Professor Hayne is referred to the document and asked: "Now in terms of the memory evidence put in front of, or referred to by his Honour, Justice Williamson, can you look at these five points he refers to, firstly Dr Zelas and secondly Dr Le Page, and just give us your thoughts on those?" And the answer is: "The first two are probably irrelevant, I would say." "Right." "Three is largely correct with a huge number of caveats." "What would be the caveats?" "It is direct

questions do increase the amount of information that children report but its accuracy is not necessarily enhanced and we've traversed that I think a bit this morning. Number 4 is correct. Children are different from adults in this regard that we recall different things at different times, so 5 is largely correct as well and I think the key here is that she's talking about children's memories as opposed to their reports. So really if I were giving that evidence I would say that children's reports of events may be incomplete but over time, retrieval of memories upon which they are based, they report additional information."

Then she goes through and considers the five points from Dr Le Page, and he said that up to age 5 or 6 children have difficulty remembering what happened during what he referred to as a childhood amnesia period, but he said: "As they get older they do remember more events and begin to understand and they acquire the language to talk about them."

Children are more susceptible to source amnesia, they are just unable to recall where a piece of information has come from. He said forgetting can occur due to threat stress but that when persons do remember such incidents, they commonly relive the emotions, and that you would expect the child, bringing back such a memory, to show emotional signs. He said, children are more suggestible than adults because of their general level of development and he said if leading questions were asked to children of this age, then they may go on to create the scenario around such concepts.

If we then go back to I think it's page 334, firstly Professor Hayne says: "Well, as we discussed and as an expert in childhood amnesia, and I think I am the only expert here as an expert in childhood amnesia…" I think that was challenged by Professor Goodman, "… I would say that number 1 is completely and utterly incorrect. He's completely conflated the issue of childhood amnesia with childhood forgetting, but the second part, as children get older they do acquire language and they use that language to talk about their memories, yes, that that is correct. Two is correct about children are more susceptible to source amnesia, and I'm not sure if it's appropriate," and

then she goes to talk about the discussion she has had with Dr Blackwell, or comments considering Dr Blackwell.

So if we can just go past that, up to 335. So we start down at about, where it says 1430: "Children are more susceptible to source amnesia. Yes, that is correct. Forgetting can occur due to threat stress. Again I think that's a sort of psychanalytic term that Professor Goodman alluded before Forgetting can occur of all kinds of things and you would expect the child – I mean children sometimes recall events and do, and not show emotional signs so. I'm sorry, I've lost the thread of the questioning…" but she goes on. She says that generally three is accurate, "…4 is correct under most circumstances, but the 'general level of development' is an odd way that we probably wouldn't talk about it now, we'd list a whole host of reasons why and under what conditions children might be more suggestible than adults, acknowledging that adults are not immune to suggestibility as well."

So she then goes on and lists the other factors, so clearly the information that was provided to the jury at this time was incomplete, and was to a certain extent inaccurate, but some of that is really because since then a lot more research has been undertaken and we understand matters a lot better than what they did in 1993.

Now at page 22, paragraph 66, Professor Hayne acknowledges that research literature has evolved since 1993. She suggests that without the jury being aware of risk factors that effective reliability of children's memories there was a risk of miscarriage of justice. We then suggest that when you look at what the Crown had to say in their closing submissions with regards to the possibility that children could incorporate suggestive information from conversations with parents and provide plausible accounts, Dr Zelas had stated: "In my opinion and my experience it is very difficult for a child who has obtained information in that manner, from a parent, to be able to subsequently give a spontaneous and plausible account of those events." The Crown frequently reiterated this claim in the closing address. For example, the Crown says that this is a child of very low suggestibility, a child who has been

able to say no to ideas or concepts put to him by his interviewers and by me. It is made out that child 5's mother implanted these allegations in a child's mind by asking leading questions. There is no evidence to support that. The details supplied by child 5 were incapable of being produced," the Crown says, by this sort of question which takes us back to that letter. The collection of empirical studies by Principe and colleagues demonstrates that this was in fact a very real possibility which the jury were not properly aware of.

Another example is Dr Zelas' evidence about the use of direct questions. This evidence led the jury to believe that the direct questions are constructive interview techniques which were necessary to elicit complete narratives about the allegations and we quote her there from the notes of evidence: "In terms of their ability to answer specific questions… it is much easier for them to respond to direct questions and there is a substantial body of research evidence that shows asking children direct questions increases substantially the amount of detail or information they are able to give about a matter. And also the asking of such questions does not lead to significantly more inaccurate answers."

In their closing address the Crown stated: "The Crown says that the issue is not just one of whether a leading question was asked or whether there was persistent questioning or whether a child said it wanted to leave a room on a large number of occasions, the enquiry must go beyond that. You must determine whether that inadequacy if you think it such has meant that the child has recounted an event which in fact did not happen and which has only been suggested to it by the nature of the interview."

Justice Williamson also noted Dr Zelas' evidence. He said: "She said because of their stage of development, it is easier for such children to respond to direct questions that can increase the amount of accurate detail that they give." Yesterday my learned friend Ms Irving took your Honours through that aspect in terms of the interviewing technique so I skip over paragraph 69 and 70.

If I just take your Honours to paragraph 74 on page 25 of the submissions where the Crown stated: “An important fact to remember the Crown says with regard to the interviews is that where criticisms can be made any deficiencies can and have been tested by cross-examination. The defence had the opportunity to test all the criticism it makes by asking the child whether or not the event alleged was in fact a true recollection or one adopted by the child only as a result of suggestion.” Well, I think the evidence that we’ve heard from the experts is that source monitoring is difficult and I think we also have to take into account 18 months has passed.

We state at page 26: “This statement is extremely misleading. A child who has constructed a false memory through suggestive interview techniques cannot later unpick that memory and identify it as false even under cross-examination.” Professor Hayne states: ‘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,” and she cites some references there. “It is therefore critically important that children’s memories are retrieved and reported without exposure to additional sources of information. If such exposure does occur, the fact-finder should be made aware of the implications for the reliability of the child’s testimony.”

So, in summary, page 27 of submissions, the appellant respectfully submits that it was essentially that expert evidence was improperly led to assist the jury in determining the central issue, the reliability of the complainants’ accounts. Without proper instruction from an appropriate expert, the jury could not possibly decipher the evidence in a way which would allow them to reach a just decision. Professor Hayne has opined that the jury did not receive all the information that they would require to interpret the evidence because one, the two experts were not memory experts and two, fresh evidence has become available since the trial that demonstrates why the experts’ statements were flawed. Of further concern is that the erroneous statements were then repeatedly emphasised by the Crown and, on occasion, Justice Williamson. As such, there was a real risk that a jury reached an unsafe verdict. So that was the submissions in respect of the experts.

Then there is the final ground that we put forward, and if I ask your Honours to turn to page 39 of the appellant's submissions? We submit that the charges were structured in such a way that it there could be no expectation of corroborating evidence. That the trial must be rendered unfair, specifically the trial was unfair due to the sanitisation of charges that were advanced against Mr Ellis, the failure to present all the children's interviews to the jury and the failure to provide the jury with all the necessary jury materials.

We refer to the Minimum Standards of Criminal Procedure as affirmed in section 25 of the New Zealand Bill of Rights Act 1990. Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights. The right to a fair and public hearing by an independent and impartial court and the right to present a defence, and the appellate courts must balance an accused person's right to a fair trial against the need to avoid overturning convictions based on inconsequential error at trial, not all errors in a trial will be so egregious that the trial will be deemed unfair. And it has been held in *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145, that we consider that in the first place the appeal court should put to one side and disregard those irregularities that plainly could not, either singly or collectively, have affected the result of a trial and, therefore, cannot properly be called miscarriages. A miscarriage is more than inconsequential or immaterial mistake or irregularity.

We also refer to the decision in *Guy v R* [2014] NZSC 165 where the minority departed from the majority in respect of where a trial is properly characterised as unfair, it must follow that a miscarriage of justice has occurred and the proviso cannot not apply. The majority continued to apply the approach in *Matenga*, that is if there is a flaw that is deemed unfair, the Court must then answer whether that flaw was capable of affecting the result of the trial. If the answer is yes, only then will the trial be considered unfair.

O'REGAN J:
I don't think any of this is in issue, Mr Harrison. None of this is in issue.

MR HARRISON:

No, Sir. I'm sorry, I'm just –

O'REGAN J:

I mean, (**inaudible** 10:49:20).

MR HARRISON:

All right. So if I perhaps turn to page 42 and the sanitisation of charges. So, I outline the number of charges and we indicate that these charges, however, did not reflect the extent of the alleged offending raised during the interviews, for example, the complainants allege that Mr Ellis defecated on their faces and clothing. Nor did these charges capture the most serious allegations, for example, one complainant alleged that Mr Ellis and 19 others would penetrate his anus with sharp sticks and their penises, and that is child 5 interview 3. This was addressed in the Court of Appeal 1999 decision and the Court stated: "It could be said that there was a degree of sanitising by the Crown in that of the 42 charges involving complainants which were the subject of committal, only 28 charges involving 13 children were included in the indictment; also, some allegations of serious offending by those were not the subject of any charge." The Court was of the view that despite the sanitisation and the rulings that there was no real impact: "There was 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 approached in the light of contemporary knowledge, there was no undue restriction placed on the defence as it was conducted at trial."

The first thing I would say in respect of perhaps if we look at child 5 is that once the charges where there was a possibility of penetration would drop to an indecent assault and the charges where the child made allegations of repeated sodomy were not before the Court, it would be an extremely brave counsel to then start challenging a child in terms of actual penetration because you could end up cross-examining back in a charge that the Crown

had amended down from sexual violation to an indecent assault. It's a very risky procedure to take and you will note that child 5 was not questioned.

ARNOLD J:
The prosecutor has to make a prosecution decision in accordance with the Solicitor-General's Guidelines and they have several elements to them and if the prosecution –

GLAZEBROOK J:
I'm not sure if your voice is coming through. It's very faint for me. I can hear you.

ARNOLD J:
Oh, right, I am virtually sitting on this.

WINKELMANN CJ:
It's better now.

MR HARRISON:
I have sympathy, your Honour.

ARNOLD J:
I will start again. A prosecutor has to make prosecution decisions in accordance or under the Solicitor-General's Guidelines and obviously must approach that in a good faith way and if he or she feels that it would be inconsistent with the guidelines in some respect, for example, on the sodomy there might be evidential insufficiency or something of that sort, then the prosecutor shouldn't decide to prosecute. So, the real issue is not prosecution it seems to me, but whether in such case the defence has knowledge of the other elements that the child has talked about and whether the defence is able to utilise that in an attempt to undermine the accuracy of the child's account on other matters. It seems to me a very odd thing to be saying: "Well, if you bring a charge on one allegation made by a child you must then bring a charge on all particularly bizarre ones"?

MR HARRISON:

Except for the fact that in terms of running a defence where you are saying that there has been contamination of a child's evidence and you have three interviews over three days and you charge in respect of interview 1, you charge in respect of interview 3. The most serious allegations sit in interview, in this middle interview, and that's not put forward and charges that could allege a violation are amended down to an indecent assault so that –

GLAZEBROOK J:

Is your point really just so I can be clear that you say all three interviews should have been put before the jury so it's not that there should have been a charge on the middle one but the three interviews should have been put before the jury and it shouldn't have been left to the defence to cross-examine especially a vulnerable child in respect of those allegations that might be suitable for an adult but not for a child, is the point you're making?

MR HARRISON:

In respect of that particular set of interviews, yes.

WINKELMANN CJ:

Well isn't it the point in respect of all of them really, Mr Harrison, because it is difficult for you to really argue that the Crown should have charged all of these matters and you wouldn't really have wanted that, would you? But isn't your point that your client was disadvantaged by the Crown's effective editing of what was before the jury and isn't there law on this about the Crown's obligation to provide a fair account of the content of interviews?

MR HARRISON:

Yes. Can I just take one step back in respect of that? I've referred to child 5 but of course child 7 has the different scenario occurring. Child 6 I think also has another set of scenarios occurring as well. The difficulty for defence was, one, there were a number of names that identified people who either had been charged with one offence and a 347 –

GLAZEBROOK J:
You were fading again I'm sorry.

MR HARRISON:
I will lean closer. So there were a number of other people that were named and places named that really affected, the appellant would say, the credibility of the whole process by which the child came to make those statements. That was why we asked initially for all the tapes to be played and that was declined so what that mean was whilst we could cross-examine on collateral matters as they were then deemed to be the full effect of it was not before the jury.

WINKELMANN CJ:
Also very hard to cross-examine all of that in. It's a very heavy burden for the defence. So your point is as Justice Glazebrook said that really all of the tapes should have been played and the Judge, the Crown was wrong to resist that and the Judge should have allowed it?

MR HARRISON:
Yes.

WINKELMANN CJ:
And the Crown should have played them?

MR HARRISON:
Yes.

O'REGAN J:
But the defence did play some of them.

MR HARRISON:
Some we were allowed to play but unfortunately the argument, we started the process before trial. You will note that the decision in terms of the tapes was on the 23rd of April. The trial started on the 26th. We ran out of time stating which tapes were to be played and which were not so we set a pattern after

that decision then we came through into trial and so there were times when we were arguing prior, immediately prior to when that tape should be played, whether or not it could be played so when we were able to do that we weren't able to put a transcript in front of the jury, for example, because we just didn't have the resources to be able to do that.

WINKELMANN CJ:
So the transcript hadn't been prepared of the other tapes?

MR HARRISON:
No, because we weren't sure whether we could – sorry your Honour. The transcripts are all there but the excerpts, we would only be excerpts that we were able to play so we couldn't sanitise them and then hand them to the Court.

WINKELMANN CJ:
Did the Judge rule that you couldn't play whole tapes?

MR HARRISON:
We had to argue the relevance of the portions we wanted to have played. So the whole shebang, if you like, was not to be played to the jury, that was the starting point and we had to justify on each ground as long as it was relevant to the charge before the Court and the argument that the process by which these children came to make these statements was put initially and rejected.

GLAZEBROOK J:
Sorry, can you just repeat that last bit again?

MR HARRISON:
The process by which the argument at trial was well look at the input to these children and what comes out the other end. You're A in and A out or B in and B out. We were looking to show the jury exactly the same process as these children went through for actually more bizarre scenarios coming out the other

end and other people being charged, sorry, involved but not charged. So that was not entirely scuppered but it was certainly hindered.

WILLIAMS J:
I can see why you would argue that the way this played out snookered you because you wouldn't want to be cross-examining and running the risk of ratcheting up the charges.

MR HARRISON:
Yes.

WILLIAMS J:
These days, could that problem have been dealt with by a section 9 statement where the prosecutor could say there is agreement that the following allegations were already made but no prosecution brought, to take the heat out of that?

GLAZEBROOK J:
You'd need the detail though, wouldn't you, because the argument would be the detail, wouldn't it?

MR HARRISON:
Yes.

WILLIAMS J:
Well, that would depend on what you put in the statement.

WINKELMANN CJ:
And the comparable presentation of the allegations if it was indeed comparable.

MR HARRISON:
Yes.

WILLIAMS J:
So that the jury could at least see that fantastical allegations had been made but the prosecution had decided not to prosecute on those fantastical allegations?

MR HARRISON:
Well, I think I work on the basis that nothing beats live performance.

WILLIAMS J:
Of course, but there's risk in that for you .

MR HARRISON:
Well, there is, yes. There's risk in the cross-examination without them seeing the tape and there's risk in playing it. There were –

WILLIAMS J:
What you wanted was balance.

MR HARRISON:
Yes, because it come to the second part, it comes to Professor Elder's evidence where she's talking about what she would expect to see had these children gone through what they say they did.

WILLIAMS J:
Quite.

MR HARRISON:
The other aspect to this particular point is the allegation that they were abused at the Christchurch City Council when people were working at their desks.

WILLIAMS J:
Sure, but Justice Arnold was right, isn't he? No one can complain the prosecutor decided not to prosecute on some of these things. What you wanted to argue though was that very decision indicated that there were

problems not just with those but with everything else and you needed to be able to argue that.

MR HARRISON:
Yes.

WINKELMANN CJ:
There is authority on this. I mean there's a recent decision of this very Court about the Crown's obligation to proceed in a particular way in relation to allowing evidence in and there's also quite a lot of authorities, my recollection, about to do with editing statements and the Crown's obligation to play statements. Has anyone looked at this in your team?

MR HARRISON:
I don't believe that we have, your Honour, no, because we were coming at the general unfairness aspect of it, but we will have a look at that.

So at page 44, your Honour, at paragraph 132, we start talking about the issues as we saw them. One is the eyewitness evidence where a child had been defecated upon. The second is the physical evidence which I've briefly noted but in particular the burn marks, needle marks, having a stick up the bottom and sodomy. The point is it's inconceivable that someone wouldn't notice that. Paragraph 133, we discuss Professor Elder's evidence. Page 46, we look at the Crown's explanation where the Crown referred to these as "exaggeration" and states: "You will note that with regard to each of the children alleging their anuses or penises or vaginas had been penetrated by the accused penis, finger or an implement, the Crown has not charged the accused with sexual violation, that is penetration of the genitalia. In not doing so, the Crown recognises children's inexperience in such matters and their limitations in describing accurate how far something would penetrate," but we have children talking about bleeding and bleeding from burning papers being placed in the anus.

He then goes on to say: “Exaggeration by children on the age of three, four and five, as to injuries sustained by them is something that you do not need Dr Zelas or Dr Le Page to give evidence about, you will know from your own experience that a small graze or cut from which a child bleeds can cause the child to think, and often say, that they’re bleeding to death. A few drops of blood can seem to a child as if it’s the whole life blood is running away. How many of you, with your own children, have had to deal with pre-schoolers who at the very sight of their own blood exaggerate a few drops into a flood? Of course, not just confined to children, adults at the sight of their own blood are of the belief that they must have lost pints. That factor combined with what the Crown says may have been elements of trickery, theatrics and deliberate confusing of the children by Ellis and others, means that you have to treat what children who talk about bleeding from the penis, anus or bottom with a healthy degree of caution. The Crown says it would be very easy to trick or confuse a child into believing that it had bleed profusely, or that a stick or other instrument had been penetrated much further than it had, the Crown says accordingly, the lack of medical findings of injury to child’s 5 penis is neither consistent nor inconsistent his account. You would not have expected, of course, to have had any anal findings with regard to child 5 because his evidence was that when the accused and others put their penis against his backside, it tickled. Whereas that contrasts with the middle interview where he said, it hurt.

The further explanation the Crown provided was that the evidence of Dr Zelas to provide credibility as to why they were not pursuing the more serious or bizarre allegations, first Dr Zelas gave evidence that children do not have the words which can lead to unusual descriptions. As to the situation when a child witnesses something or talks about something which she does not have the necessary word skills for, children can only use the knowledge and skills they have available to them so that if something has happened that a child doesn't understand or hasn’t experienced previously and doesn't have the words for, they will try to describe it according to whatever language or experience they do have. So this can lead to sometimes quite unusual description of events, for instance, in the sexual area, where a very young

child does not have previous experience of overtly sexual activities, they may try to describe an experience that occurs by using reference to things that they know, like wees or milk, when they may think the person is trying to do something different than what the person is actually doing so they can give an unusual or even bizarre description of the events and it certainly doesn't come out the way an adult would describe the same activities. Then there's the references to magical thinking.

Now, if your Honours go to page 48, I have looked at the tapes not played, I don't propose to take your Honours through them in great detail. But very briefly, child 6, interview 5, 28th of the 10th 1992, it's 408.3344.

WINKELMANN CJ:
Sorry, what was that?

MR HARRISON:
408.3344 and this is the 28th of October 1992, child 6 interview and the person who she is talking about there is someone called Andrew. If you just come on down: "Andrew touched your vagina with a knife?" And so that was the allegation that was coming out in respect of that and if we go to 408.3348 she's indicating that perhaps the other crèche teachers know that Peter did stuff to children and then she's asked about Peter's mother. At 408.3350, if you just come, ah yes, there she's referring to three of the crèche workers are attending as well when Peter's mother had hurt her.

Then the next one is 408.3362 is the following interview on the 29th of the 10th for child 6 and 408.3362 Gaye is referred to as touching the child's vagina with a knife. At 408.3365 she says that: "The knife went in the vagina." Now, if we go to child 7 and that's 408.3407.

WINKELMANN CJ:
What interview is that?

MR HARRISON:
That's 408.3407, this is child 7.

WINKELMANN CJ:
Yes, what interview?

MR HARRISON:
The 6th of the 10th 1992. She's talking about Ellis putting his penis in the mouths of children in the toilet and she's saying that the supervisor knew because when he was doing that she peeped around the corner. She saw him doing it. She is the boss.

Then at 408.3414, so here she's referring to events occurring at the City Council. So secret touching occurs at the City Council. At 408.3431 she refers to telling other workers about what's occurred and your Honour, Justice Arnold was talking to me, or raising the issue yesterday of the use of books, *Keeping Ourselves Safe*, those sorts of books. If you just look at some of the language in there, at 408.3431, she talks about secret touching and a secret, which is the language of those particular books. I'm not drawing a causal connection with that, your Honour, but it does that issue a wee bit.

WINKELMANN CJ:
How do we know it's the language of the books?

MR HARRISON:
Sorry, well, yes, your Honour, I believe they would have been part of the 1999 appeal, so they should be available on there. I don't know if they're still in print. Those were just some examples that I have raised in respect of some of those concerns.

Now if I perhaps – we've discussed with the Court briefly the impact of what we're saying in respect of these matters. If we come to page 54 and the written jury materials, and it's a very brief point, your Honours, the jury had the transcripts, they had the chart of behaviours available to them, but they didn't

have the notes of evidence. There were a couple of occasions when the jury did come back and watch some of the tapes and there was some cross-examination or some notes of evidence read out to them in respect of that. The point we would make is that they had the evidence-in-chief of the children but not the cross-examination and they also had the chart available to them to review as well.

So that is the main thrust of the appellant's appeal, your Honours. So unless there are any other questions…

WINKELMANN CJ:
No. I mentioned a recent case of this Court which was *Haunui v R* [2020] NZSC 153 which is…

MR HARRISON:
We will look at that, your Honour. I don't know if I get a right of reply to the Crown but…

WINKELMANN CJ:
Well, you do have a right of reply.

MR HARRISON:
Thank you.

WINKELMANN CJ:
But I think there might be more relevant cases because when I was a trial Judge I do recollect there was quite a lot of law about obligations on the Crown in relation to statements.

MR HARRISON:
Right. If your Honours please.

WINKELMANN CJ:
Mr Billington, did you want to start now?

MR BILLINGTON QC:

Yes, I can maybe use five minutes of my time because it's really an introduction to tell you what I propose to do, and I have made effectively seven points which I'm going to address in oral argument and the first is purely introduction as I'm doing now and I will mention the obligations under section 385 of the Crimes Act. I will then move to the Crown trial closing because it is important to understand the case that the accused or appellant had to meet, the totality of it. I will then touch briefly on the issue of the mixed verdicts, that is there were acquittals completely and there were verdicts in respect of which there were some acquittals, and it will be seen from those that there is a logic to them, particularly the mixed verdicts where you see cross-examination on contamination factors and the jury appears to have disregarded those allegations where contamination appears to have been established and likewise those verdicts are significant because each of the children of the 13 were said to be exhibiting symptoms under section 23G that were consistent with the abuse but there were not convictions in relation to each so the jury no doubt gave some weight, more weight to the actual evidence they heard than the symptoms.

I want to deal briefly then with the grounds of appeal as set out in the submissions and will indicate how I intend to respond to those. I will deal first in relation to the grounds of appeal with the matters you have just heard in relation to fairness as an omnibus description for background of appeal. I will then deal with section 23G by reference mainly to the Crown's submissions at pages 72 to 81 and I will pause there because in my submission of everything we have heard in the last 10 days this is the most significant point in this case and there are really two points to it, the first is this.

GLAZEBROOK J:

Can you just perhaps –

MR BILLINGTON QC:

Am I not close enough?

GLAZEBROOK J:
You were very good before so I think you just need to lean in slightly. I'm sorry it's so annoying.

MR BILLINGTON QC:
It's my aspiration to be very good.

GLAZEBROOK J:
You were just getting to this and you faded I'm afraid slightly. I'm just worried about the transcript that's all.

MR BILLINGTON QC:
Of course, thank you. This is probably the most, from my perspective and I can only really speak from my perspective and it may be different from yours but to me this is the most significant point in this appeal and there are two elements to it.

The first is this: was the evidence as it was given admissible under the rules the prevailed at the time. If it wasn't then that becomes a significant feature of this case but equally if it was then it was given in accordance with the prevailing law but that doesn't necessarily close the door to a consideration as to whether it is so scientifically flawed today that it may still be said to have created a miscarriage of justice. So there are two limbs to that and those are the essential inquiries in my submission.

The last matters I will then deal with as an omnibus discussion are suggestibility, contamination and I link with that the fact that we are dealing with evidential statements, they are described as interviews and they are interviews but they are as I said in opening they are evidential statements and the prosecution and the Court were bound by the rules of evidence and I will also deal with the issue of memory.

I put the proposition to Professor Hayne during the week that what her research has told us is not something that we as human beings don't know or

didn't know it rather tells us that there is a researched basis for it. So it's not that Judges trying cases, juries hearing cases or counsel arguing cases didn't know these things or don't know them it's rather that what we have learned is what we actually believed essentially to be correct based on our own experiences is borne out by studies that span the period probably from the late 1970s right through until the present time because ultimately we are all memory experts. I can't remember everything I'm going to address you on. I need notes. Equally, you won't remember everything I tell you, you will need notes. All of us, collectively, and we span here, there are 13 of us sitting here, of different age groups, have different memories and different matters that promote them. But ultimately, when judges say to juries: "You don't leave your common sense at the door," what you are bringing to the courtroom, in fact, is your own memories and whether you can relate them to what you hear. And mostly, in my submission, and I think you may well have thought this during the week, that what we were told resonates with us within our own experience. So it is not normal, it is not unique, and I put six points to Professor Hayne as to what might be properly said to a jury to inform without going to the ultimate issue. And she agreed with them, they really are six points and I'll come back to those in argument.

WINKELMANN CJ:

I don't remember her agreeing with all of them, but –

MR BILLINGTON QC:

Getting her to agree with me was a challenge but I think on this occasion I may have got her over the line. But I'll come to it in more detail.

GLAZEBROOK J:

Yes, I'm interested particularly, I mean, I can understand that people, that generally you understand, you forget. But planted memories I think is something that we probably resist.

WINKELMANN CJ:

Believing.

GLAZEBROOK J:

In terms of thinking that is what happened, but I think the research has shown that we also over estimate our ability in terms of observation such as being able to recognise who somebody is, et cetera. So I'm not sure that a lot of these points are necessarily common sense. The common sense that you might forget things and that you certainly I can understand that, or that you might get it slightly wrong. But anyway, that's for when we're getting to that stage.

MR BILLINGTON QC:

I think, all of that I agree with but if you recall our respective experiences, as counsel cross-examining two profound inconsistencies and addressing on legitimate inconsistency –

GLAZEBROOK J:

Well, of course, most of those cross-examination on inconsistencies are totally idiotic, you know, were the curtains red or where they blue, that means it can't have happened because she can't remember whether they're red or blue. I mean, we all know that.

MR BILLINGTON QC:

Yes, but if you think of the directions where a mistaken witness can be honest, the proposition that four witnesses to an accident will each relate a different version although the key features are there. Many of those things. We know, and I think perhaps, but I do understand what you're saying is, what do we know about suggestibility and whether, in fact, a memory can be totally corrupted? I think one of the points that I will make in relation to that is this, that Professor Gordon *[sic]* said this: "There were 116 children," I think she said 6% ultimately were those in relation to which a verdict was entered, they were all cross-examined, those who gave evidence at trial, and the inconsistencies were put to them which led, I submit, to a discriminatory verdict. What remained was evidence that really was unchanged from the evidential interview and, therefore, there was a measure of, obviously a measure of confidence about it to the high standard that was required.

GLAZEBROOK J:
So are you saying because it remained unchanged, it must have been true? Is that the submission?

MR BILLINGTON QC:
Sorry, I'll respond as Professor Hayne responded to me. We don't actually know what's true. What we know is that, and no one really knows the truth. If I'm being really cynical, which I am sometimes, if someone says I come to court to get truth, I'm not sure that's necessarily what you come to get. You come to court to get proof to the required standard. I don't think we ever know what's true, your Honour.

GLAZEBROOK J:
All I'm saying is, what are you asking us to infer from the fact the evidence was unchanged?

WINKELMANN CJ:
Rather than giving us your philosophy on criminal justice, Mr Billington.

MR BILLINGTON QC:
My personal philosophy, no, I don't think you want that. What I'm asking you to infer is this. That when it is tested in the way it was tested, as against the research, which I dealt with at day 1 on suggestibility, children are suggestable whether they're giving a true narrative or not and I'll come to that. That was in the Zajac, Hayne's papers, for the young children and children of six to 10 years of age. There was no difference between children who had seen or been involved in the event and relayed a true narrative and those who had different suggestions made to them. Each of those groups, to a very large percentage, changed their testimony. The question for this Court then is what do you make of it in the totality of a case which is the only system we've got where a child, and they are each little children on their own, is cross-examined and does not succumb to the suggestibility of cross-examination. Now we don't know the answer to this but if I was submitting that you could have some confidence in the verdict, that is –

GLAZEBROOK J:

Confidence in what, sorry?

MR BILLINGTON QC:

In the verdict – that is an approach that you might legitimately take, in my submission, based on the research.

GLAZEBROOK J:

But how – I don't understand the logic of that submission, I'm sorry.

WINKELMANN CJ:

Perhaps we'll come back to it after morning tea.

MR BILLINGTON QC:

I think I've now got into the substance of the argument and, thank you, I will come back to those points because I need to understand them.

WINKELMANN CJ:

You will need to.

MR BILLINGTON QC:

I will need to understand them too.

GLAZEBROOK J:

Yes. I was really just signalling that I would need you to explain that in a bit more detail later rather than asking you now.

MR BILLINGTON QC:

Well, I'm hoping that you will ask me questions because I think we might…

WINKELMANN CJ:

You can be confident in that. All right, we'll adjourn.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.52 AM

MR BILLINGTON QC:
As indicated, I wish to just briefly mention section 385 of the – is this too loud now, do you think, it's been turned up?

WINKELMANN CJ:
You can relax, it's loud enough.

MR BILLINGTON QC:
I think it is.

WILLIAMS J:
Is it too loud for you?

MR BILLINGTON QC:
Yes, but I will manage I think.

WINKELMANN CJ:
No, it's good, just don't shout.

MR BILLINGTON QC:
Every time I sound like I am addressing a jury I see you cringe Chief Justice, but I was about to say that whilst we can break this case down into compartments as we must do, you might also think it's a case of impression, an overall impression, because ultimately you have to be driven to the conclusion that the evidence of each child, or the children collectively, was so unreliable before the trial started effectively that the verdict was unsafe so no jury properly directed could convict on the basis of the evidence whether that's on the basis of knowledge then or knowledge now. So that in itself does engage something of an impression.

WINKELMANN CJ:
Why do you say that's the only issue for us because some of the grounds of appeal don't engage with that? Well, the section 23G one doesn't.

MR BILLINGTON QC:
Well, in the end, if I as at the appellate bar I would say in the end you have to take the whole lot together and say does it drive a conclusion and that may be a fair thing to say. I'm not, with respect, convinced that the third and fourth grounds would even start to get you there, but I will come to those.

