EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRES(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.

IN THE DISTRICT COURT
AT GISBORNE

CRI-2016-016-002525
[2017] NZDC 20697

THE QUEEN

v

[TIMOTI WHIU]

Hearing:	28 July 2017
Appearances:	C R Walker for the Crown A W Clarke for the Defendant
Judgment:	28 September 2017

JUDGMENT OF JUDGE W P CATHCART

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[1] Mr [Whiu] faces two sets of charges. The separate prosecutions arose because the second set of allegations came forward as a result of the police investigation into the first set of allegations. In essence, the Crown argued that all allegations of sexual offending against Mr [Whiu] are cross–admissible as propensity evidence in relation to each complainant and all those charges should be heard together.

[2] Mr [Whiu] accepted the sexual allegations made by the other three complainants ([complainant 2, complainant 3 and complainant 4]) are cross–

admissible propensity evidence vis–à–vis those complainants. But he objected to the admissibility of the evidence relating to the sexual allegations by [complainant 1] vis–à–vis [complainant 2, complainant 3 and complainant 4] and vice versa. The scope of the propensity issue thus was narrow.

[3] The Crown filed a notice under s 138(1) Criminal Procedure Act 2011 ("the Act") on 23 February 2017 notifying the Court that the two sets of charges should be heard together. Pursuant to s 138(3), the charges must be heard together in accordance with that notification unless the Court relevantly makes an order under s 138(4). Section 138(4) of the Act provides that the Court may order that one or more charges against a defendant be heard separately if it is in the interests of justice to do so. I considered that it was not in the interests of justice the charges be heard separately. This judgment outlines my reasons for that decision. More about that later.

[4] In the first set of charges, there are also assault allegations against Mr [Whiu] by [complainant 5]. The Crown accepted that if Mr [Whiu] proceeded to trial on the assault charges, those allegations should be tried separately from the sexual abuse allegations. However, the defence consent to the admission of the assault allegations at the upcoming trial. Mr Clarke says this evidence is relevant to the defence case theory on the sexual abuse allegations.

[5] Tragically, [complainant 5] died recently [details deleted]. The Crown now seeks to lead aspects of [complainant 5's] police statement, dated 18 February 2016, as hearsay evidence at the trial. [complainant 5's] statement provides not only expected direct evidence in relation to the assault allegations but also significant evidence about her observations of Mr [Whiu] and his conduct towards [complainant 1]. The Crown seeks an order that this observation evidence be admitted as hearsay evidence. The defence opposed admission of the entire document.

[6] I considered [complainant 5's] statement should be admitted as hearsay evidence in the upcoming trial. This judgment outlines my reasons for that decision.

Issues

[7] Given the scope of the respective propensity and hearsay arguments, I considered the following issues required determination:

(a) Are the sexual allegations made by [complainant 1] cross-admissible as propensity evidence in the case relating to the sexual allegations made by [complainant 2, 3 and 4]?

(b) Do the circumstances relating to the statement by [complainant 5] provide reasonable assurance the statement is reliable?

(c) If the answer to Issue (b) is "yes", should I exclude the statement under s 8 Evidence Act 2006?

Issue (a): are the sexual allegations made by [complainant 1] cross-admissible as propensity evidence in the case relating to the sexual allegations made by [complainants 2, 3 and 4]?

[8] In the procedural context of this case, Issue (a) engaged the principles of joinder and severance as recently outlined by the Court of Appeal in *Churchis v R*:[1]

> (a) Offending that is unrelated in time or circumstance should not be tried together, unless the evidence of one incident is relevant to another to an extent that its probative value outweighs its prejudicial effect. That relevance may arise in a variety of circumstances, such as where the facts are so similar or the allegations interconnected to a point that it would be artificial to present them separately.
>
> (b) Joinder may be granted if evidence relevant to one count is also relevant to one or more other counts.
>
> (c) The practicalities of the criminal process may be taken into account including the degree of connection between the charges; the impact of successive trials on the accused and witnesses; and the likely effect of publicity of the first and subsequent trials.
>
> (d) Prejudice to the accused is a factor to be taken into account. The fact that the accused may be obliged to give evidence is a relevant but not a decisive consideration.
>
> (e) The discretion is wide. In the end, what is required is a balancing between the legitimate interests of an accused and the public interest in the fair and efficient despatch of the Court's business.6

[1] *Churchis v R* [2014] NZCA 281 at [28].

[9] It is accepted that if the evidence from [complainant 1] is cross–admissible as propensity evidence, it is not in the interests of justice to order separate trials.[2] Thus, the answer to Issue (a) determines whether severance should be granted.

Summary of allegations

[10] The Crown helpfully summarised the nature of the allegations made by the various complainants in its memorandum. I set out below the relevant contents of that memorandum:[3]

> ***[Complainant 1]***
>
> The sexual allegations on CRI–2016–016–000358 are contained in the charge notice dated 19 August 2016. The sexual allegations are charges 1 to 5 involving [complainant 1]. There are also three assault allegations contained in that charge notice (charges 6 to 8). They were not included in a separate charge notice as the Crown anticipated guilty pleas. However, if the defendant is proceeding to trial on those charges then the Crown accepts they should be tried separately).
>
> [Complainant 1] was born on [date deleted]. She is now aged [age deleted] years. The charges cover the period from [date deleted] to [date deleted] when she was aged between five and 13 years. The charges are all representative and allege:
>
> (i) Digital penetration (charge 1);
>
> (ii) Oral sexual connection (by his mouth on her genitalia) (charge 2);
>
> (iii) Rubbing his penis against her genitalia (charge 3);
>
> (iv) Attempted rape (charge 4); and
>
> (v) Attempted anal intercourse (charge 5).
>
> ***[Complainant 2]***
>
> The charges relating to [complainant 2], [complainant 3] and [complainant 4] are set out in the charge notice dated 23 February 2017 on CRI–2016–016–002296. All charges relate to