Now the other matter I want to mention is this, that in preparing our written submissions, Ms Colley and I decided that, as we have done, is to start chronologically at the beginning from the initial complaint and work through the process to its logical conclusion and insofar as I personally was concerned as senior counsel I did not read the Crown closing at all, so I have no information as to what the Crown case was and I wanted to form my own views about this so I could speak I hope dispassionately and fairly to you about it.

So when I opened on Monday I said to you that I submitted the appellant was rather missing the point and they have started it at the end of the case and then invited you to draw conclusions from it rather than examining the evidence and then inviting you to draw a conclusion from it in the other direction.

Now, when I came to read the Crown closing over the weekend, now this document is in the bundle as a hard copy. It might be a document you might want to write on. Alternatively, I can have it brought up on the screen as volume –

GLAZEBROOK J:
Why don't we do both?

MR BILLINGTON QC:

Pardon?

GLAZEBROOK J:

Why don't we do both, bring it on the screen and we can get the hard copy as well.

WINKELMANN CJ:

What tab is it?

MR BILLINGTON QC:

Yes, I think the hard copy is useful in this. It's volume 7 tab 109.

WINKELMANN CJ:

What tab is it in the agreed bundle that you've given us? Did you say it was in the agreed bundle?

MR BILLINGTON QC:

Oh, it is tab 11 in the agreed bundle, yes.

WINKELMANN CJ:

Tab 11.

MR BILLINGTON QC:

That's the Crown closing.

GLAZEBROOK J:

Tab 11? No, I realise it's just not tab 11. I don't know what it is.

WINKELMANN CJ:

It's not there? It's not 12?

GLAZEBROOK J:

I don't know.

MR BILLINGTON QC:
It came in on Monday of this week. You've got it indexed as tab 11 in your bundle.

GLAZEBROOK J:
I have.

WILLIAMS J:
It is in mine.

GLAZEBROOK J:
I have but it's not that.

MR BILLINGTON QC:
Closing submissions headed up Crown closing.

WINKELMANN CJ:
That's very strange, isn't it.

GLAZEBROOK J:
No idea. No, I can get it in this. It just doesn't seem to be in that bundle, at least not in tab 11.

MR BILLINGTON:
Start by going to page 2 and this rather resonated with me as you might not be surprised: "Indeed, the Crown says that much of the defence case relies on working from an inference backwards rather than having tested and established proven facts from which the impetus can be drawn and I will give details of such examples to you. In order to explain the unexplainable, inexplicable, the defence has attempted to suggest the children's allegations came about in a number of ways. One, there was a hysterical response from the parents to the unfounded allegations against Ellis after the meetings in December and later the following year at Knox Hall. There was contamination and cross-pollination by parents talking to one another. There was

contamination and cross-pollination by the children talking to each other, contamination by a child reading a book and somehow when questioned using that to fabricate an account of Ellis' abuse of them and the complaints came entirely as a result of the nature of the questions asked of the children by the interviewers." Page 3: "The Crown says the defence had begun with these hypotheses and attempted to work backwards." Then we start to move into what is self-evident in my submission is this, that ultimately as all appellate courts acknowledge, the court of first instance has the benefit of seeing the witnesses and that cannot be underestimated in my submission in this case.

GLAZEBROOK J:
Well, we can as well of course because there are, in this case the tapes.

MR BILLINGTON:
Of the children?

GLAZEBROOK J:
Of the children.

MR BILLINGTON:
Yes. I thought that was interesting yesterday because Professor Gordon *[sic]* made a comment that –

WINKELMANN CJ:
Gordon, Professor?

MR BILLINGTON:
Professor Goodman called them. They are individuals and interesting to see there were two, with my perspective, two quite different children yesterday. That's the start and the next point was made by the Crown solicitor is: "Do the parents look the part, do they fit the type contended for by the defence?" He describes them. He then goes on and discusses his evidence with regard to the passing of information one to the other. Discussion of the children and

the interviews and if we go to page 5 he then comments on the importance not to put the matter under a microscope particularly with regard to the interviews but where criticisms can be made deficiencies can and they have been tested in cross-examination.

It's also important to recall that these interviews were evidential interviews. That is, the child had disclosed the allegations of inappropriate conduct by Ellis to a parent prior to the interview and that allegation had been relayed to the interviewer. He then discusses the repeated questioning and he then says: 'Unlike diagnostic interviews the evidential interviews carried out here do not require a great deal of exploratory questioning on the part of the interviewer to establish the child's circumstances. The parents in the main had already supplied the interviewer with considerable detail as to the child's life experience and behavioural history and family dynamics." That passage relates you might think to the symptoms: bedwetting, tantrums, sexualised conduct. It's section 23G material. And then there's a discussion about the leading questions and obviously the jury is being alerted to as it had been throughout as to whether the child was recounting a genuine event and that's top of page 6.

WILLIAMS J:
What are we to make of that point that the interviewers knew of any other dynamics that could explain the behaviours and leaving that hanging there?

MR BILLINGTON QC:
Would you direct me to that please your Honour?

WILLIAMS J:
Just at the end of the paragraph you were referring to on page 5.

MR BILLINGTON QC:
"The interviewer was accordingly aware of any other possible life experiences or factors which might have led…" The answer is I simply – I'm not sure whether he's – I don't know what he's saying whether he's talking about the

parents relaying the information of the child's behaviour or whether it's simply an open statement.

WILLIAMS J:
It looks to me like the interviewer would know whether it was likely to be Peter Ellis or maybe someone else but the interviewer doesn't raise it.

MR BILLINGTON QC:
Well maybe these interviewers through their training knew of what children in this situation how they may behave which is possibly a more likely explanation because they are trained social welfare interviewers so they had to know how children in this circumstance would behave.

WILLIAMS J:
Yes.

MR BILLINGTON QC:
I think that's probably – it's oblique but that's the best construction I can put on it.

WILLIAMS J:
All right.

MR BILLINGTON QC:
He then discusses the medical evidence and he goes to page 7, third paragraph and discusses the exaggeration by children of a young age of the nature of injuries that are occurred and he then asks the jury to draw on their own experience with regard to children's capacity to exaggerate and that is discussed further at page 8 which touches on the matter you heard from my learned friend this morning regarding the more extreme allegations made in interviews that were not played but which were cross-examined on and these more extreme allegations were cross-examined on where relevant.

WINKELMANN CJ:
Relevant in terms of what Justice Williamson regarded as relevant?

MR BILLINGTON QC:
Yes. I'm going to come back to Justice Williamson's ruling on that because it's probably the best statement of what was occurring then and no doubt we can discuss the forensics of it at that time.

Page 9 discusses the role the psychologist played in the trial and reminded the jury at the top of page 10 that they are the judges of facts not the expert witnesses as neither were counsel.

He then spoke about Dr Zelas and the fact that she did not disclose behaviour inconsistent and submitted that was not her task to do so, and I think in that he's correct legally. But equally he emphasised that Dr Zelas acknowledged there could be other explanations for the behavioural traits.

GLAZEBROOK J:
Do you say that's right in law, that you can give information about something consistent but you don't have to give anything that's inconsistent with it?

MR BILLINGTON QC:
That's what the Act says.

GLAZEBROOK J:
Well, it might but it doesn't seem right, does it, so that you can say that, well, this is all consistent with sexual abuse, but you don't say: "And there are five things that are inconsistent with it"? Are you saying that's right as a matter of law, whatever the section says?

MR BILLINGTON QC:
No, I think we have to put it another way. Is it right as a matter of law because that's what the section says? The answer to that is probably yes. But is it fair is probably a better way of putting it because –

GLAZEBROOK J:

Well, it become misleading evidence, doesn't it?

MR BILLINGTON QC:

It becomes, I think the best way to see this is it's prejudicial, there's a prejudicial effect and probative value, and harking back to a time when these phrases were not in the Evidence Act that was the principal ground upon which defence counsel relied and you could argue that if you wished as defence counsel this is simply incomplete and it's unfair, so if you give it in this form it is, its prejudicial effect will outweigh its probative value. But then the answer to that would be, well, the Act says this is what I'm required to do and –

WILLIAMS J:

It's hard to see – that doesn't really make sense, does it, because if you're required to evidence about what is consistent you're also required to give evidence about whether something is consistent and therefore give an honest view when it's not. That's just logical. The affirmative must imply an assessment of whether and therefore you'll get to yes or no.

MR BILLINGTON QC:

Yes, you are correct in that, I think, your Honour, in the sense that if you see a range of symptoms and you are giving your evidence under the section as an expert and these symptoms are consistent with whatever they are consistent – whatever they may be consistent with. But equally I observed other behaviours that are inconsistent with it and if you had the expertise to be able to say so then coming back to Justice Glazebrook's point you probably ought to do so. But the difficulty here, and I think this is a question for all of us, how do you say what's inconsistent with sexual abuse?

WILLIAMS J:

You mean more generally?

MR BILLINGTON QC:

Now Dr Le Page said it's not diagnostic. He went back slightly and – obviously the subject of criticism. I'm not sure that wasn't totally fair because you –

WINKELMANN CJ:

When you go to the Law Commission report set-up section wasn't the inconsistent meant to be rebutting –

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

– I think rape myth type situations where someone does this so – and it's inconsistent with having been sexually abused? Someone is not emotional when they're giving an interview so that's inconsistent? It's more aimed at rebutting the notion that it's inconsistent?

MR BILLINGTON QC:

It's hard to see how you could say something is inconsistent with sexual abuse at whatever level because –

WINKELMANN CJ:

So it's negating the notion that –

MR BILLINGTON QC:

Yes, it's the ability to say in response to the Crown experts, say, well, they would say it's consistent but equally I would say as an expert on the other side it's inconsistent or there are inconsistencies, and yes, your Honour is correct there's been discussion for as long as any of us have been in practice about what you could make of injuries in any sexual case or any manifestations of it and the move has inexorably been towards not being able to comment on injuries or the absence of injuries because the point would be, well, no injury is inconsistent with an allegation of sexual violation. Well, we now know we

can't do that. So that – and the qualifier was there, that the counsel said, as did Dr Zelas, that there are other explanations for this behaviour.

Now page 12, two-thirds of the way down the page: "It was never the Crown's stance and indeed in re-examination Dr Zelas made it clear she was not attempting to diagnose sexual abuse on the basis of the behavioural indicators alone."

WINKELMANN CJ:
Is that on page 12?

MR BILLINGTON QC:
Page 12, two-thirds of the way down. Starts – it's a very long paragraph: "In other words".

GLAZEBROOK J:
What about the –

ARNOLD J:
It's 11, I think.

MR BILLINGTON QC:
Sorry?

WINKELMANN CJ:
Page 12, I think. It starts with "that", not "it", it was "that", "that was never the Crown's stance".

O'REGAN J:
Probably on both.

MR BILLINGTON QC:
That was never the Crown stance.

GLAZEBROOK J:

Can I just – that's true but there were all those passages that we were taken to that were saying, well, the child's evidence is supported effectively. So we were taken to a number of passages which is a slightly different point from this one but at some stage can you deal with those passages.

MR BILLINGTON QC:

Yes I have to, I have to.

GLAZEBROOK J:

But I certainly accept that she said it wasn't diagnostic.

MR BILLINGTON QC:

I think it's probably not the right time. I certainly intend to do that.

WILLIAMS J:

With that in mind and perhaps I'm making the mistake that you're indicating of starting from the back and working to the front.

MR BILLINGTON QC:

Yes.

WILLIAMS J:

This reads like a very good prosecutor fixing a problem and Mr Stanaway is a very good prosecutor.

MR BILLINGTON QC:

No doubt. Well it certainly reads like a good prosecutor setting out – ticking all the boxes he's required to tick.

WILLIAMS J:

That's the other way of reading it, yes.

MR BILLINGTON QC:
But I've never prosecuted so I would have thought that's really what you should do. It's partly what I'm trying to do today.

WINKELMANN CJ:
But of course this is only a part of his closing address because he then does go on to stay that it is important corroborative evidence.

MR BILLINGTON QC:
He does. He does.

WINKELMANN CJ:
So I don't think it's him fixing up because in fact –

MR BILLINGTON QC:
No it's just, he hasn't entirely fixed it, no.

WINKELMANN CJ:
I don't even think he thinks he needs to.

MR BILLINGTON QC:
That is the – as we know, this is the point we're going to get to in this case I think ultimately is what you do with that.

Anyway I then move on to something that's never been discussed thus far, page 16. That's the accused discussions about sexual matters and the Crown says there are a number of important pieces of evidence given by three witnesses about matters which the accused had said to them relating to sexual practices. The witnesses are then named and the accused on a social occasion discussed with her his knowledge of a Chinese person who had a preference for or likely of inserting wooden implements into his penis. That was something that he said on more than one occasion and then we've heard allegations of the children making similar complaints in relation to needles.

The second piece of evidence came from Janice Buckingham who said she had a conversation with the accused Ellis about a sexual practice he described as the use of wooden spoons and straws in a sexual activity, which is the same, and how a male would use it to stick it down the eye of his penis.

The third piece of evidence relates to the evidence given by another witness about the accused speaking of another sexual practice known as golden showers where partners urinate on each other. And again the prosecutor says well many of the things the children complained about were similar. “Does it explain,” says the prosecutor, “why these things have occurred?” Here the accused is talking a very similar conduct of that which is alleged by the children.

There’s reference then at the bottom of the page to the use of a polaroid camera to photograph sexual activity. Page 18, the use of food and sex.

WINKELMANN CJ:
Can I just ask, there was never any kind of corroborating evidence found, was there?

MR BILLINGTON QC:
You mean a search of his –

WINKELMANN CJ:
For instance, photographs being taken, et cetera?

MR BILLINGTON QC:
Well I couldn't quite pick this up but there were photographs of the children with drawings on their naked backs but I couldn't really – and I read this in the evidence but whether that didn't seem to assume much importance but I think it relates to that the children had things drawn on them and there were photographs found but that is the only piece of evidence that I'm aware of, of the sort you raised with me.

Then there's the passage at page 18 the accused in the crèche toilets and again three-quarters of the way down the page, page 18: "The accused appeared surprised and was defensive as he came out of the toilet with a little girl and there was no sign of any change of her clothes or any soiled underwear." In other words there was no need for her to have been with the accused in the toilet at that time. And then the witness said –

WINKELMANN CJ:
Can I just ask about the toilet situation?

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:
These toilets, one of them is set aside for the teachers but is it any different or is it just one in a series of three stalls?

MR BILLINGTON QC:
I don't know, I just don't know, your Honour.

WINKELMANN CJ:
My understanding of the evidence was that they were really all the same.

MR BILLINGTON QC:
Yes, I don't know but if that's important obviously which it is –

WINKELMANN CJ:
I just would like to understand, I'm trying to get a mental picture.

MR BILLINGTON QC:
Then, and I won't do this, he went through each victim and described them to the jury and their particular differences. And these are live little people he is discussing which is important in the context of a trial.

Now there's one matter that resonated with me and it might resonate with you and that is this. If you go to page 60.

WINKELMANN CJ:
60?

MR BILLINGTON QC:
This relates to the child who, for lack of a better word, started to engage in oral sex with her mother in the bath, having made a complaint of similar behaviour in relation to the appellant. And the Crown solicitor said this –

WINKELMANN CJ:
That's child 4, is it?

MR BILLINGTON QC:
Yes. And at that stage you'll recall the Crown said: "A powerful piece of evidence from the mother," reference given. And she said this: "One of the things I observed. I haven't actually said anything about it because it is really embarrassing, and I guess it has taken me kinda a year to believe. She sorta had her mouth open and was moving her mouth up and down, just above my genital area and I guess that I just didn't want to believe what I was seeing and I haven't wanted to sort of acknowledge that." And counsel said this: "You will recall the emotion that her mother showed at that time. What is important, the Crown says, is that the mother says of her child would not have had the opportunity to see that type of sexualised behaviour at home." So the Crown says she's either experienced it or witnessed it somewhere else. Now that – there are scenes like that in trials which we've all observed.

GLAZEBROOK J:
Was it explored what she meant about "above the genital area"?

MR BILLINGTON QC:

The description, I think, is that she was in the bath. The child bent down and put her and started to bob her head up and down in her groin area, is as I read it in the transcript which she was describing an attempt at oral sex.

GLAZEBROOK J:

It's not sure what "above the genital area" means.

MR BILLINGTON QC:

No.

GLAZEBROOK J:

That wasn't explored?

MR BILLINGTON QC:

No. Not that I'm aware, no. I think this came out in the experts as well, certainly from Professor Goodman, parents initially don't want to believe their children have been subjected to abuse.

WINKELMANN CJ:

This event in the bath, though, was in the course of questioning the child about the events, was it not?

MR BILLINGTON QC:

Yes. Yes. It's a piece of evidence that resonated with me, it may not resonate with you. But it certainly was something the Crown prosecutor thought was important. It does seem to have it – the other piece of evidence that was important in a similar vein was the accused being able to name, this is at page 129, the children who he guessed would be making complaints against him. The top of page 129, and the evidence is a witness who appears at tab 105, page 629. The witness' question name is [redacted]. She and another mother went to see the appellant before he was charged to satisfy themselves or to understand, they weren't convinced, whether – what he was going to tell them about it, and the conversation came around to, who would

make these allegations against you? I'm summarising it here. And he responded by naming the four persons, the four children which, whose names you see at the top of page 129. And the transcript is the reference I've given you. So you see there are two witnesses giving the evidence. They go to visit him: "Is this true? What have you got to say about it?" They weren't convinced at all. He was evasive, non-responsive and then started to, they said: "Well, who would say it," and that's the names he gave.

WINKELMANN CJ:
And is it the evidence he didn't know the children's names at that time?

MR BILLINGTON QC:
Correct. So it was an inspired guess on his part.

WILLIAMS J:
Was that cross-examined on?

MR BILLINGTON QC:
I think the evidence to which I refer actually came out in re-examination so it was cross-examined on because I was looking for it and I went through the evidence-in-chief and I don't think – it wasn't as explicit as it was when, to the reference I gave you. I will bring that up again for you because I was searching for it and I went backwards from here to find it and my recollection is it was a re-examination.

GLAZEBROOK J:
If you just give us the reference to the –

MR BILLINGTON QC:
Yes. I've got tab 105 page 629. It will be of the trial transcript. Can you help me with that or could you ask Mr Cox to bring it up? If I can do it now I will do it. We've got it there, have we?

O'REGAN J:

I think it's 402.0648. It's at page 624, is that what you were talking about?

MR BILLINGTON QC:

624. It was part of that – have we got the transcript.

WINKELMANN CJ:

Someone has noted on that page you referred us to: "Heard yesterday from former crèche workers." I don't know, is that Mr Ellis' evidence?

O'REGAN J:

If you look at page 624, line –

MR BILLINGTON QC:

Yes, 624, line 10, that's the start of it and that's two names and they were not looking for the others. So your Honour Justice O'Regan, you are right, that's the start of that. I think if we go to page 629 we might find the other names. This is a defence witness, yes. The defence witness brought up in cross-examination –

GLAZEBROOK J:

Didn't that say he gave 12 names?

MR BILLINGTON QC:

Sorry?

GLAZEBROOK J:

Can we go back to – I thought that said he gave 12 names.

WINKELMANN CJ:

Four.

MR BILLINGTON QC:

Going to 624 he gave four names, yes. This is a defence witness being cross-examined on. Out of those names I recall and she mentions two, line 12.

GLAZEBROOK J:

He asked who the complainants were: “He provided several names, certainly over a dozen.”

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

So, where are the full –

MR BILLINGTON QC:

There are two mentioned line 13.

GLAZEBROOK J:

But he provided a dozen names, didn’t he say, not four?

MR BILLINGTON QC:

“He provided several names, certainly over a dozen. Some of those names weren’t children from my time at the crèche. Out of those names I remembered child,” those two children there, “and I can’t remember now. There were three or four that I recall.” Yes, you’re right your Honour, he must have given 12 names.

GLAZEBROOK J:

He didn’t give four and pick them right, did he, he gave 12 names?

MR BILLINGTON QC:

Can I come back to that?

GLAZEBROOK J:
Two of them –

MR BILLINGTON QC:
Let's go to 629, yes, and it was line, yes, line 15. You're right Justice Glazebrook, he did say a dozen and these are the four that are named.

GLAZEBROOK J:
So he didn't say four names?

MR BILLINGTON QC:
No, no, no,

GLAZEBROOK J:
And get it right, he said 12 names and four of them happened to be –

MR BILLINGTON QC:
I hadn't picked that up, I'm sorry. He gave 12 names and these are four that the witness was familiar with.

WINKELMANN CJ:
And Mr Ellis' evidence, he was cross-examined on that I imagine?

MR BILLINGTON QC:
The answer is no, I can't say.

WINKELMANN CJ:
Because I was wondering if that notation that appears in the closing is reference to it.

MR BILLINGTON QC:
There is a reference to that. I worked back to the evidence. I didn't work forward to see what Mr Ellis said about it no.

GLAZEBROOK J:

And also, can't be sure of the names of the other children.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

Actually, they didn't give the four names earlier.

MR BILLINGTON QC:

I suppose it's a matter of weight, isn't it?

GLAZEBROOK J:

Well, it's more than a matter of weight.

MR BILLINGTON QC:

But there's 116 children as I understand it. To come with four out of a dozen is however, whatever the jury makes of it they make of it. That I thought was the most significant was the pieces I talked to you about, the young girl in the bath, that's sort of a scene, but the rest of it is counsel's address.

GLAZEBROOK J:

Well, it is important what they mean by just above the genital area because above the genital area could be blowing raspberries.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

Low down on a person's stomach which people do to their children all the time, don't they?

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:
Well at least possibly not at that age, but blowing raspberries is quite –

WINKELMANN CJ:
The mother was shocked, yes the mother was shocked.

MR BILLINGTON QC:
I think we put it another way though, the mother was, whatever was going on, she was shocked by it. It wasn't a game, I think we can certainly be satisfied of that.

So, I don't propose to deal with the rest of it because it's areas with which you're familiar, similar fact evidence. The reference to the toilets, the touching, and that really concludes it. But that was the Crown case and on any view of the matter, it still stands and falls on the words of the victims, but there were other elements to it which have not necessarily been discussed here, and they are important which gives it a context.

Now, and there is a schedule in our submissions, and it's also in the volume of the verdicts that were returned, and I won't discuss those in detail, I'll come back to them. But there were, as I said, mixed verdicts.

Now, if I can turn now to the grounds of appeal as are set out in the appellant's submissions, page 6, paragraph 16. As I said earlier, I'm going to deal with these in reverse order, but the first ground was the risk of contamination which underestimate, which was underestimated due to the absence of scientific knowledge at the time. And improper techniques were used to obtain the evidence of the child complainants. And that's in the conjunctive and I really wonder, with respect, whether that is a valid submission or ground of appeal at the point we've now reached. There's no doubt the contamination is at the forefront of the appellant's case. But with respect, it would be drawing a very long bow to suggest that improper techniques were used here.

And if one uses the words “improper techniques” one is really talking to evidence that was obtained improperly or unlawfully, in my submission, and that’s certainly not the case. I’m not sure whether it was in this context, your Honour, Justice Glazebrook, but you raised a point with my learned colleague yesterday about *R v Wilson*, the decision of this Court and I’m not sure whether you were speaking about –

GLAZEBROOK J:
That was the Chief Justice who mentioned the case, but I think that was mentioned in the context of the test that was set in there in terms of the process that you go to in working out whether something is unreliable in accordance with six, seven and eight.

MR BILLINGTON QC:
Yes.

GLAZEBROOK J:
And whether it was that test or whether the test was the 1908 which would be probably, it wouldn’t be as structed as under the Evidence Act 2006.

MR BILLINGTON QC:
General unfairness, *R v Hartley* and –

GLAZEBROOK J:
Well, possibly prejudicial and, yes.

MR BILLINGTON QC:
Yes. Well, the –

GLAZEBROOK J:
It may be the same but not as structured as – and obviously, whatever the Crown says about that, what is the test that you would apply, I suppose?

MR BILLINGTON QC:
At the time?

GLAZEBROOK J:

Well, at – you say it's the 1908 Act.

MR BILLINGTON QC:

Yes, I did, that's right.

GLAZEBROOK J:

And so what test do you say we should apply?

MR BILLINGTON QC:

In terms of evidence that ought not to have been obtained or was obtained unfairly. It's whether it was unfair in the broader sense and that flows from a line of authority starting, with my experience, with *R v Hartley*, where, and it relates particularly also to interviews because there were no judge's rules, to the prescriptive level there are now, and whether it was simply obtained unfairly and, therefore, on unfairness grounds which were supervisory, so supervised the practice of the prosecuting authorities, and not to impact on the safety of a verdict, the evidence would be excluded. They were the two principles.

GLAZEBROOK J:

And what about elicited by improper leading questions? Because we are looking at evidence-in-chief effectively in those interviews.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

So how do you – I suppose the other question is how do you see those rules of evidence applying because you have been putting a lot of stress on the rules of applying in respect of those evidential interviews because the suggestibility and I suppose just to put that in context.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

The suggestibility is one thing in respect of that but there are also the rules of evidence which may or may not have been based on suggestibility and it might be interesting to go back to Wigmore and find out what they are based on but certainly leading questions in the evidence-in-chief are not allowed.

MR BILLINGTON QC:

I think one of the two judgments I'm going to refer to is a judgment of your Honour and the Court of Appeal on this. Whilst the –

GLAZEBROOK J:

I was just saying if evidence had been –

MR BILLINGTON QC:

Yes, no, whilst the Evidence Act now limits as I indicated in opening, the scope of evidence-in-chief and leading questions are not to be used except by agreement or to elicit peripheral material the law was no different in my submission, has never been any different. So you are right, what we are looking at here is evidence-in-chief and this is really partly where I part company with the professors in that these weren't the first interviews, where we get to on that we'll discuss later, but they are evidence-in-chief and as the guidelines say today they are still subject to the Evidence Act that is the dominant document. So the decision that is to be made is in the trial environment for counsel and the trial Judge if objection is made to the questions. So if the questions are leading then at a certain point the Court would have to intervene and there are cases where the Court has reviewed its obligation to do so in the Court of Appeal.

GLAZEBROOK J:

Obviously there's nobody there to object with the evidential interviews so what would the process be there, to ask that those questions that they be excluded.

MR BILLINGTON QC:

You have – I'm sorry, I'm speaking over you, I apologise.

GLAZEBROOK J:

No it's all right, I was finishing the thought. Would they be excluded or what would happen?

MR BILLINGTON QC:

Yes, you can get the excised. You can edit the interviews.

GLAZEBROOK J:

But what would you edit then?

MR BILLINGTON QC:

And the Act provided that.

GLAZEBROOK J:

So if you have a leading question that leads to an allegation what do you do, do you edit the whole thing out?

MR BILLINGTON QC:

If defence counsel object or the Judge intervenes and the leading question is then leading to evidence of the offence and the connection is so clear then I would have thought two things would happen, first, defence counsel object and the second the Judge would rule it out and Justice Williamson –

GLAZEBROOK J:

Well no because the Judge would have an obligation to rule it out without defence counsel objecting, wouldn't it?

MR BILLINGTON QC:

That's quite a high bar for a judge but nonetheless it is the bar that exists. I mean we've seen cases in this court where counsel's failure to object doesn't undermine the appeal and I'm happy to accept that as a proposition.

Ultimately we are here to decide whether these questions should have been ruled out.

The Judge reminded himself in his ruling that he had the ability to do so and these were discussed with him in the various pre-trial matters but in the end we can all look at those interviews and the starting point is to look at them as evidence-in-chief as I indicated when I opened and do they infringe the rules. The rules in my submission were no different than they are today just they are now codified, but what I do say is this that you can't call it improper in the way that lawyers would use the word improper. So ultimately with the first ground you are driven back to the risk of contamination as opposed to improper techniques.

GLAZEBROOK J:
Well, sorry, I just want to get the submission absolutely correct.

MR BILLINGTON QC:
Yes.

GLAZEBROOK J:
But you are accepting that it's subject to the Evidence Act and therefore the leading questions if they led directly to an allegation should have – it's not that it's an improper technique it's just the rule of evidence?

MR BILLINGTON QC:
In operation.

GLAZEBROOK J:
In operation.

MR BILLINGTON QC:
That is right, yes.

GLAZEBROOK J:
Thank you.

MR BILLINGTON QC:
It's not something dissimilar to written statements that get edited and you may recall where the officer in charge puts the whole case in one question well that goes out hopefully. So editing is to achieve the objective that what goes before the jury is as we agreed. So, yes, if you use the word improper simply in relation to leading evidence then, yes, it fits but if it's anything other than that, no, it doesn't.

Expert testimony is a different subject all together, and I will address that really under the headings that relate specifically to the evidence you were taken to this morning, that's the trial judge's direction on those 10 points, which Professor Hayne was asked to comment on, and I was going to go through it but I won't because when you read those the answers to that, of those points qualified yes but all but two she agreed with. So the question there is, are you drive to say well the expert evidence was so wrong in the way it which it was directed to the jury.

WINKELMANN CJ:
Hang on, these are your propositions, not the propositions put by the trial judge?

MR BILLINGTON QC:
No, these are the trial judge's propositions, the ones you looked at this morning under page 333 where Professor Hayne was asked to comment on the summing up?

WINKELMANN CJ:
Yes, five on each side. Not your six propositions?

MR BILLINGTON QC:

No. That was the scope of evidence, just today, is what I was addressing there. Behavioural symptoms I'll have to address quite separately, as I do, and it's in the written submissions, and the unfair trial I will address now. I'll do it in reverse order, because if there's anything of any consequence in this, and the Court honed in on it this morning, and that is the way in which the transcripts were put before the jury, or the limited way in which they were put. I think there's nothing else left in that with all due respect.

Providing the jury with necessary materials, and I'm not sure if you want to hear me on this, but over the past 50 years things have changed, albeit not dramatically. Civil juries have always had written material, particularly question trails in negligence cases where you've got two verdicts to be found, defamation cases because of the complexity, juries have question trails. Criminal trials, less so. I think, in fact, there was a case in 1968, *R v Eade* here in Wellington where the Chief Justice provided the jury with options of verdicts, but very, very rare. We reached the point where technology started to become useful in court, and coincided roughly with the period of the SFOs coming into being where we looked at flowcharts as evidence, and that material went to the jury.

The other material that went were, which is of more relevance here, transcripts of intercepted conversations, and subject to the same criticism my friend makes today, that you only had the conversations, you didn't have the cross-examination to go with it, but that's the material that went in, once established the truth of it. Then we had flowcharts, and then the courts moved towards question trails for verdicts much more later, and I think in our submissions we say 2012 before the jury received transcripts of evidence. The conventional view being, and I think you've all sat on jury trials in that period, that the jury wouldn't be assisted by it, but equally what we were confronted with was juries coming back and asking questions, and one of the difficulties with that, and I don't think anybody ever knew, whether it was the jury asking the question or one juror wanting a question, you could find yourself reading pages of evidence to satisfy one person.

So it just, with due respect, it's not a question of trial fairness, it's a question of making a trial function properly, that's why juries get transcripts today. So not giving the jury that material, in my submission, simply has no bearing on the verdict.

GLAZEBROOK J:
Isn't the, wasn't the point that they had the evidence-in-chief but not the cross-examination?

MR BILLINGTON QC:
That is correct.

GLAZEBROOK J:
And there are quite a number of cases on that saying that you have to, if the jury wants to see something again, that you have to read the cross-examination to them as well.

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:
Are you familiar with those? I mean I remember that, in fact, from the time when we used to have problems with this and there was a great deal of concern regarding balance affecting those decisions.

MR BILLINGTON QC:
Yes, well the starting point for me was the intercepted conversations, which have a similar effect, and you had nothing to counter that either. Likewise, the same arguments –

WINKELMANN CJ:
No, no, this is to do with that if you had, for instance if people wanted to see video interviews, and have them accessible to them in the jury room, then the

judge would have to read the cross-examination, and those are the cases that are, there's the balance.

MR BILLINGTON QC:

A balancing, because that's the totality of the evidence, yes. No, I'm not familiar with them.

GLAZEBROOK J:

There were quite a number of them.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

I must admit I don't totally recall but I don't think the jury usually have the transcripts of the evidence-in-chief, they had to come out and ask for it, but I stand to be corrected on that because it's rather a long time ago but there is a lot of appellate authority on the fact that you can't have them watch the video without reading the cross-examination.

WINKELMANN CJ:

And that authority is pretty much in the early part and mid-part of the first decade of –

MR BILLINGTON QC:

This century. Yes.

WINKELMANN CJ:

This century.

O'REGAN J:

I think in this case, when they did watch videos they did get the cross-examination read to them, in fact.

MR BILLINGTON QC:

Yes. Yes. Yes, there's a passage –

WINKELMANN CJ:

So that part was, the issue is in relation to the

GLAZEBROOK J:

To what they had in the jury room –

MR BILLINGTON QC:

Ultimately, yes, a lot of that occurred and they also had the transcripts from the interviews that didn't form the charges, so they had quite a lot of material. They didn't have as much material necessarily, as a jury would have today. But ultimately, as the Chief Justice says, your Honour says, it's balance and fairness. Having stood around and arguing balance and fairness for a long time, and not always succeeding, it's a matter of judgement and to some degree the balance is often tilted slightly one way, because of the way it ran. And we work more towards, as courts, trying to even that up but it's aspirational. But it is very, my submission in this case is trying to be objective, I have difficultly conceding of the fact this would influence the verdict in a way that you'd want to disturb it. But that's for you, I can't –

GLAZEBROOK J:

Well, it may be that you need to have a look at those cases just to see what the practise was. I know the defendant's statement, written statements were usually put before the jury and there might've been an issue with balance in respect of those defendant statements, but after all, there was no cross-examination because if a defendant statement went in, it was because of the very fact that he or she did not give evidence. So there was no balancing factor, if you like.

MR BILLINGTON QC:

Well, we've done some odd things there, you can't put a statement in now. Either it went automatically as now as a previous consistent statement and I question, I can question that forever. It is the law, but –

GLAZEBROOK J:

No, no, this would be statements where the defendant didn't give evidence.

MR BILLINGTON QC:

Reading the cases or not, ultimately it's a question, is it so unfair as to affect the verdict? And I can't really argue to persuade you either way. In the end you're more aware of the principles than I am and you need to decide, but I would submit you might have some difficulty thinking this is so egregious, certainly not egregious then because it was conventional.

GLAZEBROOK J:

Well, I was just asking what the case law said on it.

MR BILLINGTON QC:

Yes, and I don't know, I'm sorry. The more significant issue out of these three points, well, I'll deal with the sanitisation of charges because that in itself is a unusual situation to call for extra charges, you've really got two lines of authority working here. The first is that the prosecutor has a prosecutorial discretion and that is guided by the guidelines which don't have the force of law, and the discretion is based on an assessment of what would a jury properly directed decide, will it achieve the proof beyond reasonable doubt, and if a judgement is yes, then the charges may be laid subject to public interest factors. But equally, if the assessment is made by the prosecutor that that is not going to happen and it's just adding charges where there ought not to be, then the prosecutor ought not lay those charges. That is the prosecutor's discretion and it is not susceptible to review except in one instance, and the review is whether, what is ultimately done is an abuse of process and that's the only basis upon which the Court can interfere with it

and that's *Fox v Attorney-General* [2002] 3 NZLR 62 (CA), the reference is given in our written submissions.

WINKELMANN CJ:
Whereabouts in your written submissions? What page?

MR BILLINGTON QC:
There are two cases that are relevant, *Fox v Attorney-General* is one and the other is one recently decided by this court in relation to a private prosecution. Again, there is a statutory threshold were the Court looks at the quality of the evidence and there is a proviso that notwithstanding that if it's an abuse of process, the Court may refuse to accept the charging documents. The reference in the submissions is paragraph 208 of the Crown's written submissions and it's *Fox v Attorney* and that's –

GLAZEBROOK J:
I'm not sure that you can take the statutory case as being indicative necessarily of prosecutorial discretion except that I think you probably did get the impression from the discussion with your friend but we don't, well I imagine that we do not think that there is an obligation to charge in circumstances of this kind so it might be worth just moving on to the other aspect of it.

MR BILLINGTON QC:
Yes. Well there's the other side to this, ultimately defence counsel has to make a decision but you can turn this on its head and if the Crown were to lay multiple charges on evidence that really wasn't supportable defence could complain.

GLAZEBROOK J:
Well I think the only point is whether the Crown was obliged to play those other interviews as a matter of fairness.

MR BILLINGTON QC:

Yes, I agree that's the only point. Can I look at its ruling? It's ruling 6 which again I think is in your common bundle. The reference is volume 5, tab 27, sorry, and its 4 in the common bundle. Do you have that? Do we have it on the – not yet.

O'REGAN J:

Ruling number 6 or number 7?

MR BILLINGTON QC:

Sorry?

O'REGAN J:

Is it ruling number 6 or number 7?

MR BILLINGTON QC:

Ruling? Sorry, it's ruling 6, your Honour.

WINKELMANN CJ:

We do have it, we've got it at tab 4.

MR BILLINGTON QC:

Yes. It starts with the acknowledgement by the Judge that he is able under the act to excise portions of the evidence which addresses a point raised with me earlier and then if we go to page 4 , the bottom of the page. "On the one hand the Crown desires this trial to proceed on the basis the defence is restricted to cross-examining child complainants by reference to the videotapes as though the tapes were merely previous contradictory inconsistent statements. On the other hand the defence desire to have part of the examination-in-chief with the child complainants of all the particular evidential interviews of that child." He then sets out the arguments on page 4.

"First, counsel for the accused has submitted that there is a need for all of the tapes to be produced as part of the evidence so the expert psychiatrist can

have a basis for their opinions." He argues that the demeanour of the children during all of the interviews will be significant in that assessment. "The development of the child's evidence is also claimed to be in that category. On the other hand counsel for the Crown points to the limited nature of section 23G and to the fact that in most cases psychiatrists do not refer to material other than that contained within the evidence itself..." The judge found the merits lay with the Crown's argument and playing all of the tapes is not an essential prerequisite for section 23G.

"Secondly, counsel for the accused as a principal argument…" this is the last paragraph, "… has submitted that this is particularly a case in which the jury are entitled to have the whole picture of what occurred since the defence is based upon a proposition that it is this process undergone by the young susceptible children which led to them making the allegations..." Counsel urged that unless the jury had a chance to observe the whole process and the sequence of events then there was an undue restriction being placed on the defence, and he referenced the case of *R v Accused*, which doesn't remind me of anything because of the anonymisation of it.

Balancing these submissions are contentions by the Crown, page 6. "While it is important for the jury to have the whole picture the trial should not be conducted as though it were an inquiry into the merits of the prosecution but rather should concentrate on what are the issues that the jury ultimately have to determine. It is submitted that the fact that portions of the videotaped interviews can be cross-examined upon, does not mean that those tapes have to be played to the jury."

His Honour said in response: "In my view the Crown is obliged as part of its case to produce those videotaped interviews upon which it relies. It is not obliged as part of its case to produce the other videotaped interviews of the complainants in the same way as the prosecution is not obliged to produce as part of its case all statements made by a particular witness. The obligation on the Crown is rather to make available to the defence such material as the defence can then determine whether to use it or not."

I pause there in the sense that I think what his Honour is discussing is probably at the time there were briefs of evidence or job sheets taken in relation to various witnesses. Ultimately they were turned into an evidential statement, a deposition statement, or a preliminary hearing statement. It wasn't the Crown's obligation to lead all of the job sheets and statements, but it was the Crown's obligation to make those available, as it did, for the defence to use as it shows. That is how I interpret that in the context of the time of this trial.

His Honour then went on to say at the bottom of the page: "The course of cross-examination to be followed in the ordinary case is that contained in ss 10 and 11 of the Evidence Act. In view of section 23E the ordinary course should be followed." Which comes back to these are evidential statements or it's evidence-in-chief. "I am of the view that the appropriate procedure is to permit the defence,, if it wishes to cross-examine on any matters in a particular interview which have not been produced by the Crown, to ask for that interview to be played and, subject to any matters of excision and relevance the interview should be played in its entirety…"

That seems, with respect, to do one thing. It allows the defence full access to all interviews, to have them played in full. The only thing it doesn't do, as I think your Honours Justice Glazebrook and the Chief Justice said, it puts an onus on the defence to do that rather than requiring the Crown to do it.

WINKELMANN CJ:
He also adds the qualification on page 7: "I accept that there is weight in the submission that the jury should be aware of the total picture but only insofar as it is relevant to the charges they are considering."

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:

And I think Mr Harrison's point was that in the dynamic of the trial that was a chilling limitation, the relevance of the existing charges.

MR BILLINGTON QC:

Well the jury –

WINKELMANN CJ:

As we said here it's not.

MR BILLINGTON QC:

The jury weren't going to get all of the interviews because the Crown wasn't required to lead them, but there was no limitation imposed on the defence, except the physical limitations of having to do it, but they had the opportunity to do it.

WILLIAMS J:

Doesn't this really come down to, were there any of these exaggeration fantastical matters not before the jury in some form?

MR BILLINGTON QC:

Well can we look at some cross-examination on this, because this shows the effect of the ruling, and if I can take you to child 6, volume 6, tab 68.

WILLIAMS J:

This is notes of evidence?

MR BILLINGTON QC:

Yes, it's tab 68, it's 401.0197, and it's at line 30 to 38.

GLAZEBROOK J:

Was this after the videotape had been played? Do we know?

MR BILLINGTON QC:

I don't know. I just know that it raises issues that were in the tapes.

WILLIAMS J:
Cross.

GLAZEBROOK J:
I realise it was cross.

MR BILLINGTON QC:
Pardon? I would suspect so, because I'm not sure how you could ask the question without an evidential foundation for it.

GLAZEBROOK J:
Well you can. You do that all the time. If you had a statement you'd say, you know, you said in your statement something or other.

MR BILLINGTON QC:
Yes, it would have to be referable to a document. It can't be hypothetical, so it has to refer to the document, whether it's been played or not, but this is the nature of the allegation.

"I think on your last tape, that is the last time you went and saw Sue and made a video, you talked about Gaye putting a knife up your vagina?" "Yes, it was a plastic knife." "Whereabouts did that happen?" "I can't remember that, I mean where did it happen." "You see Gaye is going to come along and talk in court as well and she will say she never did anything like that to you?" "I wish my mummy hadn't sent me to that crèche." So that's one of the fantastical allegations being put which would have had to have had an evidential foundation for it.

GLAZEBROOK J:
You wouldn't have to have played the video to – there was a reference back to the video. I was just –

MR BILLINGTON QC:
No.

GLAZEBROOK J:

I was just asking if the video had been played. That's what I –

MR BILLINGTON QC:

No. Yes, I know, that's –

GLAZEBROOK J:

Do we know what was played?

MR BILLINGTON QC:

Well, we'll find out because I don't know the answer. What I'll do is I'll give this little note –

GLAZEBROOK J:

It's not necessarily important. It's just that, at what stage was it played?

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

It would be – I just –

MR BILLINGTON QC:

Well, it's part of the narrative, isn't it, and I think just for me to pull this out as part of that shows you that the questions were asked but it doesn't tell you what the basis for it was. We know there was a basis but whether the jury saw the basis I don't know, and I think you need to know, we need to know that, yes.

GLAZEBROOK J:

That's just what I was asking. It was just a…

MR BILLINGTON QC:

Because it's a point that's obviously troubling you so I'm going to hand this back to my colleague and she will find that. The next one is child 5, volume 6,

tab 66, at 401.0175, lines 24 to 37. "In the third tape, the one this morning," so that tells us the answer to that question, your Honour, "you talked about someone putting a needle up your penis?" "Yes." "Can you remember that happening?" "Yes." "Is that something that really happened?" "Yes." "And real blood came out onto the floor?" "Yes." "How did that feel when that happened?" "It hurt." "Can you remember how big the needle was that they used?" "Yes about that big." Witness indicates. "Can you remember how far up your penis they put that?" "Yep." "How far was it?" Witness indicates. "How much can you remember blood came out of your penis" did it? "No." "Was it a couple of drops or quite a bit?" "Quite a bit." "How long after that happened did your penis stop hurting?" "About half an hour." "Did it ever hurt again like that?" "Yep." "And where did that happen?" "Peter's house." "How many times did it happen to you?" "Twice."

WINKELMANN CJ:

That's Mr Harrison having to make the case almost. It's a risky strategy you have to play in cross-examination, isn't it, because in fact you could be seen to enforce in the jury's mind that this might have happened?

MR BILLINGTON QC:

Yes. There are strategic calls to be made here and different counsel will have different approaches. One of the points that you mentioned to Mr Harrison this morning was the possibility it might have led to further charges or there'd be further charges. As I understand the law, indictments, as they were, or charging documents now, can be amended but you can't add charges. So if, for example, in the course of cross-examination seeking to establish an inconsistency in a child's evidence, which is what you do, you bring out further offending or something that is different again, you don't run the risk of further charges. It's simply more evidence.

WILLIAMS J:

Yes, you do, don't you?

MR BILLINGTON QC:

No. You can amend –

WILLIAMS J:

There are cases where further prosecutions have followed following later exposure from the same person about different offending, even during the trial.

MR BILLINGTON QC:

Later but you're not going to run the risk –

WILLIAMS J:

No, it won't occur in that trial.

MR BILLINGTON QC:

No, no, and the likelihood of it being charged, I mean –

WILLIAMS J:

Well, there's that but do you want to –

MR BILLINGTON QC:

There's a case in the Court of Appeal *R v Johnson* which I can give you the reference for but counsel not standing too far from you cross-examined very skilfully two child complainants and extracted a whole range of extra allegations, thinking this was going to demonstrate this child was unreliable and extravagant. The consequence was the Chief Justice, who was the trial judge, had directed the prosecutor lay another count in the indictment. So the cross-examination turned from a two-count indictment to a three-count indictment. The Court of Appeal heard that case and the ruling was consistent with the law at the time. You can't add counts. You can amend but you can't add after arraignment.

WINKELMANN CJ:

That's a different Chief Justice, of.

MR BILLINGTON QC:

It was. That was quite a long time ago. But that was a strategy –

WINKELMANN CJ:

And that was a story against yourself, was it? That was a story against yourself, Mr Billington, was it?

MR BILLINGTON QC:

Yes totally, I really succeeded there. I started with two counts and finished up with three which wasn't very successful although eventually it changed but the point is cross-examination, it's a judgement thing, what do you do with these children. You have to find inconsistencies and one of the ways to do it is to expand on what they say –

GLAZEBROOK J:

I think what's being put to you though is whether there's an obligation on the Crown rather to do that, to put the full picture before the jury rather than it having to be raised in cross-examination in this way.

MR BILLINGTON QC:

I'm not sure whether you can envisage the reverse though that if you're sitting there as defence counsel and you get a whole range of charges for which there is no evidential basis I can't but think counsel wouldn't apply for a 147 discharge on those. Typically minimising –

GLAZEBROOK J:

I'm not suggesting there should be charges.

MR BILLINGTON QC:

Just evidence.

GLAZEBROOK J:

Just evidence, that was the proposition that was suggested to Mr Harrison on the basis of caselaw that the Chief Justice referred to.

MR BILLINGTON QC:

I would submit that the likelihood is most defence counsel would object to that extra testing on the basis that its prejudicial effect outweighed its probative value. As Justice Williamson said it's not relevant. Unless it is similar fact –

WINKELMANN CJ:

Yes, but sometimes the Crown at the request of the defence will play evidence so I take your point.

MR BILLINGTON QC:

Yes.

WILLIAMS J:

And call witnesses.

WINKELMANN CJ:

Yes, and call witnesses.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

And there are cases that say there's an obligation on the Crown to do that.

MR BILLINGTON QC:

Yes, either make them available and call them and the Court has a – sometimes you're directed to call and sometimes being a fair prosecutor says you call that witness even though it's damaging to your case. The line is really, you know, we're sitting here in a slightly sanitised atmosphere and defence counsel have different views. Many defence counsel take the view that less is best.

WINKELMANN CJ:

But this defence counsel took the view the Crown should play them, isn't that the point of the application.

MR BILLINGTON QC:

Yes, and the Judge then said: "Well it's not relevant but if you want to do it, it will be relevant so you have to make it relevant by giving it a relevant context." The question that you're asking me which I really – I don't think I can answer is should they have played every one of these –

WINKELMANN CJ:

Yes.

MR BILLINGTON QC:

– and what would the effect of it be.

WINKELMANN CJ:

Well, and I'm sure that there is law about this, about an obligation the Crown, apart from *Haunui* on the obligation the Crown to give a fair account.

MR BILLINGTON QC:

Yes, there's no doubt about that. I don't even disagree with you. The Crown has got an obligation to put all evidence before the jury.

WINKELMANN CJ:

And that really is Mr Harrison's second point having run his point about that the Crown should have charged all these things, that is his fallback point.

MR BILLINGTON QC:

I don't think – sorry that I interrupted you. To suggest that the Crown should charge on these allegations is simply wrong.

WINKELMANN CJ:

Yes, I don't think we need to hear you on that.

MR BILLINGTON QC:

No. Whether even though they didn't support the evidence they should have been played as part of the relevant factual nexus is a different issue and that's what was being asked for and the Judge came down on the side of well the

Crown doesn't have to do it but the defence can do it. So the question then is was that achieving the balance of the sort that the Court ought to have achieved. Does that put it fairly?

WINKELMANN CJ:
Yes, and we will take the luncheon adjournment at that point and you can address us on it after lunch.

MR BILLINGTON QC:
I'm not sure I can say any more about it.

WINKELMANN CJ:
Okay, no, that's fine.

MR BILLINGTON QC:
I will pass it back to you.

WINKELMANN CJ:
Thank you.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.18 PM

MR BILLINGTON QC:
Your Honours, I won't take you any further through the cross-examination for that topic except to note if you wish that the cross-examination in relation to these more extreme examples is covered at page 206 of our submissions in the footnotes.

O'REGAN J:
Paragraph?

MR BILLINGTON QC:
Sorry, paragraph 206. The point, as I understand it really resolves itself down to this, not that the defence could not adduce the other videos but rather was the Crown in the interests of fairness obliged to play them all that request having been made. I think that's where it gets to as I discussed with you prior to lunch.

GLAZEBROOK J:
Possibly, although I think Mr Harrison did say that he was constrained in that he wouldn't have been able to say I want to play all the videos because of the ruling. He had to choose little excerpts. That's as I understood what he said. Not that I know whether that makes much of a difference?

MR BILLINGTON QC:
I'm not sure he was constrained as a matter of law. I think he was constrained by the practicalities of it.

GLAZEBROOK J:
By the ruling. No, constrained by the ruling.

MR BILLINGTON QC:
By that ruling.

WINKELMANN CJ:

I think in his submission because of the emphasis the judge put on relevance.

MR BILLINGTON QC:

On relevance. Then it becomes an issue of what was relevant.

GLAZEBROOK J:

Yes.

MR BILLINGTON QC:

And, as I did say, for every defence counsel there are also different views, and I accept that this was what this counsel asked for, but equally, as I say, there are competing views and sometimes less is more. I can see a situation where someone, new counsel comes to an appeal court and says: "Well, this is really so damaging, the weight of evidence." Now, it's a bit like the objection thing. Just because counsel in the first instance doesn't take a point they don't lose, the case doesn't fail. But equally, it may be useful for this Court to say: "Well, what would've happened if this in fact had happened that every interview was played?" Would that have impacted on the process adversely for the accused? Now, the answer is I don't know, but I rather suspect it's a point. If I chose to argue it I could argue it.

GLAZEBROOK J:

I suppose the point though is that Mr Harrison in this case wanted to play the full videos.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

Whatever ruling 6 did, it wouldn't have allowed him to play all the videos because that application was refused.

MR BILLINGTON QC:
Because of the constraint around the issue of relevance and it was refused, yes, but I do ask you just to consider what would have happened had that happened and had new counsel come along and said: “Well, look at this.” There was so much material, so much to cross-examine on because what do you do with it as counsel?

WINKELMANN CJ:
Well, that is an issue, isn’t it?

MR BILLINGTON QC:
Pardon.

WINKELMANN CJ:
That is an issue as defence counsel because there were so many threads to follow.

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:
That’s part of what Mr Harrison is saying, it put too much of an onus on defence counsel. That they were cross-examining after so many things whereas that should have been there. I mean can you assist me with this, Mr Billington?

MR BILLINGTON QC:
Yes, certainly.

WINKELMANN CJ:
If it had been played by the Crown, what would you say would’ve been defence counsel’s obligations in cross-examination if they wanted to take the point, or could they just wait until closing submissions and say: “Well, look, there’s all this material, some of it is quite fantastic and it isn’t the subject of

charges, you can take it that the Crown didn't have confidence." What could they have said to the jury, what could they have done with it?

MR BILLINGTON QC:

Well, it has the use which Mr Harrison says it has and that is you can say it's so extreme. But equally, it could also be used by the Crown as similar fact evidence and that would raise an obligation. You come back to the point I was addressing Justice Williams about what is relevant and what is not. We really get into a very difficult area if a trial judge, or any judge says: "This is not relevant to what is being tried." We try to avoid not calling evidence that is not relevant. That's the ultimate test.

WINKELMANN CJ:

But actually, normally, the whole of an interview is played. That is one of the fundamental principles and this was a series of interviews and sometimes they were playing pepper pot bits of the interviews.

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

So, my question is not that though Mr Billington.

MR BILLINGTON QC:

No, the obligation to cross-examine on it.

WINKELMANN CJ:

Yes. If that course had been followed, what use could Mr Harrison have then made of that? Could he just have waited until closing and said, made a submission: "Well you saw all of those allegations that were made and some of them were obviously not to be believed." This is to say this is what Crown, sorry, defence counsel are saying, I'm not saying it, making a submission to the jury and the Crown hasn't even charged it. Could he have made that submission, or would he have had to of cross-examined?

MR BILLINGTON QC:

No, I think it's fair to say that he would not have been required to cross-examine on everything. He would've have cross-examined on those things that probative value in the sense of, and by probative I mean proving the case, but he could elect, I think, to not cross-examine on matters that didn't go to proof of the charge. He runs a risk as to where he draws that line, but equally, he was able to do it albeit under constraint by playing as many of those interviews as he wished and cross-examining on them. I have to confess, your Honours, I have not seen interviews of this number and how they were treated today, but what I have seen and what the judge would have seen is what happened to a series of written statements before they came evidence and that would be how the judge would have viewed that I think to be fair to him. So we have to look forward and say well, what he did then was conventional. The question you're now asking me, well, now with what we know and courts striving as they always have but more realistically to achieve fairness and balance, would the prosecutor have been required to lead this and then what's the defence counsel's obligations. He would've had to step through that pretty carefully.

WINKELMANN CJ:

It would've been a pretty tricky thing for defence counsel.

MR BILLINGTON QC:

It would've been very tricky to do, and frankly, my own instinct, for what it's worth and it's probably worth nothing actually, so I probably won't give it to you is, I can just see the problem. I can see the counter-factual. That is, you are swamped and I frankly, I think from a defence lawyer's point of view, that gets worse, not better. It really does. But that's me and Mr Harrison is not me and vice versa. And you will find this across the defence bar.

GLAZEBROOK J:

It might be the sort of suggestion that Justice Williams is making, would be the solution possibly, but –

MR BILLINGTON QC:

Which is? Remind me of it?

GLAZEBROOK J:

A section 9 statement.

MR BILLINGTON QC:

I don't see agreement coming out of what happens here. It's a very interesting topic because it's something that coming to this fresh, as I have, and seeing those more extreme statements, I wondered how they would play out in the trial because I started reading the evidence. And it wasn't really until I listened to all of the experts that I realised, in fact, that there is a body of expert opinion, which you've heard, which says, fantastical claims are actually part and parcel or may be part and parcel, because everything's maybe, of an abused child. Now that's something I personally didn't know and I couldn't bring my common sense to bear. In fact, my instinct would probably be the other way and say, well, I think this is undermining the child's evidence and I rather think that that would've been conventional thinking. But really what we know now is at least some experts and Professor Goodman is saying, well, these fantastical fantasies are actually part of the child's reaction to the abuse.

ARNOLD J:

Well, also, the Judge may well have instructed the jury in the normal way, that it's open to you to accept some of what a witness says and reject other bits. And so you've heard about bizarre allegations, it's open to you to take a view about those but nevertheless, do accept that this allegation is true.

MR BILLINGTON QC:

Yes, well, that would be conventional and expected –

ARNOLD J:

That's right, but all I'm saying is, if you had all that material in front of the jury, the Judge then has to instruct and is going to give an instruction something like that.

MR BILLINGTON QC:

Yes, yes.

ARNOLD J:

A conventional one, you can believe some parts of what a witness says, and not accept others.

MR BILLINGTON QC:

Yes. Yes. Well, we see those directions today in relation to all sorts of evidence. Whether the trial would've just got simply unwieldy and as a result of that because, if it becomes unwieldy that creates its own prejudices too, and then the jury are left with a morass, I can sympathise with them a little bit today, of trying to sift out what is relevant. So it may have made that more difficult.

WILLIAMS J:

Sometimes that's in the defence's favour, of course.

MR BILLINGTON QC:

I've never subscribed to that view.

WILLIAMS J:

No, but some of your colleagues have, I have seen them in trials.

MR BILLINGTON QC:

Yes, they do. My own view is, the more educated a court is, the better chance you've got of getting a better decision.

WILLIAMS J:

I tend to be in agreement with you, but –

MR BILLINGTON QC:

Yes, so, I think those that think they can confuse, cause confusion, really confuse themselves.

WINKELMANN CJ:

You could say, however, that the approach to the interviewing really created that conundrum, the multiple interviews over such a long period of time, really created this untriable conundrum. That would be one way of looking at it.

MR BILLINGTON QC:

I think that is fair and the only thing we can say in relation, this was in its infancy. That is taking interviews and doing this. And it's preferable to what happened prior, I can assure you of that. But, yes, I can – it's probably in a sense, it's an early stage of that process, and I can see a much more disciplined approach has evolved and logically. It is a conundrum, your Honours, I think that's, I'm going to pass it back to you.

WILLIAMS J:

The other point is that children telling tall stories is within the knowledge of parents who are on the jury and the likelihood of hybrid material i.e. fantastical and truthful is probably also within the knowledge of parents, at least, or those who know about little kids.

MR BILLINGTON QC:

As a grandparent I can – my own exception if there are any grandparents on the jury, probably not but, yes, absolutely they live in a little fantasy world at times, yes.

WILLIAMS J:

And that maybe why it wasn't the slam dunk that it was expected to be.

MR BILLINGTON QC:

And if you take that back to where we are we really need to come back to what is relevant and that's what Justice Williams did and once you start –

WINKELMANN CJ:

Williamson.

MR BILLINGTON QC:

– going outside something that is not strictly relevant the Court is looking for trouble or inviting it, understanding the point that you're making Chief Justice.

There were two cases which I will just digress now because I'm going to move onto a new topic that we put in the bundle this morning and *R v E* and *H v R*, these relate to the objection to interviews where there were repeated questions and it's a conventional approach.

O'REGAN J:

Sorry, what was the second of those cases?

MR BILLINGTON QC:

They're in the bundle, there's *H (CA376/2017) v R* [2018] NZCA 376 –

O'REGAN J:

These are the ones you put on this bundle, sorry, yes.

MR BILLINGTON QC:

They're in the bundle, what's the number? 18 and 19 in the bundle. I'm not sure what order they're in

WILLIAMS J:

In that order.

MR BILLINGTON QC:

I'm not going to address them, but we would – it's part of this context which we're discussing as to what you do with these. And the trial judge was aware at the time because he said in ruling 6: "You could edit," and it's blindingly obvious, you can. Courts have been editing statements for years.

WILLIAMS J:

I wonder how realistic that is in this case, given what Professor Hayne's coders say about the number of leading questions. It's going to be a pretty ragged looking transcript.

MR BILLINGTON QC:

I don't – when you say, with due respect, you don't mean it, so I won't say it, coding is a nonsense in this case frankly. I'll say that because I'm not going to say it was respected, it's a nonsense. It's amateurs who don't understand the process looking at something and categorising questions. You have to do what –

WINKELMANN CJ:

Well, that's your submission.

MR BILLINGTON QC:

That's my submission. Yes, I wasn't going to be polite about it. But equally, it's supported by what Drs Seymour and Blackwell say. You look at the quality of it, I mean, the Evidence Act 2006 today allows leading questions providing, and the law was no different then in the sense that if you and I co-operate, evidence is led. If it's non-contentious, evidence is led. If it's scene-setting, evidence is led. But you reach a point, which we discussed with one of us this morning, that if it leads to the allegation and it's a direct line, then I can't imagine a defence counsel sitting down and allowing that to happen. So we have to look at it as through our eyes, with all due respect, which I'm saying now, it's a lawyer's job and coding really, I submit takes this court nowhere. You will listen to some interviews, you will read some transcripts, we're going to give you a list as we indicated of ones that we think would be helpful, but really, you can go through these and Blackwell and Seymour went through everyone, and ultimately it comes down to what they categorise as qualitative against quantitative. They're not lawyers either. But equally, we can see that if a question leads to something that is led out as an allegation, you'd have to be concerned about it. As defence counsel, one would be really concerned about it and object to it. Now then the question is,

as Justice Williams says, would it finish up with the transcripts looking like a chess board? Well, my submission is no, because there is a narrative contained there.

I could probably digress slightly and deal with that topic in a sense now, because I was going to be quite short. I cross-examined Associate Professor Brown briefly on the guidelines and I'll take you to them because they're in the bundle. The Specialist Child Witness Interview Guide, document 10 in the bundle. Being a bit of a skim reader, I really took three points out of this. Do you have the document in front of you, your Honours?

WINKELMANN CJ:
It's what, document 10?

MR BILLINGTON QC:
Yes, the Child Interview Guide. It starts off, this is as I said the other day, not a protocol or a rule, it's a guide, and it's a guide that's governed by the Evidence Act, and it serves two purposes in the sense that it relates to prosecution and care and protection. There's a discussion about dolls, which I won't go into, at page 12.

WINKELMANN CJ:
Can I just say, that having viewed the video interview portions that we were directed to yesterday, we are interested in hearing about use of props and dolls in this case, because those videotape excerpts did raise questions in our minds. But you can come onto that at any point.

MR BILLINGTON QC:
Well no I was standing here because I'm thinking.

GLAZEBROOK J:
It's probably worth having a look at those portions because there were some aspects to it where they seem to be leading the child into saying something, or to agreeing to something that before the child had actually said anything.

WINKELMANN CJ:

Using props and dolls.

MR BILLINGTON QC:

The trouble with this is you're actually outside my area of expertise. I mean I'm not better than you at looking at it, and I just wonder whether you're assisted by me saying to you, well I don't think they go that far.

GLAZEBROOK J:

It's just giving you the opportunity to look at…

MR BILLINGTON QC:

Yes, I think that's –

WINKELMANN CJ:

Well you haven't seen them I think you said, Mr Billington.

MR BILLINGTON QC:

I watched them yesterday.

WINKELMANN CJ:

Okay.

MR BILLINGTON QC:

I watched the same material you watched yesterday.

WILLIAMS J:

And you weren't so troubled?

MR BILLINGTON QC:

No, no.

WINKELMANN CJ:

How he felt about it is neither here nor there though.

MR BILLINGTON QC:

No. What I don't want to be doing here is simply arguing a case because I'm on one side or the other. I want to actually do, or try and assist as I can, but when I –

WINKELMANN CJ:

Perhaps I can indicate that counsel made submissions to us yesterday in relation to what we saw, and we would be assisted by you replying to the detail of the submissions that she made.

MR BILLINGTON QC:

Well I think probably a better way to put it is this. That, and I maybe wrong in this, but my understanding is apart from one instance, these dolls were looked at after the allegation had been made, and were used as a basis of clarification –

GLAZEBROOK J:

Can I perhaps be more explicit. There was one point where the interviewer actually identified a particular body part before the child had identified that body part and had done so explicitly, and then the child went on to say, yes that was the body part.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

And that was something that troubled the Court when we watched it. It's really just to give an opportunity –

MR BILLINGTON QC:

No, I understand that, and I'll come to that in a minute, trying to be careful about what I say, but my understanding is that apart from what you saw that the props and dolls were used after the allegation had been developed.

But we're talking about a different case here where you are concerned that it was part of the development of the, what became the accusation.

GLAZEBROOK J:
It certainly seemed to be in that particular case.

MR BILLINGTON QC:
Yes. Are you speaking about the part where the child was apparently bending over the toilet at one – the doll was bending over the toilet –

WINKELMANN CJ:
No it was –

MR BILLINGTON QC:
– and then it was quite, it was confusing, yes.

WINKELMANN CJ:
I think it was the second child.

MR BILLINGTON QC:
The second one the child was asked to take the trousers off the – and then asked what the name of the body part was.

WINKELMANN CJ:
Both raised issues for us. One was the use of dolls to really – in a way where the interviewer on one view was really effectively leading the child as to where, how a body would be positioned if what she said was happening et cetera, and what might have happened, and the other one was the other child and the identification of the body part.

MR BILLINGTON QC:
Well, can I say this. You're entitled, and I can see why you reached that view, and there is no doubt, if you look through the case there is no doubt, there are two things that have gone on here, to a greater or lesser degree. One is suggestibility, and I put that in a much lower level because that runs off the

idea of leading questions. But the other is the sort of information you're discussing now, which is suggestibility in that form, and contamination, which is slightly different.

Now this is a part of the total and where I finally land on it is this, and it's really where I started the cross-examination last Monday, and that is the proposition that Professor Hayne's research showed that, and I discussed this this morning, children are subject to suggestibility and will change their stories, and there doesn't seem to be any doubt about that. There is a discussion as to whether trauma might cement the event in place or whether even then suggestion will change it, or whether it's a completely false narrative from the outset, and this type of information you saw yesterday is part of that narrative, but the question that I ask you is this, given that none of us actually know the truth in the end, is what do you do as a trier of fact when the victim hasn't changed their story when we know that victims of this sort are susceptible to changing their story irrespective?

GLAZEBROOK J:
No, some children, I understand.

MR BILLINGTON QC:
Yes, and this comes back to a question that you asked me, Justice Glazebrook, and I'm not sure anybody quite answered this, is if a false narrative is in place during the interview can that be displaced at trial by cross-examination? I think that's the concern you expressed to me.

WINKELMANN CJ:
Well, I think that was answered over and over again.

MR BILLINGTON QC:
Do you think it was, your Honour?

WINKELMANN CJ:

Yes. I think the expert evidence was, certainly from the appellant's experts, Professor Hayne and Brown and Howe, was that once it's in someone's memory and they don't know what the source is then cross-examination, you can't, it's not going to be fixed by cross-examination, so is likely to alter a true memory as a false memory.

MR BILLINGTON QC:

Yes, the cross-examination will alter a true memory and a false memory, but the effect of that is this, that if the evidence changes then the burden of proof won't be satisfied. So if a child has a true memory and changes it under cross-examination then the evidence fails. The charge is not proved. If the child has a false memory and changes under cross-examination, the charge will fail.

WINKELMANN CJ:

Yes.

MR BILLINGTON QC:

The things we don't know is if the child with the false memory doesn't change.

WINKELMANN CJ:

Yes. I think you can assume the gravamen of the appellant's case is that really once the child's memory was contaminated, that was at interviewing, and cross-examination couldn't fix it because of the fact that young children can have a greater propensity to confuse the source of information, and that's I think one of the grounds.

MR BILLINGTON QC:

Well, that's not consistent with what Professor Goodman says in her evidence, the first passages of which I was going to refer to shortly of her evidence, when she discusses the various contaminating factors and their effect, and her most illuminating evidence was that which she gave on Friday,

in my submission, where she covers these issues and it's worth reading in its totality.

WINKELMANN CJ:
So she gave evidence of a study which said that false memories can be displaced but that was an adult study.

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:
And we got quite a lot of expert evidence which said a lot of false memories, and even in her adult study, said a lot of false memories can never be displaced or corrected.

MR BILLINGTON QC:
Can I turn this around because I think it's worth doing? I was discussing this with Ms Colley in the break. This case is predicated on the basis by at least some of the experts that what occurred here is irretrievable. But in fact if you look at what they want to tell the Court as so-called experts and what they're saying, we run the risk as a society of reaching the point where you will never prosecute for child sex offending. There is significant publicity now where domestic violence is not being charged because there is no physical injury and the guidelines are being held up as a – the solicitors' guidelines – for not charging because there is no other evidence. Now if we stand around as a society and say well children one can have false memories, two, they can be led and suggested on all the things we are talking about.

WINKELMANN CJ:
Yes, and Professor Goodman referred to that, didn't she?

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:

She said there was a zeitgeist at the moment which was basically unaccepting of, it was undermining of being able to accept children's evidence anytime.

MR BILLINGTON QC:

Yes, that's right.

WINKELMANN CJ:

And obviously that is something for any court to be aware of. You can't undermine the system. The system we've got is the best system we've got, but the system nevertheless must operate, there must be parameters within which it operates and the appellant's case is that this is a case that sits outside those parameters, that good practice was not followed to such an extent.

MR BILLINGTON QC:

That's where I do differ and I think I can comment on that without going into the material what we actually saw and that is this, that this case was impaired to the extent that the questioning was susceptible to the criticisms that have been made. There's no doubt about that. The difficulty with that is –

GLAZEBROOK J:

Sorry, can you start that sentence again?

MR BILLINGTON QC:

It is impaired. When I say it was impaired and I don't mean the result, just the case was impaired, because of the criticisms.

WINKELMANN CJ:

Not because of the criticisms but because of the facts that are leading. Are you just saying it's impaired because of the criticisms?

MR BILLINGTON QC:

Well, what I call criticism, but let's call them the facts. We know there was some measure of contamination and we know there is some measure of testability. It's a question of degree, but the consensus from the defence experts is it's not high enough. But nonetheless, let's assume that it's there for the sake of this argument, so it doesn't help the prosecutor because the end result is that the potentiality for the case to be undermined by a competent defence is higher, not less because you've got something as a defence to hang your hat on. This is what I asked Associate Professor Brown, what is the aspiration of these guys? The aspiration is this, is to take away from the accused and his counsel the ability to criticise the process and to protect the child.

GLAZEBROOK J:

Well, that slightly worries me as a submission because isn't the process actually to find out guilt or innocence?

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

I know we might pretend it's an adversarial game but it's not actually, it's very, very serious.

MR BILLINGTON QC:

Well, I think maybe I'm not expressing this very well then because what it does do, it allows a child to give evidence without being criticised –

WINKELMANN CJ:

It is to allow the best collection of evidence.

GLAZEBROOK J:

But doesn't it allow the child to give the best evidence?

MR BILLINGTON QC:

It doesn't mean the truth.

GLAZEBROOK J:

We know that children have very good memories.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

That they can give very good evidence and that they have better memories of traumatic events or at least the centrality to them of those traumatic events and they can give evidence?

MR BILLINGTON QC:

They can.

GLAZEBROOK J:

So this is to allow them to give the best evidence that they can do in the most child effective way, isn't it?

MR BILLINGTON QC:

Which meets the aspiration of ensuring that sex offenders are in fact tried.

GLAZEBROOK J:

Yes, exactly.

MR BILLINGTON QC:

That is the aspiration and I think anybody that practices the defence bar would know that when you have a poor lead-up in the sense that we are discussing, you are giving the defence an opportunity to diminish the witness irrespective of how truthful that witness is. The only thing I can't account for your Honours is if the memory has been implanted and is false to start with and all I can say in relation to that is I would submit that on what we heard this week, the likelihood is greater not less that that child will change its testimony.

GLAZEBROOK J:
I don't think that was the evidence.

WINKELMANN CJ:
I don't think you got that from any of your experts.

MR BILLINGTON QC:
Pardon?

WINKELMANN CJ:
I don't think you got that from any of your experts, Mr Billington.

MR BILLINGTON QC:
Maybe it's wishful thinking. I thought we did, but certainly it seems to me there is no consensus around what will change children's testimony. I guess, well, what we were told by Professors Brown and Hayne and Professor Hayne said to me on day one: "I can't tell you the truth of what they say," and she can't.

WINKELMANN CJ:
No.

WILLIAMS J:
It seems to me the experts on each side said either I can't tell whether it's true, or I can't tell whether it's false.

MR BILLINGTON QC:
Correct.

WILLIAMS J:
But no one said if they stick to their guns it's more likely to be true.

MR BILLINGTON QC:
No, that's really my submission, isn't it.

WILLIAMS J:
It is yes.

WINKELMANN CJ:
And no one said it.

MR BILLINGTON QC:
Except me.

WINKELMANN CJ:
Now.

MR BILLINGTON QC:
And I suppose in one sense I'm an expert in the sense that I've seen so many trials where witnesses have changed their story, the case fails. So the chances –

GLAZEBROOK J:
But the opposite isn't right.

WINKELMANN CJ:
Yes, but the experts would say – yes.

MR BILLINGTON QC:
The chance of it failing is just about nil, in my submission, in the environment we're discussing, and in the end it's – we are looking, particularly the Crown experts, as what happened before the interview, what happened at the interview, and it stops. The analysis stops. It doesn't go through, for example, the other evidence in the trial. It doesn't go through the cross-examination and what it certainly doesn't go through is looking at those children and their parents, and I don't know that we can under-estimate that. We might not like the system. I can't think of a better one and I'm sure nobody else here can either at the moment.

WINKELMANN CJ:

We can think of a better one, Mr Billington. We can think of a better one than occurred in this case where you might say that helps him in some way, the system let everyone down in allowing multiple interviews and allowing such a set-up circumstance with public briefings, et cetera.

MR BILLINGTON QC:

Yes. Well, we weren't there but the Crown prosecutor –

WINKELMANN CJ:

But that's not the necessary system, is it? It's not the inevitable system.

MR BILLINGTON QC:

No, no, but the Crown prosecutor was able to say to the jury, well, you saw these parents. Are these the sort of parents that did what they, or that was accused of them? You saw the children. We've seen two children. I've only seen two. They are really different.

WINKELMANN CJ:

And they were loving parents?

MR BILLINGTON QC:

Yes, absolutely, and I think, and Professor Goodman said this the other day, we shouldn't forget this, and perhaps I've already said it, I have, I think, that we talk about children but we're actually talking about individual children, each different from the other, and the jury discriminated between them. So this is an unusual forum in the sense that we're discussing a jury's verdict in a very fact-intensive way whereas typically one would go to the summing up and a more conventional approach. So we're almost having a trial without having one and I can't address all these issues. But I did – the reason I took you to the guide is – and you've already interrupted me because, well, drawn my attention to paragraph 12 and what's said about it, and I understand what you're saying. I can't discuss with you anything meaningful in terms of what

you take from the interviews. It didn't cause me the sense of disquiet it did you, but that's just me and maybe I'm just cynical.

What I did take from these guidelines, and the last page is the appendix C, which is not specific to disabled children, in fact, it's a general application, and this is an interesting document and reading it as a lawyer as a guide as to what one would expect to see at an interview and then looking at the interviews, most of, if not all of, what is in this chart was in the interviews. It may not have been there in the chronological order but that's just dancing on the head of a pin, in my submission. What you ask yourself is were the really important steps there? One, did the child understand between truth and lies? Did the child promise to tell the truth? Did the child understand that they were okay to not remember, and did the child then get the opportunity to, and this is the crucial point, tell their story in an uninterrupted fashion, and then did the interview conclude? Now Professor Brown agreed with me. The other witnesses say yes, those parts were there.

WINKELMANN CJ:
And Professor –

MR BILLINGTON QC:
It's interesting when you look at this. We're talking about a child, and I think some of them were what, five, six, seven years of age or thereabouts, the challenge with any witness just leading evidence is how do you get a witness to tell their story, depending on who they are, without giving them a prod in some shape or form? Now you can't lead it, but that comes back to giving the conversation context and you've watched prosecutors trying to lead evidence, and leading evidence is a real art. It's very difficult, and here you are looking at young children and their evidence is being led, and by "led" I mean it's being asked to be given. But looking at that chart, my submission is that that is modern thinking and it was all present then.

WINKELMANN CJ:
Yes, some modern thinking. We've heard about what the guidelines are now.

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

Professor Brown explained a lot of the thinking behind those guidelines but some of that thinking wasn't in place at the time. So what do you say about applying, this is a question we asked the appellant's counsel too, what do you say about applying modern methodology in our assessment of how adequate these interviews were?

MR BILLINGTON QC:

You come back again to the duality of this case. The first is looking at the time at which it was tried and at least two defence, Crown witnesses say that they met the best practice of the day. Professor Goodman says that. She also says that there's no unanimity today in America, which is unsurprising, in relation to how these guidelines or guides are applied. But the object of this hearing is to look at the evidence and ask yourself does it meet the evidential threshold that's required to go to trial? Then, that's the first question, and the second question which is the same as 23G, well, let's go forward to 2021: was it so egregious, so ill-informed, that it starts to get into the category of blood tests vis-à-vis DNA, so you reach something that's empirical rather than intuitive, and my proposition is that when you look at something in front of you which is a 2021 document and run that over the top of what occurred, it works in both decades.

WINKELMANN CJ:

So you'd say if we think the evidence met the threshold for admissibility, then the only question that arises, which is the contamination and interview technique or issues, then the only other issue is was the basic methodology applied so egregious that it meets that threshold which we apply to debunk science?

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

Gun, bullet, bullet things and…

MR BILLINGTON QC:

Yes, that's right. Yes. When I started practice we had three, was it four, blood groups? Now you've got DNA beyond Africa, and you can take the two and you get a different result. Well, is this in that category or a different DNA ruling? No, it's not. This is the same, in my submission. What we're looking at here if you look at those transcripts, they're really – they contain all those parts, and that's what Drs Blackwell and Seymour say.

WILLIAMS J:

Well, except Professor Brown said those interviewers would not be certified. They'd be failed.

MR BILLINGTON QC:

She can say that. It's your decision. I don't accept that.

WILLIAMS J:

She wasn't saying that as an advocate. She genuinely believed that.

MR BILLINGTON QC:

Yes, but on what –

WILLIAMS J:

So she can't – I mean I expect if you two were sitting on a panel and you said what you've just said, she would disagree with you.

MR BILLINGTON QC:

I suspect.

GLAZEBROOK J:

And she also –

MR BILLINGTON QC:

We have a slightly a different view though, don't we, in the sense, and I don't mean that the, this is professionally we have a different view.

WILLIAMS J:

You're a lawyer.

MR BILLINGTON QC:

I'm looking at this as part of a component process to a verdict. She is looking at it as, and she said: "I've never looked past the interviews at all." Now yes, she's right, you would do it differently. We can go on forever about things we see differently in the courts from when each of us started practice, and hopefully they're better, that's society hopefully improving, which it does. But in the end, when we come down to this issue here, and I take that and put it over 1993, my submission is, it doesn't fall outside to such a marked degree.

WILLIAMS J:

But you do have to confront the point that Professor Brown makes after saying she would not have certified these interviewers and that is: "That there is too much risk of falsehood for me to be comfortable relying on what's being said," so that seems to contradict what you say.

MR BILLINGTON QC:

I'm inclined to think that you are stating that more highly than she did because if one reads Professor Brown's brief it is qualified, sensibly, with "may", it may have led to this outcome, it may have led to this outcome.

WILLIAMS J:

Well, of course, that's what I said, yes. So –

MR BILLINGTON QC:

Yes, because we don't know.

WILLIAMS J:
Whilst she said there was too much risk.

MR BILLINGTON QC:
Yes.

WILLIAMS J:
That's all I was saying, I didn't say she said the children were lying. She couldn't and she said she couldn't, but she was very uncomfortable with the level of risk.

MR BILLINGTON QC:
I don't think I'm giving the case away when I say the risk was there.

WILLIAMS J:
Sure.

MR BILLINGTON QC:
I don't think – that would be stupid for me to say otherwise. But that doesn't turn it into something that is so bad that you would say, by comparison between the three, four decades we're discussing, that the trial just failed as a result. As it would, for example, if the DNA was different.

GLAZEBROOK J:
Do you accept then that it's a question of degree? I think you said that earlier but I wasn't sure whether you were accepting – because there's obviously a risk of contamination and false memories, unless you live in a vacuum, one assumes in any case, so are you accepting it's a question of degree?

MR BILLINGTON QC:
Correct. I think it has to be, does it? I don't think we could look at any case where there's less real corroboration and say, well, there's always a risk but it's a risk as a community we live with, because we are living with proof beyond reasonable doubt which actually is a pretty high bar. And we're living

with the testing of all witnesses and we're living within an accused person giving evidence in his own defence. It is a totality. But that – so if one said to Professor Brown, which I wasn't going to cross-examine on this, well, yes, that is correct, but equally if you start looking at this and this has to be proved beyond reasonable doubt, where does that take you? It's a discussion that's probably better had with lawyers than with psychiatrists or psychologists.

WINKELMANN CJ:

This is what she said, she said: "In conjunction with the various risk factors associated with interviews outlined in my reports, 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."

MR BILLINGTON QC:

Yes, and in response to that, it's not a response, Professor Goodman says: "Well, they met the best standards of the day, they were generally pretty effective interviews," and she went through them and said why.

WINKELMANN CJ:

Your junior has passed you a note.

GLAZEBROOK J:

I'd also just remind you that Professor Brown said that this chart wasn't, it was not actually intended for children's interviews but in any event I think she did say it could be looked at but that, in fact, if you were assessing an interview, you should look at the interviewer assessment guidelines I think?

MR BILLINGTON QC:

She said it was for disabled children and she was wrong, it's actually not because I checked it before then I –

WINKELMANN CJ:

She didn't say it was for disabled children, she said it was for people with cognitive impairments or something like that.

MR BILLINGTON QC:

Yes, but because the section under, the appendices deal with children –

GLAZEBROOK J:

But in any event, she said that the whole of these guidelines are too general because they are there to be flexible and that if you were assessing the interviews you should assess them against the assessment guide, something else -

WINKELMANN CJ:

I can't remember what –

MR BILLINGTON QC:

Yes, there's something else, the instruction that they get or something.

GLAZEBROOK J:

Yes, exactly.

WILLIAMS J:

Well, it's the curriculum in their training.

MR BILLINGTON QC:

Yes, the curriculum, that's right, yes, which she teaches. But I'm not a psychiatrist and I just look at it and say, well, how far outside does this fall and it seems to me, I quite like the colours of it and it's a simplistic view.

GLAZEBROOK J:

No, no, I understand. So, you're really saying it's a question of degree –

MR BILLINGTON QC:

Yes, I am, yes.

GLAZEBROOK J:

And you'd be looking at both the pre-interview contamination and what happened during the interview?

MR BILINGTON QC:

Yes. Yes, but not losing sight of –

GLAZEBROOK J:

The totality of the evidence, yes, I understand that point as well.

MR BILLINGTON QC:

Can I have a moment please?

WINKELMANN CJ:

Yes.

MR BILLINGTON QC:

Yes, to put this slightly differently from the way that I have been putting it, was the jury unaware of the risks? The answer to that is no, because that was the whole essence of the defence case. That is why, when I opened, I indicated the context in starting at the end and while you look at what the Crown prosecutor said, which also tells us what the defence counsel says and what the judge said, this was absolutely in front of the jury. These children are just fantasising –

GLAZEBROOK J:

Are you going away from, but it's a question of degree or are you accepting that there is a point at which –

MR BILLINGTON QC:

Well, when I say a question of degree, it has to be a question of degree in terms of the totality of the result which leads to the verdict. Are you driven by, collectively, to think this verdict is so unsafe because of what we're discussing or do you look at the totality of it and say, yes, well, the jury was aware of it, they had to take it into account. From my perspective, as counsel –

GLAZEBROOK J:

Which is the submission? I really -

MR BILLINGTON QC:

The submission is, it's a question of degree but you've got to put that degree right through the whole case.

GLAZEBROOK J:

Well, so if it is an unacceptable risk and the degree is too great, was the fact that it was before the jury and they were aware of it enough to save the trial? Because that was the thrust of your written submissions.

MR BILLINGTON QC:

Yes. Yes, it is.

GLAZEBROOK J:

But it did look as though earlier you were accepting that there would be a point, and I'm not making any comment on whether it's met in this case, there would be a point where the risk was just too great and you couldn't say, it's okay because the jury knew there was a risk.

MR BILLINGTON QC:

I think in any case, if something was so egregious, there's two things going to happen. One is the judge is going to take it away from the jury.

WINKELMANN CJ:

Yes, I mean I might be able to help you here Mr Billington because I think you did kind of have your framework at the beginning.

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

Because you said the first question for us was did the evidence meet the evidential threshold required to allow it to go to trial, to go to jury.

MR BILLINGTON QC:

Yes, that's right.

WINKELMANN CJ:

And that's really I think where Justice Glazebrook's points come in. You're saying it is a matter of degree and you're saying is it so unreliable that it should not actually have been admitted applying the approach to that, which, under the 1908 legislation was really I don't think much different to the more structured.

MR BILLINGTON QC:

No, it's not.

WINKELMANN CJ:

It's just still the same sort of analysis as in *Wilson.*

MR BILLINGTON QC:

I mean it's a massive –

WINKELMANN CJ:

And then if it was good enough to go to the jury, it was tested by competent trial counsel and all these points were before the jury and that's your point.

MR BILLINGTON QC:

Correct. That is my point because it's very difficult, I would suggest for this Court to say that this evidence should never have gone to the jury is a massively high bar. Massive.

WINKELMANN CJ:

Well…

MR BILLINGTON QC:

It is really.

WINKELMANN CJ:

Yes.

MR BILLINGTON QC:

It would be against nearly everything an appellate court has ever done without the qualifiers of something really scientific. Now, I think I should move on.

GLAZEBROOK J:

Well, I think it can be enough to go before a jury, but then during trial it could be considered that either the trial should be stopped and it shouldn't go before a jury or alternatively, afterwards, that no reasonable jury could have come to the verdict on the basis of that evidence. So there's probably a third step to your, and I'm not making any comment at all.

MR BILLINGTON QC:

No, no, I understand. The evolution of section 347, 147 has made that even more difficult for a trial judge.

GLAZEBROOK J:

Yes.

MR BILLINGTON QC:

There are trial judges that if we go back, instinctively reached the point that you're saying: "Well, I just can't let this go to the jury irrespective."

GLAZEBROOK J:

And then there would be the O afterwards.

MR BILLINGTON QC:

You can't do that now.

GLAZEBROOK J:

I think it is O, the case which is to –

WINKELMANN CJ:

Well, there is Judge Ronald Young's decision where he pulled evidence from a jury.

MR BILLINGTON QC:

Yes. I have argued.

GLAZEBROOK J:

I was thinking of O when on appeal you say no reasonable jury could have come to that verdict.

WINKELMANN CJ;

Yes.

MR BILLINGTON QC:

Yes, that's right, but the threshold now is almost unachievable from an accused's point of view. If there is evidence there that the jury is capable of accepting, then it goes to the jury. That's the reality and that wasn't the reality pre-1990.

WILLIAMS J:

Well, it's got to be evidence capable of being accepted by the jury on a rational basis.

MR BILLINGTON QC:

No, properly directed.

WILLIAMS J:

Oh yes, and properly directed of course but on a rational basis because really the question here comes down to when you make your choice, don't speculate.

MR BILLINGTON QC:

Yes.

WILLIAMS J:

Found your decision on evidence?

MR BILLINGTON QC:

Yes.

WILLIAMS J:

If the scientists say there is no basis upon which you can believe or disbelieve a witness and that's all there is, then you've got a problem. You must have. Now, the question in this case is whether there is other inferential, circumstantial evidence that means we are not forced into that choice.

MR BILLINGTON QC:

Well, as you know, my proposition is you are not forced into that choice. It just doesn't get there because there is other evidence and the evidence is sufficiently cogent in any event.

GLAZEBROOK J:

You would go further though. You would say the level of contamination wasn't sufficient and the interviews were conducted properly. I think that's your submission, isn't it?

MR BILLINGTON QC:

It is, even though you and I will both agree we would like to have seen those interviews conducted differently. Nonetheless, you can't stand back and say this is just so bad because at that point you couldn't, I believe.

WILLIAMS J:

But you've got to be able, it seems to me, this is what I'm struggling with anyway, you've got to be able to say the evidence of contamination wasn't sufficient because.

MR BILLINGTON QC:

I think the appellant has to say the evidence of contamination is so egregious because I don't have to do the opposite.

WILLIAMS J:

Well, yes, but it is the same, from our point of view, it is the same question. This isn't a case that is going to hang on the burden.

MR BILLINGTON QC:

I think the appellant has to take you with them.

WILLIAMS J:

Of course.

MR BILLINGTON QC:

I don't have to, but I would, of a meeting and I will say no.

WILLIAMS J:

Exactly, exactly. Is that all you've got?

MR BILLINGTON QC:

No, no.

WILLIAMS J:

Well then, tell me what your because is.

MR BILLINGTON QC:

My because is because at least three of my experts say it met the standard of the day and I also say on my own analysis which I invited you to adopt if you do the same thing as when you look at it as a lawyer it doesn't fail.

GLAZEBROOK J:

Sorry, what are we talking about, just the interviews?

MR BILLINGTON QC:

The interviews, the interviews, yes we are and you know I've always said that's only a small part of the case. It's the evidence-in-chief that's what it is.

GLAZEBROOK J:
Well we've got the pre-interview contamination.

MR BILLINGTON QC:
Yes.

GLAZEBROOK J:
And then we've got the interviews so just to be clear, we're only talking about the interviews at the moment.

MR BILLINGTON QC:
Yes.

GLAZEBROOK J:
Because it would have to be a combination of the pre-interview contamination and the interviews themselves, wouldn't it?

MR BILLINGTON QC:
Yes, which was fairly before the jury. The parents were cross-examined on their role and we discussed that.

GLAZEBROOK J:
I suppose you still haven't quite answered Justice Williams' question then which is –

MR BILLINGTON QC:
What more?

GLAZEBROOK J:
– taking the pre-interview contamination and –

WILLIAMS J:
What I'm looking for from both sides and in terms of my own analysis is the golden thread, as they say. Contamination wasn't a problem because this is what the evidence provides you with. This is the thread the evidence provides

you with to show that contamination can't have been a problem and for the other side they have to say this is the thread of evidence that indicates that contamination almost certainly was a problem otherwise we're stuck with the vibe.

MR BILLINGTON QC:
Yes, well we don't like vibes very much, no.

WILLIAMS J:
No.

MR BILLINGTON QC:
I mean what would your Honours say to the points which I raised in opening, for example, that the conduct complained of was similar to that which the appellant spoke of. It's something. The fact that this child and I took you to that passage in the bar.

WILLIAMS J:
Sure, that's something.

MR BILLINGTON QC:
So there is something more so we look at this and say well over here the appellant says that is pretty bad and on its own it makes you feel really uncomfortable and then I'll say well okay I will take you through that then I'll take you through the cross-examination and I will show you that the verdicts are reason. Where the cross-examination identified the contamination there was no guilty verdict. Now that ought to give us as lawyers some comfort.

And then the accused gave evidence and the accused gave evidence, well evidence was given in relation to what he has said, his sexual, those idiosyncratic behaviours, same behaviours. Then you've got the issue of corroboration. Not corroboration, similar fact evidence as between each. Now once you accept that one child is correct and each child, you deal with them in turn, the Judge said this, then you can look at, once you're satisfied,

you can look and see if they are the same and there is a striking similarity. Now he got the benefit there of an instruction that is different from that which you would get today because we weren't talking about propensity in those days but there's a propensity issue that now would be addressed and there is a propensity to talk about this behaviour, there's a propensity to engage in it, he got the benefit of that so –

WINKELMANN CJ:
Well that's not much benefit.

MR BILLINGTON QC:
Pardon?

WINKELMANN CJ:
That isn't much benefit. He just got the benefit of the slightly more – a slightly higher threshold direction.

MR BILLINGTON QC:
Yes he did.

WINKELMANN CJ:
But that's just an evidential direction benefit, isn't it?

MR BILLINGTON QC:
Well if we're balancing the law as it was, it changed.

WINKELMANN CJ:
The evidence all still came in.

MR BILLINGTON QC:
It all came in, yes, but how the jury was invited to treat it was different so that –

WILLIAMS J:
So on the similar fact –

MR BILLINGTON QC:

So some of your questions – sorry to interrupt. The question you asked me, yes there is more and that's the more so you start with the appellant's that's – and I say well you look at the other stuff that happened all through the case.

WILLIAMS J:

So the similar fact complainants is of course generally speaking a very powerful factor in multi-complainant trials, usually it's the clincher unless there is a problem with enough complainants to pull the house of cards down and that's where you've got to drive your laser through contamination and interviews to dispel that possibility, I would have thought.

MR BILLINGTON QC:

That is, that is. There's not much of it in this case but you may recall Dr Blackwell and Dr Seymour saying they had done a study, two studies. One with juries and interviewed jurors and the other was in relation to Crown prosecutors in terms of what led to guilty verdicts and they talked about the nine points. The nine points including something other than what was said by the victim and as a lawyer, well I'm looking at a case whichever side you are on you are looking for something more, you have to. The guidelines really insist on that as well.

So there are some – there's not a lot here but there's something more and then you say to yourself well if that's the case there's a bit more in the end do we second guess the verdict.

WINKELMANN CJ:

Well, there was quite a lot to contradict though, wasn't there, in the circumstantial evidence. There wasn't much in the way of circumstantial evidence to bolster the complaints, but there was the power of the co-complainants and that was the something more in this case and that would've satisfied the Solicitor-General's guidelines, one imagines.

MR BILLINGTON QC:

Yes. Yes, that's right. There wasn't a lot more –

WILLIAMS J:

Well, there's the behaviours, they were run with.

MR BILLINGTON QC:

Yes.

WILLIAMS J:

But that's problematic now. And there's the four children named by Ellis although he says that he gave those names after the arrest and, I mean, it was open to the jury to disbelieve him on that. And on the similar behaviours, well, there's just a good an argument that that's the basis of the confabulation.

MR BILLINGTON QC:

Look, ultimately, you reach a point as an appellate court, do you feel that you're driven to interfere with a jury's verdict? And that's where it gets to.

WILLIAMS J:

Yes, well, I'm suspicious of a proposition like that. It's too vibey. In the end, the thing I used to always say to juries, hand on heart, full of confidence, don't speculate. Don't guess. Evidence only, rational basis. And usually juries did pretty well on that. And what we need to be satisfied of is that there is enough in this, that this jury didn't decide on the vibe alone.

MR BILLINGTON QC:

Notwithstanding the trial judge's summing up which does exactly as your Honour said it should do. Don't – you decide the case only on the evidence and you've heard the criticisms of it. I mean, if the summing up, one can always – it doesn't lend itself to criticisms that it caused an unsafe –

WILLIAMS J:

Not on that trial, no.

MR BILLINGTON QC:

No, it doesn't. The jury were very carefully instructed as to what they ought to do with the evidence and the competing allegations.

WILLIAMS J:

Yes, just it seems to me that our task is to be satisfied that there was enough for no guess work.

MR BILLINGTON QC:

Yes, so that involves looking at the summing up. You see, if I came to this court as a –

WILLIAMS J:

Well, but most importantly, the evidence.

MR BILLINGTON QC:

Well, typically most appeal start with the summing up and say the Judge got it wrong.

WILLIAMS J:

Yes, that's – I've often thought that that's necessary because we have a common law system where the jury doesn't have to write down its reasons so we attack the poor old trial judge, I cry insecurely. But in the end, the summing up isn't going to be the answer to this case. It's going to be, was there really enough stepping back and given our knowledge of the science now? It's got to be that.

MR BILLINGTON QC:

That's probably where you're departing from the second Court of Appeal –

WILLIAMS J:

I don't mean enough to convict –

MR BILLINGTON QC:

No, I understand what you're saying, but you're probably departing from the second Court of Appeal which said in the very early part of the judgment, where you do have to deal with this: "We're not a commission of inquiry. We are dealing with this as a matter of principle within the system as it operates." Now, the system's been criticised in relation to this case and others, obviously. I don't think it's for me to say to you, that's not how you should approach it. I think all I can say is that, maybe I'll be accused of being a bit old-fashioned here, but we do need to operate within the rubric which we've always operated on, unless you, as the superior court say otherwise. You've got a different approach. But as someone who's argued criminal appeals on and off occasionally, the propositions you're putting to me, if I dare put those, I don't think I'd got much traction, your Honour.

WILLIAMS J:

Well, by "is there enough" I mean, is there enough for that jury to found a verdict upon. That's all, I'm not saying, do I think, because I don't think that's the question for me. But I do need to be satisfied there is enough firm ground to support a verdict at all.

MR BILLINGTON QC:

It's trite for me to say that's the Crown's case, because it means nothing to you. What I do say to you is that, yes, as a matter of fact there is sufficient evidence. Whether the jury should have acquitted because maybe you and I think they should have acquitted, is a different matter. That's just what you and I think.

WILLIAMS J:

Yes. Yes, well, that's – and that's neither of our business.

MR BILLINGTON QC:

It's neither here nor there. But was there enough said by these witnesses that the jury could accept, having heard them and having been instructed on what they were to do with that evidence, and having heard from defence counsel

who clearly knew what he was about, could they then reach that verdict. Now you and I might say –

WILLIAMS J:
In brackets, given what we now know.

MR BILLINGTON QC:
Even with what we now know, and what we also know is that with the burden of proof such as it is it is very difficult to get a conviction in this field too, and judges who have sat on jury trials are often surprised by the verdict in the acquittal not the conviction.

WILLIAMS J:
Yes.

MR BILLINGTON QC:
And of course we're bringing to it albeit a different perspectives of our own lives and we're not one of 12 but what has come through in my few years of practice is this, that it is an amazing a dynamic when you put 12 people together and I've seen 12 jurors who are all educated and could all operate a computer do a trial and there was a disagreement and I've seen another 12 jurors do a trial and not one of them could operate a computer and the result was the same and it's the human dynamic and it seems to work and that's what you've got here. You've got 12 jurors looking at these 13 children and reaching a discriminating verdict. As a lawyer I would say to your Honour it's a big ask to set that aside.

WILLIAMS J:
I agree with that.

MR BILLINGTON QC:
Section 23G, the best way for me to deal with this is to go to the written submissions at paragraph 72, page 72 I should say and I will just – I think

probably I will just step through these and you've got section 23G in front of you as well if you – I think we put that in the bundle, didn't we?

WINKELMANN CJ:
Yes, you did.

MR BILLINGTON QC:
And I've gone a little bit further. If you look at section 23G the written submissions confine it to subsection (c) but there was a discussion yesterday about sexualised behaviour.

WINKELMANN CJ:
No knowledge.

MR BILLINGTON QC:
Yes, that's right, knowledge rather and I think the issue for you is this is whether that falls within subsection (a) as well and subsection (b). Now I'm not aware of any cases that have broken this section down into its component parts like this but given the qualifications of the expert they can give evidence on these matters. Intellectual attainment, mental capability, emotional maturity and then if you move that down the last option down to (b). "The general development level of children at the same age group." Now it did appear that sexual knowledge fell pretty squarely within emotional maturity and general development level in that children of this age would not be expected to have the level of sexual knowledge that they were said to display. So that is aware if that evidence was to be admitted it would fall under that section.

WINKELMANN CJ:
Development?

MR BILLINGTON QC:
Well emotional maturity and general development because I think emotional maturity you could argue giving its broad definition would relate to age and

development and then you've got general development anyway. My submission is that if a child has sexual knowledge at four years of age that it's going to fall within one of those aspects of the section and then you reach that rather difficult point you raised with me this morning is what is supposed to be done with the words “consistent” or “inconsistent” and we've been running into this problem as courts for a long time in sexual offending and to say what is inconsistent is almost impossible because you may display no symptoms at all. We think about rape cases, just nothing except the complaint. That doesn’t stop a conviction. So I’m not sure. So, the view that was taken at the time was that what was called for was behaviour that was consistent. So, the question then is, if that’s the correct analysis of the section, is the evidence that was given, was it admissible then because that’s the first enquiry.

Now, I am putting, I put it this way in the written submissions, going to page 73, because the appellant’s case is slightly different in that they tend to simply say: “Well, there was no opinion of that sort then and it’s wrong now.” That is not my submission. The law was that, whether we like it or not, and that is what had to be done, but in any event as we say, there was no unfair advantage or advantage at trial because of course you’ve got evidence given by both sides and can I just take the summing up for a minute and demonstrate because I think we need to look at the summing up on this point.

GLAZEBROOK J:
When you say: “That’s what had to be done,” you didn’t have to call evidence on this, did you?

MR BILLINGTON QC:
No, you didn’t, no. What had to be done was if you were going to give evidence you gave it in terms of what were the symptoms, what was it consistently.

GLAZEBROOK J:

So the argument is thought that those symptoms weren't indicative of sexual abuse.

MR BILLINGTON QC:

Well, the argument is, the appellant's argument is that that was not the knowledge at the time and that simply doesn't accord with the authorities that this Court and others were looking at which takes it right through into the early 2000s.

GLAZEBROOK J:

Sorry, I thought argument was even at the time there was no such thing as a cluster of symptoms that were indicative of sexual abuse.

MR BILLINGTON QC:

That's the argument, yes.

GLAZEBROOK J:

And that is the evidence that was given.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

And the argument is that whether you are looking at it, whether you were looking at it at the time or now you couldn't give that evidence because it was wrong.

MR BILLINGTON QC:

My preference is to say this, that the use of the word "cluster" is an adjective to describe a number of symptoms and it was only used, I think it was used twice by the witness and once by my friend in cross-examination. You were taken through the evidence this morning. So, you could describe it as a group

of symptoms, a number of symptoms. Maybe calling it a cluster elevates it to something it's not, but it's an adjective, that's what it is.

GLAZEBROOK J:
Well, leaving out the adjective, they're not indicative of sexual abuse, whether in combination they're not indicative of sexual abuse was the evidence we've heard and were not thought to be at the time.

MR BILLINGTON QC:
Well, in terms of the not being indicative of sexual abuse, what you did hear and I think you put this yourself, your Honour, that they're a red flag. I cross-examined on it. So, where it takes you –

GLAZEBROOK J:
Well, no, I don't think that's what was said. That would indicate further investigation.

MR BILLINGTON QC:
Yes, that is right.

GLAZEBROOK J:
If you saw the cluster of symptoms and in particular which is only two of the complainants there was also sexualised behaviour that was outside the age group.

MR BILLINGTON QC:
Yes. What was agreed by Professor Patterson was that if you took them on their own they told you nothing. If you put them with a complaint of sexual behaviour, it was an indication that you would then need to look further. That was her evidence of what the knowledge was at the time.

WINKELMANN CJ:
But that notion of need to look further, that's as a clinician.

MR BILLINGTON QC:
Yes, not as a witness in court.

WINKELMANN CJ:
Yes, not as a witness in a court.

MR BILLINGTON QC:
One of the matters that doesn't seem as clear as perhaps it is expressed to be is what was the state of knowledge at the time and I can only get that from cases that the Court of Appeal was dealing with.

WINKELMANN CJ:
Well yes. So, Dr Zelas said she had, there were studies that she was basing her view on, didn't she, and the experts said there were not.

MR BILLINGTON QC;
Yes, Professor Goodman spoke about the school of thought in 1984. That's in her Friday evidence.

WINKELMANN CJ:
But she said by 1992 –

MR BILLINGTON QC:
1994 she discussed a paper that had started to discount.

WINKELMANN CJ:
And she said that that would have been gathering steam.

MR BILLINGTON QC:
Gathering steam then, yes.

WINKELMANN CJ:
But there is a Court of Appeal decision referring to Dr Zelas giving similar evidence, isn't there?

MR BILLINGTON QC:

More recently I think. The cases that I looked at were *R v Aymes* [2005] 2 NZLR 376 (CA), which is the Court of Appeal of Justice Glazebrook, Robertson and Baragwanath. It's tab 64 in volume 2.

GLAZEBROOK J:

Can we get that up?

MR BILLINGTON QC:

Yes. Can you bring that up? It's Crown authority's volume 2 of 2, tab 64 and there's a comprehensive discussion commencing at paragraph 111 on page 1,320 and that discussion goes through to paragraph 118. So, the proposition starts with the fact that if it's within the ordinary knowledge of the jury then we don't have the evidence, but if it's outside that knowledge, then yes, the section permits it. It is limited to evidence of consistency or inconsistency. Then your Honour says that: "Not only must the evidence say whether there is consistency or inconsistency but articulate how consistent it is and with other factors," and that was captured in my submission and what Dr Zelas said by conceding there may be other matters.

In terms of the state of knowledge at the time, paragraph 115 on page 1,321: "It's been observed that there have been comments that some have taken a suggestion this evidence should not now be given," and the passage is referred to.

Paragraph 116: "The Court was not going so far as to suggest that there was no longer a place for section 23G evidence. Section 23 evidence can always be given provided it is relevant and within the bounds of the section," and that's really the challenge for you here.

GLAZEBROOK J:

Well, it probably is actually saying you couldn't give any of this evidence because it would be within the normal knowledge of the jury.

MR BILLINGTON QC:

A challenge for me probably actually. Sorry, say that again?

GLAZEBROOK J:

I think what this is actually saying is that you shouldn't be giving this evidence because it would be within the normal knowledge of the jury.

MR BILLINGTON QC:

If it is, but this goes beyond. If it goes beyond, which is what the Court said, but doesn't the Court say –

GLAZEBROOK J:

But does it in this case though?

MR BILLINGTON QC:

In the particular case?

GLAZEBROOK J:

In this particular case, why would it go beyond the knowledge.

MR BILLINGTON QC:

Yes, oh, the case, our case that we're discussing now.

WINKELMANN CJ:

In this case, Ellis?

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

The question is this case, Mr Billington.

GLAZEBROOK J:

Sorry, I meant that.

WINKELMANN CJ:

No, no, you were. The question was which was this case.

GLAZEBROOK J:

Not the only case no, because I think that was, well I can't think of the company –

WINKELMANN CJ:

Am I repeating this case to make it clearer?

MR BILLINGTON QC:

I think before I come to that, one of the reasons I focus on this was this is a 2004 case and the evidence is still clearly being given and the Court is still saying there is a place for it. So whilst Professor Patterson says: "Well this had gone by 1990," that doesn't seem to be reflected.

WINKELMANN CJ:

Well, I mean the Court of Appeal may not have had the benefit of advice from someone like Dr Patterson though.

MR BILLINGTON QC:

No, they didn't, but what they were seeing was, as we see in the next case, they were still seeing this evidence being given. So Dr Patterson is probably not the only source of this information. There were others who were still of the same view. What Drs Blackwell and Seymour say is that eventually they determined, irrespective of what the rule said, that it was going too much to the ultimate issue and you couldn't really give the evidence in a meaningful way.

WINKELMANN CJ:

Well, that may be their memory of how it developed, but I think the case law might say something different.

MR BILLINGTON QC:

I beg your pardon?

WINKELMANN CJ:

I said I think the case law may say something different. I think it was the case law that said it couldn't go into the ultimate issue.

MR BILLINGTON QC:

Oh, correct, but it actually had started to fall into disuse through prosecutors themselves and witnesses before the Act was changed and then the Law Commission as we say in our submissions actually recommended that it stay in, but it just fell within the general rubric of expert evidence and whether it was helpful or not. Then in the next case, which I think we discussed yesterday –

GLAZEBROOK J:

All I was saying is that *Aymes* says that you can only give it if it is outside the normal knowledge.

MR BILLINGTON QC:

That's right.

GLAZEBROOK J:

I was asking whether in the Ellis case any of the behaviours would be outside the normal knowledge of the jurors and therefore whether in fact under the *Aymes* test, whether this evidence should have been given at all.

MR BILLINGTON QC:

Well, the best I can say in relation to that is from my own general knowledge and that is this. When you go through a list of behaviours that children exhibit such as bedwetting, such as night terrors, such as refusing to go to school, such as refusing to go to the toilet. Personally, I'm not necessarily going to link those to sexual abuse. The way that –

GLAZEBROOK J:

That's because they weren't linked to sexual abuse, isn't it? Isn't that the point?

MR BILLINGTON QC:

I don't think my – I think we'd better stop this discussion.

GLAZEBROOK J:

That that evidence we hear is wrong.

MR BILLINGTON QC:

But really, when you say, what's beyond, it's when you link it back –

WINKELMANN CJ:

A room full of experts.

GLAZEBROOK J:

Sorry, they were –

MR BILLINGTON QC:

But sexualised behaviour, for example, is something that –

GLAZEBROOK J:

But that was only two of the children.

MR BILLINGTON QC:

Yes, either behaviour or knowledge. But the other point that came out of all of this is that, and I said this this morning, there was something of this sort said in relation to each child, but they didn't get a conviction in relation to each child. So the weight the jury gave it, they will have been informed.

GLAZEBROOK J:

No, that's a different point really. I was just saying, in terms of those sort of behaviours that show a child is disturbed, aren't they in the normal run of the jury's knowledge?

MR BILLINGTON QC:

Well, the jury would know –

GLAZEBROOK J:

So under *Aymes* there shouldn't have been expert evidence on it, there could have been submission that these behaviours indicated something was wrong with the child.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

And that may or may not, depending upon the view the jury took, have been, because of sexual abuse, it may have been for other matters.

MR BILLINGTON QC:

Every juror would know that if a child's displaying probably say two of those signs, that there's something wrong with their child, yes. What it is, where it takes them, I'm not sure. And I'm not sure – and I think from what you're saying to me, the *Aymes* is really saying well that's – you don't need to add to that.

GLAZEBROOK J:

As that's within the normal knowledge of the jurors, you shouldn't be calling expert evidence on it.

MR BILLINGTON QC:

Yes. But you've got a disturbed child on your hands, yes.

GLAZEBROOK J:

That was all I was asking you.

MR BILLINGTON QC:

Yes. Well, we know that, for sure. But what it means beyond that, I'm not so sure.

The next case is slightly, it's the same year I think, it's slightly more informative. This is tab 66. This is the Court of Appeal in September 2004, do you have that? It's *R v G*, it's tab 66 of the same volume, it's the next case. 414, that's exactly it. Now this is case is probably of more assistance to the appellant than the previous case, but the courts made a number of cautionary statements in relation to behaviour in discussion at paragraph 27. This is an interesting discussion. If you go through to paragraph 28. "The problem which evidence of this kind presents to juries have been well documented. The admissibility at common law of expert evidence has been discussed on several occasions in decisions of this court." The evidence was ruled inadmissible because the Act didn't exist at that time under *R v B* [1987] 1 NZLR 362 as that came in, in 1989, and there's a reference there to Justice McMullin's statement: "Such cases are the exception rather than the rule because to admit evidence of a complainant's conduct would generally be to allow the complainant to corroborate herself… As child psychology grows as a science, it maybe possible for experts to demonstrate matters of expert observation and they are acting in a clear and unmistakable way."

Then we go on to 89 which is still pre the Act. "The need to demonstrate such behaviour in an unmistakable and compelling way. The appeal was allowed because the expert evidence amounted to a powerful and almost unchallenged corroboration of the complainant's evidence and went some distance towards usurping the jury's function. These assertions led to a section 23G." Now, contrary to what the Judges were saying before, section 23G seems to actually open it up to allow this sort of evidence, whereas previously it was self-corroboration evidence. The question now is, is discussed at paragraph 34, in *R v Jarden*, where the difficulties are identified with this evidence.

So, we reach, we had really two periods of time here. The first is before the Act where largely you're looking at resistance on conventional grounds. It's a self-corroboration, like a self-serving statement. You've got the 1989 Act which specifically addressed it, but it seems to allow experts to give that

evidence albeit around parameters. So that's a move towards supporting victims of this nature. Then you've got the Court by 2004 restricting it again for reasons that really aren't much different from those that existed before the Act and then the Act, Parliament not re-enacting it for the reasons that it appears to be difficult and it would have to satisfy. Coming back to your point Justice Glazebrook, it would have to be subsequently helpful and by that it would have to be on the knowledge of the trier of fact. So that's the evolution of it and this case falls into the early part of that evolutionary process.

GLAZEBROOK J:
Well, except that cases are always speaking. So what was said in 2004 is actually the law on that section.

MR BILLINGTON QC:
Yes, it is. That Court is addressing that section and giving a meaning to it in a trial context and it has been interpreted in such a way that it's reasonably restricted or unreasonably restricted depending on which side you act on, but it's really almost a reflection of what judges were saying before the Act and afterwards.

GLAZEBROOK J:
Yes, it's basically saying it has to be helpful, it has to be outside the normal knowledge of the jurors.

MR BILLINGTON QC:
That's not what the Act is –

GLAZEBROOK J:
The jurors would know that, I hesitate to say cluster of behaviours, but a group of behaviours –

MR BILLINGTON QC:
A group of behaviours, yes.

GLAZEBROOK J:
– could well show that a child was disturbed.

WINKELMANN CJ:
I don't think the Act displaces the normal law in relation to the admissible of expert evidence and that's what Justice Glazebrook's point, one of Justice Glazebrook's point is even though section 23G may seem to be permissive in that regard.

MR BILLINGTON QC:
Well, the Act is seen to be permissive, but the interpretation of it is that it doesn't take, it still doesn't allow the evidence to be called because it suffers from the same impediments.

GLAZEBROOK J:
If it's within the, yes.

MR BILLINGTON QC:
That never have always existed, yes, that's right and eventually it's fallen into disuse for that very reason. I haven't looked at the Law Commission's papers as to why it was enacted, but I would have thought the thinking was it was going to make it life easier for victims, not more difficult.

WINKELMANN CJ:
Well, a large motivator was his concern about the notion of inconsistent conduct by victims and to debunk a notion that it was inconsistent.

MR BILLINGTON QC:
Correct.

WINKELMANN CJ:
That you didn't get emotional, et cetera.

MR BILLINGTON QC:
Yes, that's exactly right.

GLAZEBROOK J:
And the consistency is probably a bit the same as jurors would normally think there would be an injury –

MR BILLINGTON QC:
Absolutely.

GLAZEBROOK J:
– and they have to be told that no it's perfectly consistent with sexual abuse but there isn't actually evidence of injury because of quick healing et cetera.

MR BILLINGTON QC:
Correct and because of consent not freely given is still not consent. So I mean we've seen an evolution of that through just ordinary adult sexual violation cases and it's eventually fed its way through into amendments to the Crimes Act.

GLAZEBROOK J:
And also the counter-intuitive evidence that of you might give the perpetrator a birthday card.

MR BILLINGTON QC:
Yes.

GLAZEBROOK J:
That, you know, people might think that that is inconsistent with there having been sexual abuse, but that's not the case.

MR BILLINGTON QC:
Stockholm Syndrome.

GLAZEBROOK J:
Or that you would cry immediately.

MR BILLINGTON QC:

The immediate complaint fiction, there's a whole range of things and yes, this was brought in to dispel a lot of what may have been thought to be ill-informed thinking at the time but it's proved to really be an unhelpful section and was falling out of use in any event as the witnesses identify. But one of the reasons I referred to those cases, whatever some experts say, there was certainly experts, a number of them were still giving the same evidence at that time, so what was the state of knowledge at the time, it's not just as Dr Patterson says. Frankly, that really in my submission is not the issue. The issue is when you look at the evidence and the way it was given, was it admissible then because if it wasn't then you've got a completely different case on your hands and that creates a number of subsidiary issues and that is this. First of all that evidence was not the subject of an objection and it could only be a limited objection because the defence would know that the parents are going to give the evidence anyway. You see the parents are going to say: "My child came home and they were behaving in this particular way and this alerted me to the fact that something was wrong." Now that evidence is, in my submission, is unexceptional. So that's coming in in any event and it came in in various forms with each of them. So the defence had to contend with the reality that the jury were going to hear this evidence.

The next step is, and I will work this backwards, if the defence wanted to deal with it it had to find an expert who would say that that's not consistent with or give the Le Page type evidence and the moment that's on the cards likewise the Crown, it opens up the issue of the Crown so you can put it whether the Crown calls it first or the defence calls it first you're going to get that evidence in front of the jury.

WINKELMANN CJ:

The defence didn't have to call that evidence, did they, if they didn't have the Crown witness who was weaving and do a narrative. They could have just, if there was now Crown expert would have just sat there and the evidence, to the extent it was relevant.

MR BILLINGTON QC:

No, I don't think that's right, it couldn't sit there and challenge. So if one's defending – let's assume for the sake of argument we're talking about – we must talk about this case, that's the evidence that you've got coming in. Do you then say how do I rebut this? These parents are saying this, can you then call a witness and you'd be allowed to? Forget no Dr Zelas. It's the likelihood Dr Zelas was coming but it doesn't necessarily follow so the moment you call medical evidence as a defence lawyer to rebut the parents' testimony you're going to open up the whole issue.

WINKELMANN CJ:

But really we're not dealing with the factual evidence we're dealing with the expert opinion associated with it.

MR BILLINGTON QC:

But the question is in the end did it affect the outcome of the trial because what you're going to get – you're going to get this evidence irrespective. Section 23 –

WINKELMANN CJ:

Hang on, is your point on this based on the notion that the defence would have to call an expert?

MR BILLINGTON QC:

No, it's just a choice they made but it's hard to think that you could lead that evidence unchallenged.

GLAZEBROOK J:

Well there's ways of challenging on the facts. You'd say: "Are you just misremembering what these behaviours were? Hadn't you just moved house? Are there other explanations."

WINKELMANN CJ:

"Lots of children do this," that sort of thing.

MR BILLINGTON QC:

Well, you come down to the discussion we had earlier, Justice Glazebrook, that when a child shows these symptoms as a parent you think there's something wrong here.

GLAZEBROOK J:

Well you may or may not. You know, these children were quite young, bedwetting, tantrums.

MR BILLINGTON QC:

Regression, all sorts of things, yes.

GLAZEBROOK J:

Yes.

MR BILLINGTON QC:

Anyway, it was going to happen so the question is what do you do with it and –

GLAZEBROOK J:

Well I think the defence would say you don't have somebody saying this shows that the children's evidence was reliable especially when you'd written a letter saying you had concerns about it.

MR BILLINGTON QC:

And that evidence wasn't then called. In fact the parents got pretty grumpy because the interview was cancelled. Were you going to finish at 4 o'clock today?

WINKELMANN CJ:

Yes, did you want to finish a bit early?

MR BILLINGTON QC:

I do because I think I could probably be more help to you on this if I came back a little more laser sharp tomorrow and addressed it than I am right now.

WINKELMANN CJ:
Still more laser sharp.

MR BILLINGTON QC:
Because I have wandered a bit.

WILLIAMS J:
Well you've been dragged around I think to be fair.

GLAZEBROOK J:
You've done well.

MR BILLINGTON QC:
Well tomorrow I've got to come back to this. I've got to come back to memory experts which in my submission is not a big subject and I've got to come back to this question of contamination again generally speaking. That won't take so long because I really have a pretty simple proposition which I've made which is not necessarily falling on fertile ground and that is the cross-examination, the suggestibility and I can't keep repeating that so I may be able to attenuate what I'm doing.

WINKELMANN CJ:
Abbreviate would be –

GLAZEBROOK J:
On Zelas it's the ultimate question issue and whether the evidence should have been called under the section.

MR BILLINGTON QC:
Yes, and I think there are two ways of looking at that. One is when you look at it, it is very broad. The other is you look at what the Judge did with it and that's always important. He distilled it down into 10 points but that may beg the question but it is broad evidence and then the question is well to what

extent were the concessions that Dr Zelas made sufficient to provide a balance that was necessary in any event.

GLAZEBROOK J:
I can understand the concessions point, but what we were taken to by Mr Harrison were passages where she appeared to be saying, and this bolsters the children's evidence, it shows it's more reliable.

MR BILLINGTON QC:
Yes.

GLAZEBROOK J:
Which would certainly have not been allowable before section 23G, is said not to be allowable under section 23G and so perhaps you could just deal with whether or not you agreed with his characterisation of those passages that we were taken to?

MR BILLINGTON QC:
That's the fundamental issue.

GLAZEBROOK J:
Yes.

MR BILLINGTON QC:
It is for me. So I do like a little more time, just to try and be a little more focused in my responses to you. The other stuff I don't think is quite as troubling for anybody. So, yes, if I am –

O'REGAN J:
I think it would also be worth addressing whether Dr Zelas was an appropriate person to give this expert evidence, given her involvement in the investigatory phase of the case.

MR BILLINGTON QC:
Yes, there are two elements to that, I read her –

O'REGAN J:

I'm happy for you to deal with it tomorrow.

MR BILLINGTON QC:

No, no, well I read her CV because I was interested to see just what qualifications she had. The qualifications are there, without a doubt. Whether she didn't do it very well or some people disagree, that's a different issue. But she was qualified to give it on lots of bases.

WILLIAMS J:

It's not really the question of qualification.

MR BILLINGTON QC:

But really, was she an independent – was she an expert absent the Code of Conduct for experts is probably, was she sufficiently impartial is the question I think you're asking me, your Honour?

O'REGAN J:

Yes, or was she wearing too many hats, was the way it was put by, I think, even Dr Blackwell said that, from memory. That she thought Dr Zelas was wearing too many hats.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

And whether her evidence went beyond what would normally be given as well, it was too wide-ranging, aside from the section 23G aspect.

WINKELMANN CJ:

That really deals with the responding on how well they dealt with in the interview, the narrative of the interview, and appearing to corroborate or to bolster their credibility.

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

We'll take the adjournment now.

MR BILLINGTON QC:

Yes, thank you. Look, I'll try and be a little more focused on those issues because I think that's really the –

WINKELMANN CJ:

No, you were very helpful today, Mr Billington. We asked you lots of questions, sorry about that.

WILLIAMS J:

You said you enjoyed them.

MR BILLINGTON QC:

I do actually, I think it's a much better way of getting to the bottom of what we do.

WILLIAMS J:

I agree.

MR BILLINGTON QC:

Thank you.

COURT ADJOURNS: 3.52 PM

COURT RESUMES ON THURSDAY 14 OCTOBER 2021 AT 10.19 AM

MR BILLINGTON QC:
Tēnā koutou e ngā Kaiwhakawā.

WINKELMANN CJ:
Mōrena, Mr Billington.

MR BILLINGTON QC:
Mōrena. Your Honours, we are getting to the pointy end and I've slightly recast what I was going to do yesterday and I think it'll be more of assistance but you may have seen a memoranda filed this morning by Ms Colley in relation to the Dr Zelas letter, and I'm going to ask her to address you on that and clear that issue away.

MS COLLEY:
Tēnā koutou e ngā Kaiwhakawā, kei aku rangatira. Your Honour, the respondent has placed two memoranda before the Court this morning. The first is relatively self explanatory. That is a schedule detailing the evidential video interviews in this case that went to trial. It notes the children who went to trial and the relevant evidential video interviews that relate to each of those children. It describes whether they were played to the jury or not, which charges they correspond to, just based on the discussions that we had in court yesterday.

The second memoranda requires a bit more explanation, your Honours, and that is in relation to Dr Zelas' letter that was discussed during yesterday's hearing. We understand that Dr Zelas' letter was attached as exhibit O to a pre-trial affidavit that was filed by the Crown in 1993 before the High Court. With the assistance of Mr Greenhow yesterday afternoon we found a court copy of this affidavit in the 1999 Court of Appeal records held by this Court. That court copy was missing two exhibits from the affidavit: exhibit O which was the letter that we are concerned with and exhibit P which was an earlier affidavit of Dr Karen Zelas. We do not know if that court copy found in the

1999 Court of Appeal records was the same court copy that was before Justice Williamson for the pre-trial hearings. Unfortunately, as is often the case for this case, it is difficult to understand from the records.

Unfortunately, I can't take that too much further but we do note in our memoranda from paragraph 4 onwards some other points that we have found in the record. The first is that it appears that Mr Nation who was defence counsel for the other crèche workers who were initially charged alongside the appellant, it appears that Mr Nation had knowledge of the letter at the depositions hearing.

WINKELMANN CJ:
Can you point out why you say it appears he had knowledge because that was not my reading but I might missing something. He certainly had a sense that there was something but I'd rather read it as him trying to find out what that was.

MS COLLEY:
Yes, that is understandable, your Honour, and I agree that it is not entirely clear from the record. I would point your Honours to the particular quote at page 3 of that memorandum, about half way down the one in bold where Mr Nation asks: 'Have you been aware of any assessment that has been made by anyone connected with your part of the inquiry as to the credibility of those interviews?" Of course, Mr Nation does not expressly address the Dr Zelas letter but it could be inferred.

WINKELMANN CJ:
Well, it couldn't – isn't it a more likely inference that – you're saying it could be inferred that he had the letter or knew of it.

MS COLLEY:
Yes, or knew of it.

WINKELMANN CJ:
If he knew of it, wouldn't he have put that to the witness?

MS COLLEY:
He may have, yes, your Honour, and I do note that this discussion and cross-examination was with Susan Sidey who was one of the interviewers of the children, one of the primary interviewers, but Dr Zelas was not a witness at the depositions hearing. Now I do accept, your Honour, that it is not clear, it is not clear from that transcript, but I wanted to put it before the Court just so you're aware of what was there. There was no other record in the depositions to the letter.

The second point that we, with Mr Greenhow's assistance, again we found in the Court of Appeal records was a letter from the appellant's former counsel, Mrs Ablett Kerr and Mr Barr, dated the 22nd of July 1999. In that letter they state that appellant counsel had not previously seen exhibit O, Dr Zelas' letter, but it was their understanding that the exhibit was before his Honour, Justice Williamson, at the pre-trial hearings. Again, there's no confirmation, your Honours, but I just wanted to put it before the Court.

The third point is, as the trial Judge did observe, there was evidence before the jury that further interviews with child 5 ceased as a result of detailed conversations with his parents in August 1992. That evidence came up in cross-examination of child 5's mother at trial.

And then the final point, your Honours, is just the paragraph being included there of the ruling that my learned friend took you to yesterday, ruling number 9, where further cross-examination of child 5's mother about the cancellation of later interviews was prevented by the trial Judge. Just put that quote in full so you can see that his Honour concluded about the relevance of a credibility assessment being conducted in relation to child 5.

Unfortunately that doesn't give us a conclusive understanding of what happened but those are the matters that we were able to find based on the record held by the Court. Unless your Honours have any question.

WINKELMANN CJ:
Thank you that's very helpful, thank you.

MS COLLEY:
Thank you.

MR BILLINGTON QC:
If the Court pleases. I can round out our submissions in this way which I hope you will find of the most assistance to you. I'm going to deal very briefly with section 23G and what the Law Commission had to say about it. I'm going to then look at a very brief passage of Dr Patterson's evidence, Professor Hayne's evidence on memory in the transcript of cross-examination and some comments Professor Goodman made on Friday.

What I am proposing to do if your Honours find it helpful is to go through Dr Elder's evidence and highlight passages. Now what that does do it captures the memory issue, the qualification issue and it captures the 23G issue and I think if we work through it that way whilst it covers a number of components given the prominence of her testimony and the prominence it now takes in this appeal then if there are questions arising as to whether the evidence ought properly to have been given we can address that as we go through it if you would find that helpful because that's what I propose to do and I think that will then conclude all I need to say about this case from the respondent's point of view. So that's the course I will follow.

I will start off with the Law Commission report which is in volume 2 of our authorities at tab 79, Mr Cox. I think Chief Justice you referred me to this yesterday.

WINKELMANN CJ:
Yes.

MR BILLINGTON QC:
It's brief and it indicates of course the Law Commission was proposing that the section remain in the statute in its present form as it then was and at paragraph C111 it is described effectively as counterintuitive evidence, that is evidence to show that behaviour a jury might think is inconsistent with a claim to sexual abuse may not be so and it's as the Law Commission says to restore the debt that arises in that way.

It's interesting in the sense and we're all of us who have worked in this area know that physical injury was once cross-examined on and perhaps juries intuitively thought to think well that would be what you would look for in the case of sexual abuse of adult or child and what we see here is the Law Commission thinking well in fact it's that sort of intuitive thought that we want to get rid of and counterintuitive evidence of this sort that was described as being symptomatic and the other developmental features were to remain. Now Parliament didn't accept that and it simply fell within the general rubric of expert testimony and we still see counterintelligence evidence today although it has been subject to a number of limitations I think as we progressed through it.

The interest I think is this in the sense that there is something of a disconnect in what the Law Commission is saying there and what was actually happening in practice which we discussed yesterday and the difficulty is that apart from the witness being able to comment on the development, the emotional and physical development of the child they had the option of commenting on matters that were consistent with or inconsistent with the abuse and that then led, as we see in the cases that were discussed in the Court of Appeal in 2004, to running the risk of ultimately being ultimate issue questions which is, with those judgments in mind, one can see why the use of that evidence fell away and also why Parliament didn't re-enact it. There is an issue that, in particular, Justice Glazebrook raised with me yesterday which I'm not totally

added in with your Honour on this, and that is the differentiation between what would be known to the jury as a usual –

GLAZEBROOK J:
Sorry, I was only putting to that, Mr Billington, because that's what that case said rather than necessarily - and I know I probably wrote the judgment, but –

MR BILLINGTON QC:
I think you probably did.

GLAZEBROOK J:
But whether, in fact, that was the case at the time of trial is, of course another matter.

MR BILLINGTON QC:
It is.

GLAZEBROOK J:
And whether it should be the case is another matter.

MR BILLINGTON QC:
Well, when we look at the jurisprudence we, as I said, we see before the Act and at the end of the Act the courts are not far apart because it does get to the point where you can see the defence saying, well, really, it's self-corroboration, it has all those qualities to it. But you did raise with me, at least I think I understood you to say also, well, was it going to be on what parents and jurors wouldn't know anyway. I guess there is two things to say to that. One is, not every juror is a parent or a grandparent. So there is a role for it, in any event. And the second thing was that we seem to, this is my appreciation of the evidence we've heard is that a parent's first reaction typically can be to deny there's been sexual abuse and think of other reasons because that's one's natural reaction. One doesn't want to think one's child has been abused. And we saw some of that in the evidence of the parents in this case. So, it's, I'm not so sure that's a distinction that would one want to draw, it's

simply a question of does the evidence fit within the scope of the section or not?

WINKELMANN CJ:
Well, you can actually see a coherent reading of section 23G because it is, when you look at it on its own terms, it's a reasonable incoherent piece of legislation. But if you place it within the overall framework of the admissibility of expert evidence, which is that you do not allow expert evidence where it's within the jury's common sense knowledge, then you place it in that context then what you're allowing under section 23G is evidence which is of that counterintuitive type, so it's the kind of thing that a jury is likely to have the wrong view unless they receive that assistance.

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:
And that does make some sense out of section 23G.

MR BILLINGTON QC:
It does. Yes, I think – I didn't express it clearly, but I think it is counterintuitive evidence. That's it's place but unlike some other counterintuitive evidence, it is very difficult to articulate it without transgressing, that's the fine line. And I think that is why the courts and counsel and the experts have started, withdrew in any event because it's a line that can't be trod very easily. But it is still there. The symptoms are still there and we've heard evidence about that. So, thank you, your Honour, that is really the point I was struggling to make.

GLAZEBROOK J:
And we have recently had a decision on that to say exactly how that counterintuitive evidence should be done and not tying it to the particular case, but just giving evidence that then allows the misconception to be

corrected in juror's minds and they then apply it how they see fit in terms of the prosecution case at hand, in light of the evidence.

MR BILLINGTON QC:
Which is really why I cross-examined Professor Hayne in that fashion, and I'll take you to that now, if I may, and that's at the hearing transcript at pages 320, 322, 323 and 328. I did this because you have heard a lot about how a jury and this jury would be assisted by hearing from memory experts who I actually think in this context are people who have conducted studies and read studies and whether that makes you a memory expert is slightly different. What it makes you an expert in is the result of the studies. I am a bit cynical about that too but maybe I'm just getting too cynical.

WINKELMANN CJ:
Possibly.

MR BILLINGTON QC:
I think one needs to run a critical eye over that as to what it actually is and I'm sure you will do that. But if you go to the evidence at page 320 starting at the cross-examination at the bottom of the page. "So trying to capture what might be said to a court without commenting on a particular child would have to be reduced to a number of understandable principles wouldn't it?" Answer: "I guess, yes." "What I have tried to capture is what I consider may be the scope of evidence of principle not in any particular order and I'm wondering if they're partially correct and I go through these points because coming back to the question you just asked me, we can't speak about the child, it's only what would inform the jury and this is what I was, I'm trying to capture, whether I do it's a matter for you. The first is that memory is not a camera, it's a process of encoding, storage and retrieval so that would something that a witness could tell the Court isn't it?" And the answer is: "Yes."

So that's point 1, I had eight points as it turned out. Then we go across to page 322, cross-examination continuing. "The second point I've recorded is that memory is subject to suggestibility, can you agree with that?" And the

answer's: "Yes." The next point: "Memory is subject to contaminating events?" Answer: "Yes." "And memory is subject to impairment as a result of a time gap?" "Yes." "And also the gap," and I'm summarising this, "From the date of the incident and the date at which it is being asked to be recalled?" "It is, we call it forgetting." That has some interest here because there were varying time gaps between the date of the alleged offending and the date of the interviews.

The next point is: "There are variations of that with regard to the age of the child?" And I think the answer's agreed to. "The time gap was initially what we call forgetting?" and that's the next point. And then the last point was: "I'm not sure if there's a consensus around this," this is at 323, "Because it depends on definition but the ability to recall detail as opposed to peripheral matters?" Answer: "I think the distinction that you're trying to draw is between central and peripheral details which is something we have traversed in the course of our discussions?" And the answer is a qualified: "Yes." Now your Honours asked a question which was answered in different ways from Friday. Some of the witnesses gave answers very similar to that which is in that transcript.

WINKELMANN CJ:
Would that be your witnesses Mr Billington, your respondent's witnesses?

MR BILLINGTON QC:
They were the witnesses that understood the question. I think mostly they were – they're not my witnesses, your Honour, they're the –

WINKELMANN CJ:
Sorry the respondent's witnesses.

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:

Quite so they are not your witnesses, they're expert witnesses.

MR BILLINGTON QC:

I think that's where it's, well no actually that's not quite right because when Professor Hayne provided what was she euphemistically called her homework on Friday it was almost identical to what I had taken her through. It developed into a treatise by Monday, we gave her too long to think about it and we got more as a result. But if you actually look at and I invite you to do this, look at what she gave us on Friday if you have it, I'm sure you do.

WINKELMANN CJ:

I'm not sure we do.

MR BILLINGTON QC:

Well you should have. If you haven't I'll make sure you have it.

WINKELMANN CJ:

Would that be correct?

GLAZEBROOK J:

It was annexed to the memoranda that came in, yes. But I don't know, I think…

MR BILLINGTON QC:

What happened, well maybe you didn't get it.

GLAZEBROOK J:

Maybe we didn't get the updated.

WINKELMANN CJ:

I imagine we wouldn't have her draft, we'd want to have the final document.

MR BILLINGTON QC:

I'll discuss that with my friend because what happened in fact and I wasn't sure whether it had been sent, it was sent to Mr Greenhow. It was what she called homework and it was a one page paper which is exactly what I thought the Court was looking for.

GLAZEBROOK J:

Yes.

O'REGAN J:

We did get it.

MR BILLINGTON QC:

And it was and it was very similar to what you've just heard here and, in my submission, and then we've got some other responses which you will have looked at equally. But we come back to this point and it's really, this is very important for the Crown in particular, not just in this case but in the wider context. Is there a place for a memory witness in a trial of this nature.

GLAZEBROOK J:

Can I just check we're off 23G now or we're on 23G, it's just I'm not quite seeing the connection?

MR BILLINGTON QC:

No, what I'm doing now is I'm merging both. I'm sorry to do this but I think it's more convenient, I'm talking about memory and 23G together because that's really –

GLAZEBROOK J:

All right, that's fine, I'm just checking.

MR BILLINGTON QC:

Yes, I was going to deal with them separately but I think they sit together and I just want to pause here and emphasise this that the first question is is there a

place for a memory witness and what you're being asked to accept in this particular case is there ought to have been a memory witness or the memory evidence that was given alternatively was so bad as to mislead the jury.

Now the points that I think you wanted to find out on Friday and which I made here as well, if there is going to be a my witness what can they actually say without going down the same road that 23G went with successful appeals and the Court of Appeal finally saying well as it's starting to say now already in the cases to which I've referred, this is within the knowledge of jurors collectively. You can't speak to the individual victim so all you can give is some generalities. Now the question then is beyond those generalities which we are discussing now what more can be said and there is a risk that if we start to expand on that we're going to have the same succession of cases that we've had in relation to section 23G and counterintuitive evidence, and as I've said to you yesterday, a lot of this is a matter of impression for each of us here but if we sit back and think about what we – distil what we've heard over the last week, was there anything we didn't really know from our own experience.

Now you'll know the answer to that, I don't know, but if we join this group of us together collectively what did we hear that we didn't know. In my case probably one thing only and it actually operates in the Crown's favour and that is that children do move into the fantastical as part of relating abuse and whilst one coming to this case as I did looking and think this is a problem in fact actually it works the other way but beyond that each of us will have our own different views on it and ultimately collectively you will have to do the same but I'm really wondering whether all we learned was that what we know has been scientifically established by way of ecological studies and even they have produced different results in what are virtually the same situations. Professor Howe told us about that so it is a very uncertain feel.

So that's that point. The reason I'm doing this is because this will all link into this looking at Dr Zelas' evidence. Now the other evidence I want to look at is Dr Patterson who speaks directly to it. Volume 4, tab 16 and if we go to paragraph 26 of that affidavit. The paragraphs to which I refer are under

paragraph 26 and that paragraph identifies a wide range of behavioural symptoms which have been associated with child sex abuse, sexualised behaviour, internalising, externalising, fears, insomnia, regressive behaviour, nightmares, toileting difficulties, tantrums, whining, PSD and they are the symptoms that the jury heard about in the Ellis case.

The next paragraph is this that in a study in relation to where the general population where identified those who were known to be sexually abused showed a higher proportion of those symptoms than those who did not. At 26.3, in relation to a study of children with already known problems there was no distinction as between those who had been sexually abused and those who had not and who had other causes for their symptomatic display.

Then paragraph 36, expert opinion now is that child behavioural symptoms cannot be considered as indicative or diagnostic of sexual abuse, and in 1994 the CSA expert said that professionals assessing CSA needed to consider any displayed behavioural symptoms, including inappropriate sexualised behaviour, in the context of the entire case. Other evidence, and in relation to the biopsychosocial development of the child that may otherwise or better explain the child's symptomology. So it's not that it doesn't exist but there needs to be more known and studied of the child before the conclusions can be drawn as opposed to the consistencies.

Then I cross-examined on this at pages 96 and 97 of the transcript. If we go to the top of page 96, I had discussed paragraph 26 with her and just drew it to her attention at the bottom of the page. Question: "Thank you and equally, as you've told us today, not any one symptom, or any group, will conclusively indicate the presence of sexual abuse, will it?" "No…because these symptoms can occur in children who are non-sexually abused." "So they may be indicators of sexual abuse, a red flag I think they were described a moment ago, but that's as far as you can go, isn't it?" "Yes. Generally you have a red flag that something isn't going well for the child, so, you know, a clinician will look at, you know, what are the contributing factors to that."

A little bit further down the page. "And what is the position if a child actually says: 'I was sexually abused' and those symptoms are present? As a clinician, what would that inform you of, if anything?" "Well, I guess what you have then are two pieces of information on which you start exploring and doing a very thorough assessment in terms of those two pieces." "So the question is really there are probably three components to it, aren't there? The first is the child presents with problems to the clinician of these behavioural symptoms, they are indicators that something is psychiatrically disturbing this child and one factor could be sexual abuse. That's as far as you can go?" Answer: "Yes, but I'd rein it in a bit in terms of those symptoms."

And then further down. "We simply say a child presents and has these symptoms, it raises a flag and that's as far as you can go?" "Yes, that's what clinicians do." And over the –

WINKELMANN CJ:
I'm quite interested in that because Dr Patterson there is talking about a clinical assessment.

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:
So she's not really talking, and in her brief too, she's not really talking about giving evidence on this.

MR BILLINGTON QC:
Evidence, no.

WINKELMANN CJ:
She's saying, what it's saying is "I have to go away and do more work as a clinician"?

MR BILLINGTON QC:

That's right. And over the page, she says: “Because if a child discloses abuse as well then that’s another piece of information that needs to be examined and acted on.” Now all of that makes total sense now in terms of what we do know. It’s not, as you say, Chief Justice, it’s actually what’s the clinician’s approach. The clinician knows to explore it. It simply doesn’t prove it.

Now one can’t argue with that. The question is, however, in terms of section 23G, are those symptoms, which are the symptoms described at paragraph 26, are they consistent with sexual abuse? Now in its narrowest terms the answer to that is yes. The difficulty –

GLAZEBROOK J:

Well, so would the absence of symptoms be consistent with sexual abuse if you’re looking at it in that narrow sense, in the sense that a number of children who have been sexually abused show no symptoms. Equally, perfectly normal children without being disturbed may show some or all of those symptoms. So really, the expert evidence would be, if you see those symptoms they might be just perfectly normal, there might be some disturbance, that disturbance could be sexual abuse, it could be a lot of other things.

MR BILLINGTON QC:

Totally.

GLAZEBROOK J:

So it would be – wouldn’t it?

MR BILLINGTON QC:

I think I’ll agree with you nearly all the way, your Honour, and that is, what they are, if you look at section 23G, they are symptoms that are consistent with sexual abuse. But that’s not the whole answer and the whole answer is, of course, it maybe consistent with some other form of trauma.

GLAZEBROOK J:

Or consistent with being a totally normal child exhibiting one or more of those behaviours that normal children can –

MR BILLINGTON QC:

I'm not sure it goes that far if you've got more than –

GLAZEBROOK J:

Well, it depends how many, it depends how many, I guess, but.

MR BILLINGTON QC:

But I'm not sure it much matters in terms of the point because what the section was letting the witness do was describe symptoms that were consistent with it. It ran into two problems, the first we've already discussed that it goes to self-corroboration which the law allowed but it shouldn't. And the second is that we also know that there are other causes for displaying the same symptomology. But that did not render the evidence inadmissible at the time and I did wonder, coming again to it, why this evidence was not the subject to an objection which could've been made, not because it infringed the scope of the section, because it doesn't, but simply that its prejudicial effect may have outweighed it's probative value. And that was, prior to the Evidence Act 2006, that was the basis upon which objections could be made to evidence that would be otherwise admissible. Now that's now been codified and I did wonder this, and went back and had a look at the judgment of the Court of Appeal in 1993, which is in volume 1 –

WINKELMANN CJ:

Can I just ask you to re-state, I'm sorry I missed it, you said there were two problems with evidence, first it allows for self-corroboration. And the second problem was?

MR BILLINGTON QC:

That on its own, unless it's qualified, it has the potential to mislead unless it's qualified. And what you have to do, what we're going to do is look at Zelas' evidence and see how, where it fits into that, those two areas.

WINKELMANN CJ:

By that you mean that it was actually, and you're going to qualify this, but inconsistent with the scientific knowledge at the time?

MR BILLINGTON QC:

If it was, if it was. I think that's a point you need to, if you'd flag, and we'll talk about it when we look at the evidence. So I think the things will come out of that evidence when we do that. As I say, I was really interested –

GLAZEBROOK J:

Can I just double-check?

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

You accept then that you can't give misleading evidence under section 23G.

MR BILLINGTON QC:

No, no. Absolutely not. As I say, having had the benefit of having no preconceived notions about this case whatsoever and looking at it, how would I approach it, then and now, I did wonder about why there was no recorded objection to it and, in fact, what happened to it subsequently in the appeal process. The first Court of Appeal hearing which is at volume 1, tab 8, did deal with this. 1994, the first appeal. It didn't figure in the second appeal at all. So when I looked at the cast of thousands for the second appeal, I was just thinking to myself, what happened here? So if we go to page 1010076 and there's a passage beginning two-thirds of the way down the page, yes. "The next ground was a complaint that the extent of the evidence permitted

from Dr Zelas in terms of section 23G of the Act occasioned a miscarriage. Mr Panckhurst opened on this, albeit with some delicacy, that Dr Zelas' conduct in undertaking a supervisory role in the interview process and then appearing as an expert expressing the opinions authorised by the Act. Those opinions were about consistency of each complainants behaviour with that of sexually abused children of the same age group, intellectual attainment, mental capability and emotional maturity of the complainant and the general development level of the same age and that was the scope of the evidence. Counsel did not suggest that she was disqualified from giving such evidence because of her prior involvement but said she was in an uneasy position when it came to drawing the fine line between the evidence allowed under the section and the expression of an opinion on the credibility of particular complainants. The Court then goes on to discuss that fine line. It is inevitable that general statements about young children's mental capacity may be seen as applying specifically to these children, for example, the way they use magical thinking, their tendency to give unusual or bizarre description of events of which they had no previous experience, their ability to recall central details more readily than peripheral ones and the stages of memory development in the ability to recollect past matters. It's interesting that all came out of the first trial on the first appeal and it was very obvious to the counsel on the appeal and to the Court these are the same matters we are discussing.

GLAZEBROOK J:
They wouldn't, a lot of them wouldn't be under 23G would they?

MR BILLINGTON QC:
The Court's well this is –

GLAZEBROOK J:
I know the Court seems to think they are but…

MR BILLINGTON QC:

Well I went searching for this, your Honour, as you probably have or if you haven't in thinking why, what –

GLAZEBROOK J:

It doesn't mean it wasn't admissible necessarily.

MR BILLINGTON QC:

No it doesn't does it. I was wondering as counsel what was done with this problem because on any view of the matter and I'm happy to say this it was important evidence in the trial and important evidence for the defence usually means it's not very good. And the Court then went on to discuss the alternative evidence from Dr Le Page, the same kind of evidence and the Court concluded that neither had overstepped 23G. Now for very obvious reasons you are not bound by that decision but it is indicative of the judicial thinking and lawyers thinking at the time of what the scope of that section was and it's probably fair to say that there was an evolution in thinking both on the bench and the bar which we've seen by 2004.

GLAZEBROOK J:

And what do you say we should be looking at what it meant at the time?

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

Or we should be looking at what it would be interpreted as in accordance with, well really in accordance with how you would actually just interpret a statue in the context, probably the same point the Chief Justice is making, in the context of the whole of the Evidence Act and the whole of the way evidence was and the actual scientific knowledge at the time as against what might be more expansive interpretation that had been given to the section than maybe it warranted.

MR BILLINGTON QC:

When I introduced this point and I'm going to come back to that, I think there are two points to the section 23G material. The first is this, was that evidence admissible and properly given at the time. Now if the answer to that is yes then there is no scope for this court to say that it would have the potential to cause a miscarriage of justice if you look at it in 1993.

WINKELMANN CJ:

Well I think you've accepted in your submissions a proposition that's inconsistent with that statement which is that if it turns out that it was completely that it was as it happens completely wrong scientifically with years that have passed –

MR BILLINGTON QC:

No I hadn't because I was about to go to the second point which is if you look at it in 2021.

WINKELMANN CJ:

But I tried to finish. You accepted earlier, yesterday I think, that if as it turns out the jury was given wrong information by this expert although she didn't know it was wrong and the Court at the time didn't know it was wrong but we now know it's wrong, you accepted that that could have led to miscarriage of justice, just as when we have in the DNA evidence area or the ballistics evidence area or fingerprinting and suddenly it turns out that a jury's been told the wrong science.

MR BILLINGTON QC:

So we're looking at evidence that was admissible because it met the statute, but we now think, not think, we now know is probably a better way to put it, that the evidence was wrong in the sense that it was factually and scientifically flawed. It would have to be at that level, your Honour. Not just a difference of opinion, it would just have to be qualitatively wrong, the analogy I drew with the DNA and the blood tests.

So the duality is this, one, was this admissible? The answer to that, before we go to the detail of it is, yes. Was it susceptible to objection? Yes. What would the grounds of objection be, not that it didn't comply with the terms of the statue, but that its prejudicial effect outweighed its probative value. But for whatever reason, counsel did not make that objection. And nor did counsel in the Court of Appeal make the same objection. And the Court of Appeal, if nothing else, is reflecting judicial thinking at the time with regard to the interpretation of what was a relatively new statute.

So, in my submission, it would be difficult to conclude without the qualification the Chief Justice has reduced, that this evidence was not properly before the jury in 1993.

WILLIAMS J:
What do you make of the potential impact of the letter?

MR BILLINGTON QC:
The letter.

WILLIAMS J:
Yes, assuming for present purposes that it wasn't available to counsel, is that conclusion in the Court of Appeal that there is a line, it's a fine line, it wasn't crossed, correct?

MR BILLINGTON QC:
I have trouble keeping all the detail in my memory.

WILLIAMS J:
Me too.

MR BILLINGTON QC:
Yes. But my recollection is that there was cross-examination around the fact and the jury were told around the cancellation of the interview.

WILLIAMS J:

Yes, there was that, but it was –

GLAZEBROOK J:

It was stopped, wasn't it, before –

WILLIAMS J:

It was all nipping at the edges because the gotcha wasn't before them. Because it really was a gotcha.

WINKELMANN CJ:

It was stopped, Mr Billington.

GLAZEBROOK J:

It was stopped, yes.

WINKELMANN CJ:

It was stopped.

O'REGAN J:

Really a section 23G –

WINKELMANN CJ:

No, it's not actually, I don't think -

MR BILLINGTON QC:

I wonder, you see one of the ways of viewing this, and again practice has changed slightly, collateral issues for example –

WINKELMANN CJ:

We may have taken you off course here?

MR BILLINGTON QC:

You have taken me off course.

WINKELMANN CJ:

Because it's not section 23G.

MR BILLINGTON QC:

No it's not.

GLAZEBROOK J:

Well, it is actually probably.

MR BILLINGTON QC:

It's a fairness issue, I think.

WILLIAMS J:

That's right.

GLAZEBROOK J:

I mean it probably is in terms of what the Court of Appeal in the appeal said was section 23G, but I personally don't see that as section 23G.

MR BILLINGTON QC:

No, I don't, I just think it's in the general fairness, is it something that got in the road of –

GLAZEBROOK J:

Well, contamination isn't section 23G, it's a totally different point.

MR BILLINGTON QC:

It is.

WINKELMANN CJ:

I mean, I would actually like to hear from you and I appreciate it's not at this point, but I mean, Mr Harrison was stopped from cross-examining in relation to this point. He also didn't have the document to cross-examine Dr Zelas, and so –

MR BILLINGTON QC:

No, it's not something I was aware of particularly either, but the point is that what the letter says is this child has reached a point where they can no longer give evidence that can be relied on. And that interview was cancelled because of that. Now one would think that's an appropriate course to take. The parents complained, we know that. Now, the question then is this, what would be the basis of cross-examination of Dr Zelas in relation to that child? So: "Did you, Dr Zelas, form a view that this child's evidence had been contaminated as a result of parental discussions?" Answer: "Yes." Now, I'm not sure where that takes the defence because –

WINKELMANN CJ:

You do really know where it takes the defence, Mr Billington, put yourself as defence counsel with that letter, you would regard it as –

MR BILLINGTON QC:

Well, the interview was cancelled, so the evidence –

WINKELMANN CJ:

But you would regard it as cross-examination gold, wouldn't you?

MR BILLINGTON QC:

No, no, but I haven't appreciated – I'm just trying to think where it would take you because where it tells you, yes, Dr Zelas would say that's exactly right. This child's evidence had been contaminated to a degree that we could no longer call that child to give evidence in relation to that matter.

Now whether you could then extend that back and say well are you satisfied Dr Zelas that the – this is where you run into difficulty with cross-examination – well you cancelled that one because you then knew by the end of the third interview that contamination occurred. Let me put it to you that the first interview was equally contaminated. Well I'm not sure I'd ask that question because the answer is almost certainly going to be no so you're no further ahead. All we know is that this doctor is going to agree that they stopped the

process. What you can then say to the jury is well: “Members of the jury, the process was stopped because the child was spoken to by her parents, contaminated and you didn't hear any evidence of it, but the question for you members of the jury is this: are you satisfied that the earlier interviews aren't equally contaminated,” but you can almost guarantee that any question in relation to the earlier interviews are going to give the answer, no, that that was not the case because if that was the case the doctor said I would have told the police then not to proceed with this. So that is how I see the letter but equally as I said yesterday, defence lawyers have different views as to what they can do.

WILLIAMS J:
But the contamination view expressed in the letter is a retrospective one not a prospective one.

MR BILLINGTON QC:
Yes it is.

WILLIAMS J:
And the interviews are retrospective interviews.

MR BILLINGTON QC:
Yes.

WILLIAMS J:
So she’s going to be pushing it uphill a little bit to say that: “I have no concerns about contamination in the earlier interviews,” when in fact they were the source of her concerns.

MR BILLINGTON QC:
Yes, that's perfectly fair. Well it's certainly an issue you can raise in the way I've said how can you be confident, and you're saying this to me as if these interviews were all contaminated.

WILLIAMS J:

I can imagine you cross-examining on this Mr Billington you'd have a field day.

MR BILLINGTON QC:

I said that the proposition would be –

WILLIAMS J:

Any competent cross-examiner would.

MR BILLINGTON QC:

– how can you be confident that the rest of the interviews aren't equally tainted and it doesn't much matter what the witness says I suppose.

WILLIAMS J:

Well that's the ultimate question, yes, but that's at the end of that cross-examination but you've got a whole lot of laser questions before you get to that.

MR BILLINGTON QC:

Would you be good enough to remind me that the questioning was stopped because I just don't have all the detail in my –

GLAZEBROOK J:

We did have it up just before I thought where it was stopped.

WILLIAMS J:

Yes, it was a ruling.

MR BILLINGTON QC:

Is this cross-examination Dr Zelas?

O'REGAN J:

It was in the memorandum handed up by Ms Colley where the Judge made a ruling which was quoted in that memorandum.

GLAZEBROOK J:

I knew I'd seen it recently.

WINKELMANN CJ:

Are you talking about oral judgment number 9 ruling?

MR BILLINGTON QC:

Yes. You're talking about the ruling as to –

WINKELMANN CJ:

Are you looking for the letter or the ruling?

MR BILLINGTON QC:

No the ruling, yes.

GLAZEBROOK J:

We could perhaps get the cross-examination up but I don't know whether Ms Colley's got the point in the transcript where the cross-examination was stopped.

MR BILLINGTON QC:

Yes, the reasoning is set out on page 2, isn't it, of that ruling which is volume 5, tab 30. So the doctor is expressing an opinion and the – page 178 of the transcript. This is the parents.

ARNOLD J:

301.0094 I think. Sorry, that's the ruling.

MR BILLINGTON QC:

The ruling is – is the ruling in the bundle?

MS COLLEY:

The ruling is that one there.

MR BILLINGTON QC:

Yes, I know, but is it in the common bundle? I don't think it is.

WINKELMANN CJ:

Yes, it is. It's at tab 14 of the common bundle.

MR BILLINGTON QC:

Yes, it was handed in. It's probably useful to look at both at the same time if that's possible.

WINKELMANN CJ:

I did say I didn't think you had to deal with it now.

MR BILLINGTON QC:

I think we might as well because I'm not going to be any better equipped any other time.

WILLIAMS J:

Well, it does go to that paragraph in the Court of Appeal's judgment where they say, look, this is a fine but it hasn't been crossed.

MR BILLINGTON QC:

Yes.

WILLIAMS J:

The too many hats problem which is only obliquely alluded to.

MR BILLINGTON QC:

That's a different issue, the too many hats, I think, but what we're looking at here is was – in fact, what we're looking at here really is is this a correct ruling, ruling 9, and that is the scope of the cross-examination because what was being sought was to cross-examine Dr Zelas on her opinion about the child's veracity and the Judge says, well, you cannot cross-examine that witness, the mother.

WILLIAMS J:

But isn't the point really that the involvement, the vicarious clinical involvement, shall we call it that, of Dr Zelas, compromised her position as an expert with respect to that child at least, and child 6?

MR BILLINGTON QC:

Because she'd given an opinion about the child's suggestibility.

WILLIAMS J:

Right, so that she could not be the person referred to in section 23G. She was too compromised.

MR BILLINGTON QC:

Sorry, that she couldn't speak of that child because of the fact she'd had this involvement?

WILLIAMS J:

Well, she could not speak in terms of the counterintuitive 23G evidence, consistent or inconsistent, because she had been involved in a clinical way with the child. Now, generally speaking that might not raise too many concerns.

MR BILLINGTON QC:

No.

WILLIAMS J:

It's untidy. But then we've got the letter.

MR BILLINGTON QC:

But didn't we have the proposition that perhaps witnesses such as this should actually have seen the child themselves before they express the opinion? That's another issue. She seems to have seen this child and formed this view. In fact, wouldn't you put it the other way and say she's acting quite

appropriately as an expert and saying do not put this child up because, because she's been subject to this contamination?

WILLIAMS J:
I thought we were proceeding on the basis that 23G counterintuitive evidence cannot be based on personal engagement?

WINKELMANN CJ:
I think that provision actually says it. I may have put you wrong with earlier questioning but I don't think it, that the witness is allowed to base it on their own examination of the child.

MR BILLINGTON QC:
No, no.

O'REGAN J:
But I think they –

GLAZEBROOK J:
But I think that's what Dr Blackwell said was the problem.

O'REGAN J:
Yes.

MR BILLINGTON QC:
But what was being sought to be done here was an examination of the parent about an opinion expressed by another person.

WINKELMANN CJ:
No, no, it was about her letters. If you look at the ruling, it's about her letters. They wanted to…

MR BILLINGTON QC:
To put to the mother?

WINKELMANN CJ:
Yes.

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:
Her own correspondence.

MR BILLINGTON QC:
Yes. And the ruling proceeded on the basis that you're questioning a witness about an opinion somebody else has expressed, that's what the judge has ruled, and that's not something that you can do. If nothing else, it infringes the collateral evidence rule. It's a collateral issue, and then you finish up with an argument as to whether the opinion is right or wrong. That's why the judge would have ruled that out.

WINKELMANN CJ:
But the cross-examination was sought to be pursued because of the issue of contamination, so this was evidence that –

MR BILLINGTON QC:
But it's the route into it, I think, was the problem, coming in through the mother as to what someone else had said about her child. That was – if you go to Dr Zelas and say –

GLAZEBROOK J:
Well, it was her reaction to it so it didn't actually infringe hearsay at least.

MR BILLINGTON QC:
No.

WINKELMANN CJ:

I think, Mr Billington, you're misunderstanding my earlier point. They were trying – the counsel were seeking leave to cross-examine the mother about her own correspondence.

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

So it wasn't someone else's opinion of it. It was her own correspondence referring to things that had occurred.

MR BILLINGTON QC:

But doesn't that have the same effect in the sense that the mother learns that a doctor's said your child is not to be examined any more and I'm very cross about this because – and I don't accept her opinions and I haven't done –

WINKELMANN CJ:

Well, that's one way you could have, one path you could've followed in cross-examination or else you could simply have relied on the information in the mother's own letter –

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

– to show the extent of involvement of the mother.

MR BILLINGTON QC:

Well, ultimately, yes, you can look at it either way.

WINKELMANN CJ:

Which doesn't bring in Dr Zelas' opinion.

MR BILLINGTON QC:

The Judge took the view it was collateral because it leads down a road that you – it's a collateral matter. The mother's expressing a view that someone else has said that her child shouldn't be examined any further. That is a collateral issue, and that's how the Judge has ruled. Equally, you may take the view that it's not a collateral matter but I'm not so sure that's correct. But if you take that view, your Honour, then the cross-examination would be permitted. Rulings happen, I don't think you can necessarily fault this ruling as a matter of law.

WINKELMANN CJ:

No but I don't think that was the point was it.

MR BILLINGTON QC:

Yes.

WINKELMANN CJ:

I think we had got to this ruling because we were asking about, you were dealing with Dr Zelas' letter.

MR BILLINGTON QC:

Yes I was and the question is what would you do with it and in the end my submission is you take that as part of the overall fairness and does it – has it reached a point where it is so unfair that it wasn't, it appears not to have been available. The ruling itself I don't think have that effect, I think the ruling, as you just agreed a minute ago, is perfectly correct in terms of law.

WINKELMANN CJ:

I'm not saying it's correct but I'm just saying we're not really talking about that.

MR BILLINGTON QC:

I thought you did for a minute.

WINKELMANN CJ:

I don't think we're talking about that. Yes I don't know if it's swept up in the grounds of appeal in the fairness level question but.

MR BILLINGTON QC:

No, no it's not. What we ought to do given its prominence in this trial is look at the evidence of Dr Zelas and I will do that now. Mr Cox this is volume 6 and tab 83. My approach, if it's acceptable to you, is to simply go through it as it was given and it picks up really the two main points and that is memory and section 23G, her qualifications and it also touches on the point that both the Court of Appeal in 1994 and Justice O'Regan asked is whether she was actually an independent expert and whether that was a matter that ought to be of concern. So it's an evaluation of this evidence and if we start at page 332, and I'm not going to read it, but on any view of the matter, in my submission, her qualifications which are both practical and in a written form more than qualify her as an expert in this environment. And then she discusses at page 334 her involvement in this particular inquiry which was a responsibility for the work of the interviewers remaining with social welfare and not her, she had some involvement throughout this inquiry, she attended the Knox Hall meeting which was the second of the two meetings. She had no formal involvement until later in 1992 at which point she reviewed the videotapes of the interviews, a wide range of those. She gave advice to the police more formally about several children and we have seen that now and I reviewed all videotapes at that point. She was also an observer from time to time. Subject to matters that arose in cross-examination later that is her involvement which may or may not have compromised her, I submit it doesn't. But that's the point Justice Williams was asking me about a moment ago. The evidence then goes on to discuss the general development level of children of the age group in question, that's lines 25 to 35, mental ability, thought processes and the ability of children to understand and communicate to the jury. Page 335, can I and I'll just stop here. What I tried to do and you may do the same thing, is try and relate what she's telling the jury here as to what we heard from the experts about what they would say and what they say now and whether it in

fact is so different from it. I tend to suggest that generally it's not but you may reach a different view.

GLAZEBROOK J:
Well you probably have to go to the bits because nobody has actually taken us to these bits and said it's wrong.

MR BILLINGTON QC:
No.

GLAZEBROOK J:
They have taken us to bits they say are wrong and they've taken us to bits where they say it's ultimate issue and they've taken us to bits where they think there's a lack of balance and it would be those that you would have to look at.

MR BILLINGTON QC:
Yes, you could pick bits out but what I'm doing is you read it as a whole and with the qualifications. I'm not so sure you're going to get driven –

WINKELMANN CJ:
Which is what you would say appellate courts do all the time.

MR BILLINGTON QC:
Beg your pardon?

WINKELMANN CJ:
You would say appellate courts do that all the time, look at things as a whole. You know, appellate courts often say you have to read the evidence as a whole.

MR BILLINGTON QC:
Yes, that's right.

GLAZEBROOK J:

I was just saying some bits are right doesn't actually make the bits that are wrong right.

MR BILLINGTON QC:

No, I agree with that. Well you come back to this prejudice effect and probative value in the end, I mean it's there for ever.

GLAZEBROOK J:

Well you just come to whether it's wrong or it's right.

MR BILLINGTON QC:

Or actually black and white wrong, yes, about which is a debate.

GLAZEBROOK J:

Sorry, I should actually say that was the submission that your meeting, I wasn't expressing an opinion on it as a –

MR BILLINGTON QC:

No, no. And then we've got page 335, the thought processes of children: “Their ability to comprehend objects, touch, feel. They can't think in the abstract so easily. The world tends to rotate around themselves. As a parent none of this would appear to be terribly novel. Pre-school children, to an extent early school children engage in magical thinking,” that’s line 20. “Older children will sometimes regress when under threat in this manner. “They have at a younger age,” line 25, “a more limited ability to be clear about what things are real and can really happen and so these matters can be involved in the elaboration of magical thoughts. Magical thoughts in primary school aged children are commonly invoked in a self-protective manner to try and protect them from some adversity of threat.” She discusses briefly at page 336 at line 15 the ability of children to differentiate between truth and lies.

Now from there I move on in this discussion to page 341 where she introduces the subject of memory and recall and she says at line 9: “Memory

and recall as far as accuracy is concerned is how a child's memory equates with an adults memory referring to children we're talking about here a spread of ages of three to 10. Children's memories can be as accurate as adults and I think it's important to remember that. Children however tend to recall much less information than either an older child or an adult. If you just ask a child to tell you what happened in an open sense like that with a young child one is likely to get only a very small amount of information but the accuracy of that information is likely to be as accurate as an adult's account."

342, line 8: "The central detail of the event is more clearly recalled by a child than peripheral detail. A definition of central and peripheral detail, central detail in a piece of action is that detail which actively involves the child whereas peripheral detail are things around that." That's quite an interesting statement because we will recall perhaps from Professor Howe the pink thing on the window with the abused woman, that was a central detail to her although it appeared to be peripheral to the other parties and that really captures that concept.

"So what is the person wearing may be peripheral, it may not be. Central details, however, are recalled more readily than peripheral details and accuracy of recall has a part in that."

Bottom of the page, line 30, line 35/34: "In terms of obtaining information from the child perhaps in an interview situation any situation where you are trying to elicit detail the factors that are going to influence retrieval of that information the things that are best remembered are those events that had a significant emotional effect on the child.

And then we move into a discussion, page 343, of time gap and age starting at line 4: "Time is a factor. The greater the distance between the time when an event occurred and the time when a person, particularly a child, is being questioned about it the less likely the child to be able to recall the event, but it's not just confined to children. And that's one of the matters we heard from Professor Hayne, a number of them. And then line 17: "As far as a child

recalling events several years later when they might be seven or eight as opposed to three or four is quite complex." So that's identified in the age issue.

Right at the bottom of the page we then start at line 37 with trauma. "With regard to traumatic memories and traumatic events they will not necessarily be recalled all at once, they may be retrieved over a period of time. Traumatic memories are commonly retrieved piecemeal and the more a person thinks about them the more they remember and this is so for children as well. They will inevitably be incomplete to some degree when talking about children because all their memories will be incomplete to some degree and over the passage of time retrieval will occur given cues and a motivation to remember. What happens is also that remembering one aspect or one event triggers a memory for something else," I think we're all familiar with that concept. That, you might think, is an explanation for why there's more than one interview here. It takes time for anybody to remember and cues will promote a memory as time goes on, as you remember one thing something else then jogs your memory, if we use that expression.

GLAZEBROOK J:
Well it isn't said to be good practice though is it and I don't think it was good practice at the time.

MR BILLINGTON QC:
It's unhelpful. Then at the bottom of the page, line 29: "With regard to children's development at this particular age as to what ability they have to perceive the significance of particular questions of an interviewer, because a child's thought processes and reasoning skills are very limited they will often not be able to guess what an interviewer has in mind when they ask a particular question and therefore are less likely than an adult to fill in the gaps."

Then we go down, the next page 345 we go into the question of interviewing techniques starting at line 27. "The issue of interviewing children generally,

they tend to be piecemeal, small with free recall and we go through this pattern then of asking them questions and demonstrate what they are saying in a nonthreatening manner."

Then she then talks about the evidential interviews at page 346 and this is the structure of the interview. "The basic form at an interview the first phase is to engage with the child and put the child at ease, there are no specific requirements. The child is asked to distinguish between truth and lies and understands a promise to make and tell the truth," that's lines 5 to 15. Page 347, line 2: "The next phase one would recommend is using or offering the child any aids that might assist the child to describe an event to facilitate recall." We move down to lines 14: "There are other types of approaches, if a child is known to have disclosed information outside the interview," which I submit is highly likely in cases of this nature. "But to date within the interview has not repeated that information or any other similar information," and here we have this contentious issue of using anatomically correct dolls to give the child the opportunity to demonstrate an event.

But she qualifies that at line 28: "It is not something that one ordinarily, deliberately would do at the earlier phase or assessment of a child. Quite commonly interviewers will also at the end of an interview review with the child the information they have gained from the child. Sometimes by that means clarifying things further, perhaps helping distinguish between events," and then the final phase is bringing the interview to a close. A discussion continues about the effect of leading questions at page 348, lines 1 to 5, which is not contentious in my submission. And then over the page, page 349, two matters here is whether the language being used in nine is consistent with the developmental language of the child. And the other is, the child's ability to say "no" or "can't remember". Those phrases were all picked up in the interviews and in my submission are not controversial.

Now, it's 11.30, I don't have a lot more to do with this, but I'd like to continue this process, if you're finding it helpful, because in my submission it is the whole, rather than piecemeal. And it's my way of addressing the criticisms

that have been made. So, if you'd like to take the break now, I can do that and carry on.

WINKELMANN CJ:
Thank you.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.48 AM

MR BILLINGTON QC:

Page 350, Mr Cox, thanks. This is an interesting part of the evidence that deals with toys, commencing at the top of page 350. The role of play with toys or pens and paper generally in interviews such as this. Firstly, I think, one needs to distinguish between play and play materials and others for non-play purposes. In general terms, free play should be kept to a minimum, but there are places for it. And one of them is to stop the child feeling anxious. Then we move over to 351 at line 20, is where she then starts the discussion about behavioural characteristics. "Dealing with general indicators which are consistent with sexual abuse in children of this age, things one looks for. The behavioural effects of child sex abuse tend to be greater the closer the relationship of the child to the perpetrator." Issue of whether there's physical violence. "They types of symptoms," this is line 30: "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 the symptoms are not solely confined to child sexual abuse but can be caused by other sorts of traumatic events."

Over the page to 352, and that really reflects what Dr Patterson told us last week. "What tends to be apparent from studies of children who have been sexually abused, however, is that some are more likely to be indicative of sexual abuse than others and that the 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 mood, tearfulness, sadness, anxiety about bodily symptoms such as headaches, stomach aches, vomiting. There may be open expressions of anxiety and fearfulness". Line 15: "With younger children

regressive behaviour may occur so the child, as it were, slips backwards in their development at least in some areas." Line 19: "Particularly young children may engage in sexualised play with other children to a degree and specificness that most children do not engage in. It may become a pre-occupation." "Changes," at line 30: "in a child's ability to function more generally at school, loss of concentration," bottom of the page: "loss of self-esteem." Page 353: "Anger and hostility not necessarily focused at the perpetrator but may come out generally." Line 20, which is not particularly relevant here is, but it was discussed in the evidence we heard is: "Recanting is not uncommon in children who have been abused. It's a common finding because," at the bottom of the page: "many children will either deny or fail to disclose sexual abuse at the time its occurring." We go over the page to 354, line 7: "Ordinarily a child will have warm feelings, loving feelings for that person because not everything that takes place between the child and that person is of a negative nature." This is explaining why it might not necessarily be disclosed. Equally, however, line 20: "Sometimes there will be threats made by the perpetrator against the child," and that was a feature of this case, allegedly.

Then go to page 357, "Other factors", and this is speaking about a child at line 7: "The mother gave evidence about a person at the crèche being extremely extroverted, happy child. Following departure from the crèche, less confident, no extroverted and frightened of minor things, that behaviour could be consistent with a child who's been abused. It's a marked behavioural change which has been more recently relived. It could have, of course," at line 14: "be consistent with other factors, other events. The more such factors that are present, the greater the likelihood. There is a general description by the mother of the child being more confident after counselling and disclosure interviews."

We then move on to page, the cross-examination starts at page 382, the next passage that I want to refer you to is at page 385, line 30. Mr Cox, have we got this page 385? Perhaps take us to the top of the page, if you wouldn't mind, thank you. This is a discussion in cross-examination about infantile

amnesia and source amnesia. And then it moves down to more focused questioning at line 29: “You accept that for young children most people cannot remember what happened in that preschool period.” Answer: “There is a difference between what an adult can recall of being three or five, or what a three or four or five, six-year-old can recall of being three or four.” And that is what we’re discussing here. “What research have you done in this area?” “I’ve done no research other than reading other people’s research.”

Suggestibility was raised at page 386, passage commencing line 24, 25: “Would you accept children in the preschool period are more subject to suggestibility than older children or adults?” Answer: “Yes.” “Would you also accept that in young children the state or the environment they are in at the time can also influence how suggestible they are?” Answer: “At the time of what?” “At the time the suggestion is made?” “Suggestibility is a human characteristic and occurs at all ages but is greatest with very young children, children younger than the ones we are considering here and gradually diminishes with age but it affected by the emotional state at the time and the circumstances at the time. Essentially you can almost place suggestibility on a curve from extremely young children through to adults?” Answer: “Yes but you are still suggestible.”

Page 387, this is a discussion of leading questions, line, really at the top of the page: “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 the particular child answers the question and responds to the leading question,” and there’s a discussion as to that and the context of an interview situation, and then the questions coming down the page at 20 where such questions are asked by non-interviewers, the concept that they will pick it up. “A leading question’s a leading question whoever asks it,” but then counsel

explored leading questions from parents so they're not asked in isolation and the concession was: 'Yes the child may take on board the question," and that's at line 33.

This is an interesting piece of evidence, your Honours. "If that is the case and there are further questions asked then it's entirely possible for children of this age to develop a whole scenario based on the type of questioning undertaken by the parent?" That's the question. Answer: "Only if, as you say, the whole series of questions, as it were, were all leading questions so that all the information was coming from that parent and even so there would need to be very strong motivation," we're going over the page, 388, "For the child to pick up that information and in my opinion and in 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." "Children of the age of which the children we are dealing with also at this age have the ability to create a certain extent scenarios?" was the question. "Yes, but they can only create scenarios on the basis of information that they have from their general knowledge and life experience, they can't create information out of nothing," and there are examples given, and then this is a discussion about something that the witness didn't agree with, a sexually abused child syndrome, that commences at page 388, line 20 and that moves down to line 30: "The behaviours which you have been referring to as being consistent or inconsistent with child sexual abuse also come under that syndrome?" Answer: "They are not described in conjunction with that syndrome no. They are likely to be behaviours some of those children may manifest but the actual discrimination of the," whatever the syndrome is, "Is not one that describes all the behavioural consequences of child sexual abuse." So this is the qualifier. And we then go over the page to page 389 starting at line 4: "Would you accept that the list of symptoms you have relied upon which you include to make up your profile are also inclusive of the symptoms of a wide variety of childhood disorders and normal behaviour in young children?" Answer: "The majority, as I have already indicated, are not exclusive to child sexual abuse. When defined as

symptoms that endure over a period of time none of them are normal which does not mean that a normal child does not, for instance, occasionally have a nightmare or if they are toilet trained occasionally wets their pants or bed but that is something different from something actually reaching the significance of being what is clinically referred to as a symptom. These symptoms, as you referred to them, are also symptoms of anxiety, are they not?" Answer: "That is correct. Anxiety in a child can be caused by a multitude of things, yes, and that is why the importance of looking at the full spectrum of the behaviours in the child and why those behaviours or behavioural symptoms that are less commonly associated with other causes such as sexualised behaviours become significant." Now that's the qualifier I think that Dr Patterson put on the same information in her affidavit and cross-examination.

The next page, line 1: "Where you have a child displaying a cluster of behaviours," this is the question, "at best that can be said to be indicative of anxiety in the child?" Answer: "There have been studies of sexually abused children which suggest that the clusters of certain symptoms are more likely to indicate sexual abuse even though they are symptoms of anxiety in the child."

Now I understand the objection to that in the use of the adjective. One of the things Dr Patterson's evidence told us what that in the general population, this is paragraph 26(2): "Children who had been sexually abused as opposed to the general population did display these symptoms but equally," she said in paragraph 26(3), "where you've got children who are disturbed there was no differentiation between the two." This is not really inconsistent in my submission with what Dr Patterson says about it.

WINKELMANN CJ:

Sorry, you're saying it's not inconsistent with the notion of clusters because I think every witness who was asked the question about clusters said no there was no basis for that.

MR BILLINGTON QC:

You know, I think the use of the word *clusters* is unfortunate. I've described it as an adjective but what its describing is a child displaying a number of symptoms and it's been expressed in that way by this witness herself.

No what I think if one looks at this paragraph lines 1 to 7 and puts it alongside Dr Patterson's paragraph 26 of the affidavit. First of all she identifies a range of symptoms in 26(1) of the sort that we're discussing here. Secondly she says in the next paragraph that in surveys of the general population children who have been sexually abused displayed a higher proportion of those symptoms but thirdly the qualifier is that where children who had psychiatric issues of some sort there was no differentiation. So it is not as high as that expressed but my submission is and ultimately your Honours it's for you, I'm not so sure it's all that far wrong with what we have been told today but that's simply my take on it.

WINKELMANN CJ:

So what is said against – said by the appellant is that when you look at – and there are other portions of the evidence we were taken to that there is a sense that comes from Dr Zelas that the more there are the more indicative it is and then you combine that with the chart.

MR BILLINGTON QC:

Yes. Would you remind me to answer that question again when I've finished this.

WINKELMANN CJ:

I may and I may not.

MR BILLINGTON QC:

You may not. It depends whether you remember to do so.

WINKELMANN CJ:

Exactly right.

MR BILLINGTON QC:

We then go, because I do want to round this out if I may, it addresses your question. If we go to page 391 and line 15, it's a discussion of sexualised behaviour. Line 16: "In terms of sexualised behaviour I think you mentioned on Monday last that sexualised behaviour must be learned, is that correct?" Answer: "I said sexual information must be learned, sexual knowledge." "Then you would agree that some forms of sexual behaviour the young child may learn for themselves?" Answer: "Fondling their own genitals they learn for themselves." "And masturbation?" the question. "Yes."

But then you go down to line 25: "Your reference to knowledge of sexual activities that you have mentioned under section 23G in terms of specific children such knowledge can be either learned through being taught or being seen or actually participating in, is that correct?" Answer: "It is in broad terms but there are differences in which a child will give account of events depending on whether it's being taught by an adult, observed it personally or involved in the activity themselves."

We've then got a passage, evidence at page 393 through to 396, which is cross-examination of the witness' involvement in the Holmes programme early in the year, March 1992. I'm not going to take you all through it but it addresses an issue that Justice O'Regan raised with me yesterday as to the line between independence and otherwise. The timing of this is before the formal engagement. It post-dates the Knox Hall meeting but it's before the formal engagement by the police to give advice. It is unfortunate, and –

GLAZEBROOK J:

You said after the Knox Hall meeting, is that right?

MR BILLINGTON QC:

She was at Knox Hall meeting, yes.

GLAZEBROOK J:

And this is afterwards?

MR BILLINGTON QC:
It's after the Knox Hall meeting but before the formal engagement.

GLAZEBROOK J:
Yes.

MR BILLINGTON QC:
And it's obviously a matter that was there to discredit the witness and it was an appropriate way of approaching it, but what does come out is what was said at that interview with Holmes is effectually what was the advice being given to parents: do not contaminate your children.

It doesn't really compromise the advice that she was giving either then or later. What it does, it just raises an issue, this is pretty – this is not very fortunate behaviour, but she hadn't been engaged, so it is what it is, which is a pretty poor submission to make, isn't it, really? It's just a fact. What you make of it, I'm not sure. But me saying "it is what it is" is not really helping you either. I submit it's not so significantly compelling as to compromise her independence. But you'll form your own judgments on that. So it is what it is.

And then we move down to page 398, and her discussion then on the scope of section 23G, commencing at line 3. Question: "In terms of section 23G you have ignored the behaviours that would be inconsistent in those children, is that right?" Answer: "Well, the task has been, I haven't ignored them in my own consideration, the task has been to identify those matters in their behaviour which are actually consistent with the information that they have given in their interviews." I think that's quite an important answer in relation to what the Act permitted at the time. "If you have never thought about behaviours that are inconsistent with –

WINKELMANN CJ:
Well, the Act did permit her to give evidence about that which was inconsistent though, didn't it?

MR BILLINGTON QC:

Yes, and as I said yesterday I really wonder how you can do that. There are no symptoms. You say, well, that's inconsistent. I just don't understand how you can actually express that in a meaningful way. I don't. That may be my problem but I can't see how you can. All you can say is: "This is what I observed. These are symptoms. My evidence is they're consistent."

WINKELMANN CJ:

I mean it's better –

WILLIAMS J:

But if everything is consistent, that's problematic, isn't it, without saying to the jury: "Look, it's consistent but, to be fair, everything is consistent," which she doesn't say.

MR BILLINGTON QC:

Well, that's a bit of – that's actually what she said. That's what she said, this is not just symptomatic. Well, the passage I'm about to come to plus others. She's qualified it all the way through.

WILLIAMS J:

She said there could be other causes –

MR BILLINGTON QC:

Other causes, yes.

WILLIAMS J:

– for the symptoms that she's identifying as consistent?

MR BILLINGTON QC:

Yes.

WILLIAMS J:

But your point is a different one, that is that everything is consistent?

MR BILLINGTON QC:

No, my point is you –

WILLIAMS J:

All behaviours are consistent?

MR BILLINGTON QC:

She is saying what she has identified as "my task was, and I haven't ignored them, is to identify those matters in their behaviour which are actually consistent with the information they have given," but you could say, well, the child's given those but a child also eats three meals a day and plays rugby. Well, I don't know whether that's consistent or inconsistent. I mean I don't know what you say. I don't know what you would say except doing what Dr Le Page did and said, well, these are not diagnostic of… which he got into trouble for saying that but they're not diagnostic of it. But you can't. I mean, a child's a mix of symptoms and non-symptoms.

Then you've got a long question and an equally long answer at the bottom of the same page, 398, line 26, this is the question: "The term 'sexual abuse' covers a multitude of behaviour, are you saying that where a child suffers an indecent exposure by an adult then due to the make-up of that child you may discover just the same cluster of behaviours as a child who has been raped, for example?" Answer: "No, there are a variety of factors that seem to be associated with more serious reactions from children and these include abuse which has occurred repeatedly over a prolonged period of time."

Now we then go to page 408, line 23: "Do you know who is regarded as the inventor of the syndrome sexually abused child syndrome? Answer: "I'm not sure what you mean by that. In its typical form the sexually abused child syndrome is merely the notion that there are a set of behavioural characteristics such as you described, signs or symptoms typically of children who have been sexually abused, with that definition do you understand what I am saying when I refer to the sexually abused child syndrome?" Answer: "Yes." "Are you also aware that the use of such a syndrome has been largely

discouraged and discredited in the US because it the Frye test?" Answer: "I am very aware from my own experience as well as from my reading that it is inappropriate to diagnose sexual abuse solely on the basis of behaviour symptoms and that is not something that I would do. It is diff. 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."

Then over the page 409, line 16: "There is a very big diff. between saying something is indicative of abuse and saying it is or may be consistent with abuse and I think that the difference of opinion that you are alluding to in my experience is to do with the way in which one applies and makes use of the behavioural information from the child. In your evidence Monday last about interviews you refer to the use of anatomically correct dolls, would you accept such dolls could be suggestive to a child?" Answer: "I don't accept that and the recent research suggests that isn't so. However, because of the quite commonly held but uninformed view that they are suggestive I do not encourage interviewers to use anatomically correct dolls in the first instance with a child but to use them after a child has made a disclosure of abuse either in the interview or to some person outside the interview."

Page 410, it's questioning about a particular child, line 4: "Would you also accept that the stress headaches she suffered could also be consistent with emotional trauma in the 5 family?" Answer: "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."

There's discussion about sexualised behaviour at page 411, lines 25 and there's a discussion there about the boundaries between what is normal sexualised behaviour as opposed to, as the witness says, crossing boundaries and actually unzipping the trousers of men they know and there's a discussion about that and you will be pleased to know I've almost finished at page 421, re-examination.

The whole page is concerned with it and it concludes at line 30, 32: “One of the things that has to be remembered also is that many of the symptoms are actually appropriate under certain circumstances. It is appropriate to be afraid at times. If someone prevented you from going to the toilet for 24 hours chances are you'd wet your pants. There are certain circumstances so you can't just take that symptom in isolation without knowing how persistent and invasive it is and what other things are present, what changes there are that are inconsistent with their normal patterns of behaviour, what things a child is saying, they all have to be taken together.”

All I can ask you to do now is stand back and take the totality of that evidence, and look at it afresh and ask yourselves if, at the time this trial was conducted, would it be ruled inadmissible as non-compliant with section 23G. I submit the answer is no, it wouldn’t, having regard to judicial thinking at the time. There was no objection made and the only basis of objection was that if it complied with the Act is that it would – its prejudicial effect outweighed its probative value. That’s never been argued.

WINKELMANN CJ:
Can I just ask you, test one part of your answer there?

MR BILLINGTON QC:
Yes.

WINKELMANN CJ:
You’re saying would it have been ruled inadmissible in 1993 but that really, even on the best view, it is not the question for us really, is it, because not what a trial judge is doing but really what was the – it was the correct view about section 23G that the Court of Appeal –

MR BILLINGTON QC:
Yes, you sitting, you, your Honours, sitting as trial judges then applying the law then. Not what Justice Williamson did. It’s what would you do with this

evidence as a trial judge then, and my submission is you would find the way in which it's given is that it's admissible evidence. All relevant evidence is admissible, it complies with the statute, in terms of judicial thinking at the time and the way in which that section was interpreted.

ARNOLD J:
Dr Zelas went through from page 354 on the individual complainants and commented about them.

MR BILLINGTON QC:
Yes.

ARNOLD J:
And you skipped over that for obvious reasons of time and so on. But what is your general submission about that process and the way Dr Zelas did it?

MR BILLINGTON QC:
I think you and I come from a similar place, your Honour, in that sense.

GLAZEBROOK J:
I'm sorry, I just missed the first part.

MR BILLINGTON QC:
I think his Honour, Justice Arnold, and I come from a similar place in a similar time in that sense. I did read that with interest.

WINKELMANN CJ:
Because I must say, Mr Billington, there is quite well-established law, isn't there, that experts aren't really meant to sort of give a commentary in that fashion.

MR BILLINGTON QC:
Yes, that is right. If I had been sitting in defence counsel's chair at the time, it would have raised concerns with me then and probably, and I've made a number of objections to evidence over my professional career, they haven't

always been accepted, but would I have considered that? I certainly would have, yes, for the reasons that – and I think the best way to look at it is this. It actually does comply with the statute in the sense that it talks about what the statute permits, but it goes into the individual child and that is where it is problematic. But the difficulty with that is, that is what I think the statute contemplated as being counterintuitive. What we discovered was it became unmanageable because it did exactly what you're raising with me. So technically, and I think if I was dealing with it then, trying to put myself in defence counsel's chair, I would not be able to say to the Judge: "Your Honour, this doesn't comply with the statute. What I would say to you is this, your Honour, its prejudicial effect outweighs its probative value." Now that is a discretionary matter.

GLAZEBROOK J:
But how does it do that because –

MR BILLINGTON QC:
Once it –

GLAZEBROOK J:
Well, the lament of defence counsel is often, well, that's really prejudicial, and I think I've heard Justice O'Regan say that that's the point of Crown evidence.

MR BILLINGTON QC:
I was about to say I…

GLAZEBROOK J:
So it's wrongly prejudicial.

MR BILLINGTON QC:
Yes, that's the whole point. All Crown evidence is prejudicial, and I've had that served up.

GLAZEBROOK J:
So it has to be wrongly or unfairly prejudicial?

MR BILLINGTON QC:
Yes, it does, and that's your problem, isn't it, and I think that's why. I've tried to work out why this wasn't –

GLAZEBROOK J:
But I'm not sure it necessarily is because going through each child was actually possibly or, certainly that's the argument you're meeting, actually talking about the ultimate issue whether those children were telling the truth or not.

MR BILLINGTON QC:
Yes. I understand that, and you run into the problem of how this section is supposed to work.

GLAZEBROOK J:
You say, these behaviours can be consistent so that there are a range of behaviours that can be consistent with trauma, that trauma can be sexual abuse, it can be other factors. It also, these behaviours can be exhibited by perfectly normal children who were just exhibiting behaviours and I suppose you might say, what's traumatic for some children may not be traumatic for others and I'm just interpolating that because I'm just assuming that might be one of the reasons why people don't display behaviours is because something that's traumatic for one may not be traumatic for another.

MR BILLINGTON QC:
I think that's true.

GLAZEBROOK J:
And I know that is true with PTSD.

MR BILLINGTON QC:

That's true with children.

GLAZEBROOK J:

Well, it's true with PTSD, somebody can stub their toe and get PTSD, other people can have absolutely appalling experiences and not, or at least not immediately, but…

MR BILLINGTON QC:

Yes. Well, I think it's also true of children where they have a very close and warm relationship –

GLAZEBROOK J:

But all I'm really saying is that is the evidence she give and then the jury themselves do with it what they will, having had it explained to them and decide in the particular case whether it helps them decide whether its sexual abuse or not. It won't be conclusive, because they've been told it's not conclusive, they've been told it's not diagnostic.

MR BILLINGTON QC:

Yes, I think the response – no, it's not, I don't think anybody's, neither witness has suggested that, they haven't. And I think the answer to your question, Justice Arnold, really is this. That the trial judge, if the objection was made will respond, yes, but there is sufficient balance throughout the totality of what the doctor is saying, so yes, the doctor's entitled to do, because if one thinks about the, say it's a one victim case, then the evidence could arguably be more likely to be given providing it has the balance throughout. Because we're looking at prejudicial effect here, we're not looking at non-compliance with a statute. So you'd have to say, well, yes, the statute's complied with, but it's prejudicial effect here is too great. And that's quite a hard submission to make in a trial context.

GLAZEBROOK J:

Well, it may not be here, in the submission that's made is that yes, she did refer to other factors but, in fact, discounted them, especially in the particular cases. And, therefore, she was talking about the ultimate issue. I absolutely accept that if there is sufficient balance and the evidence was given in the way I said, probably better expressed because it would be expressed by an expert in a better manner, but basically that these can indicate trauma and that trauma could be sexual abuse, it could have other causes.

MR BILLINGTON QC:

Yes.

GLAZEBROOK J:

So there's two aspects, I think, to the challenge was that there wasn't sufficient balance and the second aspect to the challenge, as I understood it, was that there was evidence on the ultimate issue which is not permissible under section 23G, or otherwise, and even more so at that time than it is now.

MR BILLINGTON QC:

Well, you're really responding in a sense to Justice Arnold's question about those, each child and is that ultimate issue –

GLAZEBROOK J:

Well, no there were two aspects to it, I think, with each child. One, that there wasn't sufficient balance, but the other one was that there was a comment on the particular issue and they're two separate points.

MR BILLINGTON QC:

Yes. It's an unusual process in the sense that, I come to it in a similar way that you do, we're removing time, we're removing anything, and I look at it and I then ask myself, why was the trial conducted in this way? None of us there, and it does raise the sort of issues that you have raised just now, and I'm asking myself about those, and I think my response ultimately is that, sitting, if I'm sitting as a trial judge, one would say, well, the starting point is the statute.

It's a new statute, I have to apply the statute, and is the witness giving evidence of symptomatics that are consistent with. Now the answer is yes. The next question is, if there was one victim would it be acceptable evidence? The answer likely is yes, if there's more than one, maybe not. And that comes down to what, I think you and I -

GLAZEBROOK J:
Sorry, no, I just didn't hear. If there was one symptom, it may –

MR BILLINGTON QC:
Sorry, you may say yes and as you go through what is happening but the problem you run into, I think, is if the trial Judge is applying the law correctly it's very hard to say to a trial Judge in a child sex abuse case that the law allows this but I'm going to not let the Crown do it. Now that's ultimately where the juris prudence moved to but at that time I don't think that's a realistic approach and it would seem fairly clear that counsel both then and at the appeal hearing in 1994 and in 1999 took exactly the same view. So it's easy for me to come along maybe now 28 years later and think well that – you think that's a bit odd and that's why I think Justice Arnold raised it with me but I've worked it through in that way and I think I get there in the end. But whether today we would do that I think the answer is probably it would be more difficult given where the courts moved with counterintuitive evidence.

WILLIAMS J:
I wonder whether an impartial witness, expert witness would have said: "These behaviours are consistent with child sexual abuse but there may be other reasons. I haven't not interviewed the children and cannot comment on that possibility because I do not have any knowledge of the child's background, I've only viewed the interviews." That would be a completely impartial statement, wouldn't it?

MR BILLINGTON QC:

It would be a counsel of perfection. The statute is not contemplating that occurring because it's based on the witness' observance of the evidence being given. If you come back to the other proposition –

WILLIAMS J:

Yes, but the witness already accepted that there could be other causes the details of which she can have no knowledge of yet in response to at least a couple of the children she discounts alternative explanations.

MR BILLINGTON QC:

Don't we have a problem with that in a sense that there are two things that happen with expert witnesses in similar environments to this. One, the witness sits and listens to the evidence, reads it or listens to it, at the preliminary hearing and subsequently, and gives their opinion on what is provable, proven in court. That's all the witness can comment on, whether it's – whatever it is. They can only comment on what the Court hears and may accept or reject. That's the proposition which the section contemplates.

WILLIAMS J:

Yes, but experts must comment on the limitations of their evidence.

MR BILLINGTON QC:

And this has been done.

WILLIAMS J:

Well, except that having discounted other causes without clinical knowledge of the possibility of other clauses hasn't she overreached?

MR BILLINGTON QC:

No, because I think the other side of that is what you're asking for is the clinician to come along who's been –

WILLIAMS J:
I'm not asking for anything I'm just dealing with this witness.

MR BILLINGTON QC:
No, well I think your proposition is that the witness would have to have been a clinician as well and then we run into all sorts of problems with a clinician who is treating a child and then say: “Well I'm treating this child and the symptoms are being displayed,” are in my view now on a diagnostic basis.

WILLIAMS J:
But we're not talking about a clinician, we're talking about a section 23G counterintuitive witness.

MR BILLINGTON QC:
No, I don't say that. No, you can't have that under that section, in my submission, it doesn't contemplate it. It would create –

WILLIAMS J:
What doesn't contemplate it?

MR BILLINGTON QC:
An interview of the child and a diagnosis, it just doesn't.

WILLIAMS J:
Quite, which is why I'm suggesting to you that an impartial witness would be careful to explicate the limitations of her evidence given that she doesn't know the background of any of the children.

MR BILLINGTON QC:
No she doesn't. All she can tell me, your Honour, is this witness and this victim and this victim’s parents have said this is what occurred. My child came home. My child would not go to the toilet. My child’s bedwetting. My child’s doing all sorts of things.

WINKELMANN CJ:

All right, okay. So where have we got to Mr Billington?

MR BILLINGTON QC:

Where we've got to is this. You have to read this evidence in its totality. Ultimately you put that alongside what we have heard and ask yourself is it really any different in any material way from that which we heard last week? Now in my submission, me, reading it as a lawyer, I do not find this evidence offensive but that's my perspective and you will have your own but I don't. I find from a suitably qualified person, suitably qualified and suitably identifying what was required of her and what is more, in my submission there is nothing in that beyond perhaps a discussion around anatomical dolls which really offends against current knowledge but that's just me but you have to look at it and say, well has knowledge changed so much that this evidence is simply wrong across the board and it's the totality element, it's not selected passages.

Now if you can say as judges this is just wrong by comparison with what we have heard so it becomes like a number quantitative. Then obviously it will affect what you decide but if you simply say well it's within the general bounds of acceptability both legally and factually then it doesn't, you don't get there.

WINKELMANN CJ:

The question is not just whether it's wrong with the knowledge we have, it's also whether it was wrong with the legal parameters and the knowledge at the time?

MR BILLINGTON QC:

Yes it is, that's right. Well as I say you start with the first proposition what are you doing as trial judge, as what we be doing as trial people then, applying the law and what do we do now, there are two separate questions. But the other thing that overlays all of this is that this was evidence that was being given in criminal trials of this nature for a long period of time and that in itself raises issues that you would obviously be aware of.

WINKELMANN CJ:

And it has to be said there was a reasonable level of appellate success with this kind of evidence being given wasn't there?

MR BILLINGTON QC:

Sorry your Honour.

WINKELMANN CJ:

There was a reasonable level of successful appeals brought on the basis with this kind of evidence at the time? I mean I think it's a fair point.

MR BILLINGTON QC:

Subsequently.

WINKELMANN CJ:

Subsequently but in the '90s, in the '20s.

MR BILLINGTON QC:

Yes, well I think the appeals were largely being brought on the scope of counterintuitive evidence and the propositions we've been discussing is where does it start and end.

WINKELMANN CJ:

Ultimate question.

MR BILLINGTON QC:

The ultimate issues, yes and in fact my first experience with Dr Blackwell was in the judicial review which he'd given such evidence and I challenged it, not very successfully but. Now I want to finish now with Professor Goodman from last Friday starting at page 358. It's funny, your Honour Chief Justice, it is a bit like a jury trial in that ultimately you're driven to selecting passages of evidence that you think will help. You will see other passages but these are simply ones that I think are helpful, and she starts off, as she said, she's got 45 years of experience discussing the very topics, this is the bottom of the

page, true and false memory, interviewing, lay and professional people's evaluations of children's accuracy, childhood amnesias she's published on.

We then go over the page. At the middle of the page she discusses where Dr Zelas had been trained in relation to interviewing at the Kempe Centre in Denver which it reflects in what Dr Zelas said and was consistent with her evidence. "The interview was videotaped and that was controversial at the time, toys and props were used," and she discusses that particular case. Then we go over the page, 1994 she conducted research in a special child protection unit, second paragraph. This is an interesting observation, this paragraph. "They often tell us that as children they were not willing to tell the legal or clinical professionals at the centre about the abuse they were suffering as children despite the leading questions and anatomical dolls that were used. This is the more frequent problem in my opinion than false reports. It is not to say false reports aren't possible, but the more frequent problem, the bigger problem, is not disclosing what's really happening in abuse cases." She then goes on: "I'll now attempt to address the Ellis interviews," and as she said many of the techniques are still being used across the US, which doesn't mean they're right, it just means they're being used: "83% bring writing or colouring materials with them, 57% bring body diagrams, 24% bring anatomical dolls, 18% bring toys," et cetera. So we're not out of step with what happened here, with what's still going on. Interesting at page 361, 1010: "We must remain cognisant of the fact that the interviewers do not know if the child has been sexually abused or not. They have to be open to the possibility that it did occur and often that may be true. They have to stay as neutral yet friendly while hearing about some horrible things that can happen to children. It is actually quite a difficult task but a task that is very easy to criticise in retrospect.

It's also worth noting we tend to be highly perhaps overly focused on what the interviewer says or does to prop the child during the interviews whereas the studies show the interviewers are often reacting to the child's responses. In other words, researchers were able to predict whether a child would acquiesce or deny in response to a question by examining the child's previous

response. In this way children often in effect determine the types of questions asked of them."

We then move over to the issue of contamination, page 363, middle of the page: "So finally I will address what I think will be the result of contamination in the Ellis case. A review of the initial interview tapes indicates that many of the children were already primed to disclose abuse quickly and in many cases, not all, but in many this has little or nothing to do with the dolls, props or anatomical pictures." She instances child 1. The child discloses the abuse before doing anything with the dolls. Child 2, same scenario. Child 3, similar scenario, likewise child's 4, 5 and 6 and 7.

What she says at page 364 at 1035 is this: "As the children were disclosing fairly readily and this is one likely result of the pre-interview contamination they experienced. As has been discussed at length by this panel, understanding exactly how contamination may have impacted the accuracy of the test is a matter of conjecture. It may have resulted in false or exaggerated accounts. It may have blended true memories with distorted memories. However, research on fantastical claims by child sex abuse victims also indicates that after trauma some children will themselves come up with exaggerated events to describe actual abuse and we've seen that in children we have tested. This propensity may be further facilitated by contamination. Ultimately the science only allows us to speak in terms of possibilities."

She then says over the page: "The were 116 children interviewed in this case but only seven resulted in convictions. That is 6% of the children interviewed. It is a small subset."

Page 365, second paragraph. "Overall, in my professional opinion the initial first interviews tended to fall within best practice norms of their day. Later interviews became more leading and problematic. Although they fell short in certain ways of best practice today we do not even know if best practice today can counter possible parental or other pre-interview contamination." And that is an interesting summary, in my submission, and informative as well because

it brings together many of the things that we have been hearing during the week.

What none of the witnesses are able to address is this because none of them had the experience of it. This is a trial from start to finish with its many varied components and ultimately the finders of fact are 12 individuals with different upbringings and backgrounds who heard all the evidence and as I mentioned in my start of these submissions, one of the mothers of the children described an event that she couldn't bring herself to discuss and was emotional about it.

Hearing and seeing the witness is something we simply cannot capture so my submission is this that you need to be driven to a point where you are satisfied that something has gone so wrong with this case that a miscarriage of justice has occurred and my submission is whilst there are criticisms that are able to be made ultimately the knowledge that the community has with regard to matters of memory are sufficient and do not need any more than the sort of prompting in those eight points I discussed with Professor Hayne and with you this morning, and having seen the alternative trial where children sit in a witness box in front of a jury, it's a horrific environment and this is a means of protecting young children against it. It was in its infancy, but it had that effect, but it did lead to a different way in which evidence was given, but it didn't traumatise children again and again. And to that extent we have to endorse that approach and knowledge has moved on. But we need to be careful what we do with it and from a time and an age.

Now, I don't think now I can make any further submissions but if you have any further questions for me, I'll do my best to answer them.

WINKELMANN CJ:
Thank you, Mr Billington.

MR BILLINGTON QC:
I just want to say, it's been a privilege to appear in this case, thank you, your Honours.

WINKELMANN CJ:

Thank you, Mr Billington. Now, Mr Harrison. Do you have a reply?

MR HARRISON:

I do have a reply, your Honour, but it's going to be reasonably brief.

WINKELMANN CJ:

Do you want to deal with it before lunch or do you want to collect your thoughts and deal with it after lunch?

MR HARRISON:

I think perhaps if I could just deal with it after lunch and I would imagine that I wouldn't detain the Court for longer than an hour, subject to questions.

ARNOLD J:

Can we start at two?

WINKELMANN CJ:

Can we start at two then?

MR HARRISON:

Certainly.

WINKELMANN CJ:

Thank you, we'll adjourn.

COURT ADJOURNS: 12.41 PM

COURT RESUMES: 2.01 PM

MR HARRISON:
E Te Kōti Mana Nui, tēnā koutou. Your honours, this morning we asked for a few additional documents to be placed under tab 20 and that was in request I think from the Chief Justice concerning photographs of the crèche and the toilets. So I have placed those under tab 20. There is a small diagram. Just to give the Court an indication of the vicinity of the toilets.

Just in respect to responses to some of the comments made by the Crown, firstly in relation to the corroborating evidence, perhaps if we could have page 401.0119 up, please. This is in relation to the Crown suggesting that photos of naked children had been found.

O'REGAN J:
Sorry, say that again. Photos?

MR HARRISON:
My learned friend said that there was some supporting evidence which was photos of naked children.

WILLIAMS J:
Naked backs, I think was…

MR HARRISON:
Yes, naked backs. Yes, so, and if we can go line 8 and this is child 4's mother: "While at the crèche I was aware of instances of body painting. Witness refers to exhibit 10182. I remember that photograph. It's a photograph of child 4. I think it may have been another child, I'm not sure, with their bodies decorated in paint. I was given that photograph after that happened at crèche." So it's a photograph taken of two kids with painting on their bare buttocks that's given to the parents. It's not as if it's been hidden away or it's open – it's not as if it's been found. It's just been handed over by

a parent of a child who obviously had no concerns about it for a number of years.

The second matter my learned friend referred to was the conversations. I think the conversations were quite risqué. They were of bizarre sexual matters but what's really significant, in my submission, is there was never any conversation referred to the police where he referred to children in a sexual manner at all. It would be fair to say from the evidence of crèche workers that it was a shock value in terms of his conversations. You might say that he had a bit of a mouth on him like a torn pocket nothing was filtered.

The sexual behaviour that the Crown referred on, there's one instance where a child exposed himself in the back of a car and then there is the other behaviour which we're not quite sure about, concerning child 4.

WINKELMANN CJ:
Just before you go on, was Mr Ellis asked about that passage that Mr Billington took us to regarding him predicting who might complain and listing 12 or so children?

MR HARRISON:
He was cross-examined and that, as I understand it, your Honour, and it was, he placed the conversation after the Knox Hall meeting, not prior, is my memory of it.

WILLIAMS J:
But he said he couldn't quite remember, to be fair.

MR HARRISON:
Yes.

WINKELMANN CJ:
What was the significance of that?

MR HARRISON:

The significance of?

WINKELMANN CJ:

The timing of it.

MR HARRISON:

The timing of it.

WINKELMANN CJ:

The implication being is –

GLAZEBROOK J:

He would've known that –

WINKELMANN CJ:

He would've known who it was.

WILLIAMS J:

The allegations had already been made.

MR HARRISON:

Yes, he was arrested on the 30th of March, the Knox Hall meeting is on the 31st and just while we're on timeframes, Dr Zelas was on *Holmes* on the prior to the Knox Hall meeting, about a week prior.

GLAZEBROOK J:

And not afterwards?

MR HARRISON:

Not afterwards.

GLAZEBROOK J:

And Mr Billington said that, or Mr Billington had it the other way round, but he, I think, also said that Knox Hall, she wasn't at that stage engaged, do you

agree with that? She was engaged after the Knox Hall meeting or is that not right?

MR HARRISON:

Well, that's what she had to say, but I challenged her on that in the notes of evidence because I put to her the appearance on *Holmes* which suggested to me that she had to be involved but she said she'd just been invited by an interviewer, but she was speaking specifically about the crèche.

WINKELMANN CJ:

So, I'm sorry, I missed. When did you say that the *Holmes* interview was in relation to the Knox Hall meeting?

MR HARRISON:

Prior and I can get that date for you, your Honour.

WINKELMANN CJ:

And her evidence was that she had not been engaged by the time of the Knox Hall meeting?

MR HARRISON:

Yes. So, it's 401.0412, please. Yes, so it's about line 13, and it starts: "Didn't you also appear on the *Holmes* show on the 23rd of March 1992?" She says: "No, not that I'm aware of." "What was the topic of that?" "If I did it was about a different topic." "There was a programme viewed on the 23rd of March 1992, Holmes programme, about the Civic Creche inquiry." "No, I haven't been on TV about the Civic Creche inquiry. I certainly don't remember it." "Do you not recall being asked by Mr Holmes on the 23rd of March 1992, he asked you the question: 'There's a danger, isn't there, parents can now start imagining change?'" and your answer is: "Yes, there is. I would very much urge parents if they can to be able to hold back until they have formal contact with the agencies that will be investigating these matters. There is a real risk if they start to try and speak with their own children about it, that unintentionally in their effort to get to the truth they might introduce ideas to the child by the way

in which they ask questions of the child and then they may finish up in a position that it will become impossible to know whether or not their child actually has been abused."

So, was insisting that she didn't have a memory of appearing on *Holmes*, but she conceded that she must have been. She refused to refresh her memory and she accepts it's the sort of thing she would have said under those circumstances. At line 32: "So you would now accept that on the 23rd of March you appeared on the *Holmes* show?" "Yes I accept that." "And at that stage you were giving specific advice to the parents about how to deal with their children concerning the Civic Crèche inquiries?" And she says: "It was much the same sort of information that was given to parents all along, for instance, at the Knox Hall meeting."

So the point I was trying to make was that she was obviously involved at some stage prior to the Knox Hall meeting. She was present, as I understand it, at the Knox Hall meeting and she denies that she was there at the behest of the police on the *Holmes* show. "It would have been from a reporter contacting me and asking whether I 10 was prepared to be interviewed," she says at line 8 or 9. And she also said and I go to line 12: "Didn't you also say in that interview that there are specialist interviewers who are being set up to interview these children over a period of time and it is very important that parents don't conduct their own interrogations?" And the concession is: "If you say so."

She also talked about just behavioural problems. "With young children," and this is line 22, 23, "With young children some of the more specific things include things like having nightmares, sleeping disturbances of varying kinds, young children also quite often will start to display sexualised behaviour themselves?" "I don't recall saying that but if you say I did I accept that." "Do you also recall advising them that there may be problems associated with the child's concentration, ability to perform at school, to make friends?" "No." "Can you recall saying: "Well they can show themselves by continuing symptoms of anxiety perhaps with sleep disturbances, perhaps with problem

in relationships, perhaps with continuing sexualised behaviours, there may be problems associated with their concentration, their ability to perform at school, to make friends and then you refer to behaviours when they get older, do you recall saying that now?" "No I don't recall the content but I agree with those things, they are all valid comments." She goes on to say she can't remember the content of the interview at all. So the point I was trying to make with Dr Zelas at that time was that she was involved prior to the Knox Hall meeting and this was advice specifically about the Civic Crèche and also about the manner in which it was being run and operated.

WINKELMANN CJ:
But the evidence was that she wasn't engaged by the police at this point in time I take it?

MR BILLINGTON QC:
That's what the evidence was.

GLAZEBROOK J:
When you say "evidence" that's what her evidence was, is that what you're saying?

MR BILLINGTON QC:
Yes.

GLAZEBROOK J:
What did the police say or you didn't ask them?

MR BILLINGTON QC:
I don't know, I don't recall whether I asked Detective Eade or not. Just in relation –

WINKELMANN CJ:
Parents were asked whether they saw this show weren't they I think?

MR BILLINGTON QC:

I think some of them may well have been, your Honour, yes. It was the major show, I think, in New Zealand at the time, it wasn't a sort of, you know, 10 o'clock at night programme, it was prime time television, the *Holmes* show.

WILLIAMS J:

We're all old enough to remember that.

GLAZEBROOK J:

I was going to say it's very flattering to suggest we don't remember it.

MR HARRISON:

Now the other matter I wish to address was the issue of expert evidence and I will be very brief. My learned friend has made much of the fact that issues were raised before the jury but unless you have an expert who is knowledgeable about the level of risk presented by some of those matters in my submission are we can't all be experts in memory especially, for example, the influence of parents, the risk of child to child discussions, the overhearing, the air of accusation and those sorts of matters that would assist a jury in a case such as this and I acknowledge that this is a unique case. It's not going to be every case that a Court would have this issue and part of the reason there was this issue in this case was because the sheer volume of material that was available to show the level of interaction between parent and child and the cross-contamination. Yesterday Justice Williams said: "Well where's the golden thread in respect of all of this?" If we could now have 404.1764 please and I'm just going to call this parent A but we will have a name available.

WILLIAMS J:

Could you give me that number again?

MR HARRISON:

404.1764. So this is the person whose child made a comment stating that they didn't like Peter's black penis and as a result of that a number of events occurred.

ARNOLD J:

So is this a deposition statement?

MR HARRISON:

Yes, this witness was listed to give evidence at trial. Just before the Crown case ended they indicated that they would not be calling this witness but made them available to the defence. Given the nature of this particular witness we didn't feel it would be a high risk option on our part to put that witness in as our witness.

WILLIAMS J:

Sorry, you had a negative there which I think you didn't mean? You did think it was high risk?

MR HARRISON:

Yes. Sorry, yes.

If we just come down there a bit further if we may to 1790 please. From line 1 onwards she discusses the other people that she discussed concerning her concerns about her child and Peter Ellis. In amongst them is child 6's mother, if we just come down please. Just pause there, she also indicates that there was an informal support group set up prior to the December meeting in December 1991 and child 7's parents were also present at that meeting.

WINKELMANN CJ:

The support group's meeting?

MR HARRISON:

Yes, this is an informal support group, so this is not – this is in 1991 and it's really designed to support this particular parent and child 3's parent, as I understand it, was also present at that informal support group.

O'REGAN J:

So 7, 6 and 3, is that right?

MR HARRISON:

Yes. Now I should say, your Honour, I don't believe child 6's parents were at this informal meeting but they were close friends with parent A, but these other parents were there, amongst other people.

WILLIAMS J:

So child 6's parents you don't think were at that interim –

MR HARRISON:

I don't think they attended that meeting, Sir, but my understanding is she had had discussions with them and subsequently there were discussions with them. They were, as I understood it, friends of some standing.

Now on the 2nd of December there was the parent meeting at crèche. Ms Sidey and Detective Eade attended that meeting and gave advice to parents.

WINKELMANN CJ:

Sorry, what date was that?

MR HARRISON:

The 2nd of December 1991. That's the first meeting concerning the crèche.

O'REGAN J:

Are you referring to evidence now or are you just telling us this?

MR HARRISON:

Sorry, your Honour, I can refer to evidence at –

O'REGAN J:

It's in this…

MR HARRISON:

Yes, so that's at, in terms of Ms Sidey, 401.0281 to 282.

WILLIAMS J:

But this is in evidence, not in deps?

MR HARRISON:

This is trial, I believe, Sir. No, it's deps, sorry. If we can just continue down to the bottom of page.

WILLIAMS J:

You're being whispered at. It's trial apparently.

MR HARRISON:

It's always handy to have it said. It's trial, I'm advised, and –

WINKELMANN CJ:

I think they look different. The notes of evidence look different between trial deps.

MR HARRISON:

Yes, thank you. There's no signature down the bottom which should be a giveaway. So at line 35 Ms Sidey says: "My main contact at the police at that stage was Colin Eade. There was a meeting arranged at the crèche on 3rd December 1991. I think the crèche parents committee organised the meeting and asked Colin Eade and I to go along and talk. I had interviewed prior to that day a few children and had some knowledge of what the concerns were based on and I also went along to talk to the parents about what they needed to be looking for." So that was where she started to give advice, and

indicated that if there were concerns they could contact her. Detective Eade's advice to the parents, this is at 402.0505.

WINKELMANN CJ:
Did she say what she'd said they had to be looking for?

MR HARRISON:
No, she's just said that they were – sorry.

GLAZEBROOK J:
She didn't discuss specific indicators. Line 6.

MR HARRISON:
Just sticking to the guidelines of –

GLAZEBROOK J:
"…talk to parents about what they needed to be looking for." "I didn't discuss specific indicators…" "…noticeable changes in their children's behaviour".

MR HARRISON:
Then at 402.0505 we have Detective Eade's advice to parents. So at line 5. He indicates that they were dealing with concerns as opposed to allegations or anything specific. That's line 20. "By that time one interview had been conducted." "Nothing was raised as a result of that interview," and he basically
left it in the hands of Ms Sidey.

Now if we could go to 404.1792 please, line 35, and again this is person A and she is asked: "What was the nature of the advice given to you at that stage by the police and specialist services concerning passing of information between parents?" "I don't remember what they were saying about that, I assumed they would have advised us not to do it, I intentionally didn't listen to that because I have a strong belief that secrecy in sexual abuse cases keeps it happening and I felt it needed to be talked about."

She then indicates that: “Prior to that meeting in March,” which was the Knox Hall meeting, “You had enforced those views by ringing parents and telling them what other children had said about their children?” “I rang the parents of friends that child played with ‘cos I was concerned for those kids. I didn’t initiate contact with others, several people rang me and if I heard things about them then I would tell them and recommend they talk to the parent concerned. I think I didn’t go through the list and rang a lot of parents, I rang people associated with me as friends or my children’s friends and some other people contacted me.”

So that was the mindset, if you like, of person A and if we go to 404.1794 at line 3, sorry I’ll start at line 1. “When were you convinced in your mind that abuse at the crèche was widespread?” “When child first talked to me because of my work in sexual abuse I knew it was rare for only one child to be abused and I knew certain profiles of abusers are attracted to work with children so I thought at that stage it probably was but I felt stronger about it, my friend had talked to a friend who knew someone who had taken their child out of the crèche earlier in 1991 because the child had been saying something disturbing about Peter and that clinched my feeling I suppose.” “And so really from when your son made the comments about Peter’s black penis in your mind you believed that there had been some widespread abuse at the crèche?” “I believed it was highly likely.” And then if we can go to 404.1795 and at line 18 please.

GLAZEBROOK J:
And which were these, what meetings were these, the informal ones they’re talking about or the?

MR BILLINGTON QC:
I believe so, perhaps if we could just go up a bit please Charlie sorry. So this is the support meeting initially for her as I understand it but she had stopped going to that by April. There were more formal meetings set up after that or support groups. And she makes mention that: “And at those support

meetings," or she's asked: "At those support meetings parents were discussing freely what their children had disclosed?" "Yes." And then she refers to some of the parents that were there. Now the numbers there are from depositions not trial so. But we understand 10 and 13 is child 6 and 3.

Now I do have references that go from how the allegations starting coming forward from that particular person who was involved in passing information around. Now I can go through that piece by piece today or I can provide that. I've already put some of it through in the notes of evidence when I put those matters to Dr Seymour, but I can go through those again if that would be helpful.

WINKELMANN CJ:
I think it would be helpful. I'm not quite sure what you're talking about, so, it would be helpful to know what you're talking about.

O'REGAN J:
What are you replying to here?

MR HARRISON:
Well, I'm just, there was a question raised about where is the golden thread and I was just answering.

O'REGAN J:
You're replying to Mr Billington's submissions, aren't you?

MR HARRISON:
Right, well, in which case, your Honour, I won't go any further with that material.

WINKELMANN CJ:
Can you just clarify what you were talking about, Mr Harrison, because I couldn't tell what you, other references to what, you were saying, that you put to Dr Seymour?

MR HARRISON:

Yes, so when I was, on Wednesday I put to Dr Seymour the allegations that had been made and then appeared in the first interviews of the children.

WINKELMANN CJ:

The carrying forward of the contamination?

MR HARRISON:

Yes.

WILLIAMS J:

By that you mean product A in and product A out, is that specifically what it was?

MR HARRISON:

Yes.

WILLIAMS J:

Right.

WINKELMANN CJ:

And is this in reply to Mr Billington?

MR HARRISON:

Well, I don't think Mr Billington addressed it really, in great detail, so I'll put it to one side.

WINKELMANN CJ:

No, so it's not in reply, yes.

MR HARRISON:

The only other matter that I would raise, your Honour, is in respect of child 4 and some of the comments my learned friend made concerning the transcripts, being the evidence-in-chief in essence then if there'd been a leading question in them, they wouldn't have been, or shouldn't have been

allowed. If we could go to document 301.0065 please, and this is ruling number 4 of his Honour Justice Williamson, and if we can go to 0070 please?

WINKELMANN CJ:
Sorry, what ruling is it?

MR HARRISON:
Ruling 4. So this is concerning child 4 and the issues of the clip that you Honours viewed yesterday was put to the Judge in terms of leading issues.

WINKELMANN CJ:
The day before yesterday, I think.

MR HARRISON:
Sorry?

WINKELMANN CJ:
The day before yesterday, I'm pretty sure. Or was it last week? Anyway, it wasn't yesterday.

MR HARRISON:
No, the short clip that you Honours viewed. Yes. So, in any event, those sorts of matters were raised with Justice Williamson and he did have a look at them and he did take them into account and he still thought it was a matter for the jury.

ARNOLD J:
But this was in terms of the videotaped evidence being so defective that none of the tapes should come in?

MR HARRISON:
Yes, well, we're referring to leading question.

ARNOLD J:

Yes, but that's different from saying to the Judge, there's an answer here to a leading question, it is an important answer, that part of the paper is to be excised. I thought that was the point that Mr Billington was making, and that does happen, as you know.

MR HARRISON:

Yes, but I would've thought, your Honour, if a judge is presented with something where we're saying, this is unsafe, so unsafe it shouldn't be before the Court, that it's not too different from the point my learned friend is making.

ARNOLD J:

Well, personally, I think there's a significant difference, but there it is.

MR HARRISON:

Those were the main points that I wanted to raise. Unless there are any matters in particular the Court would like me to address?

WINKELMANN CJ:

No, thank you, Mr Harrison.

MR HARRISON:

Your Honour, just before I am seated, on behalf of the extended Ellis family, they ask me to pass on their thanks for the time the Court has taken to consider this position. Thank you.

WINKELMANN CJ:

Thank you. Might I reciprocate, with my thanks to counsel for the very careful and responsible way that they have all handled this appeal and I would also like to extend my thanks to those who are in court today, in the public seating area, and who have joined us by VMR, thank you very much for the patient way you have listened to us exchanging with counsel.

Karakia Whakamutunga – Kingi Snelgar

COURT ADJOURNS: 2.37 PM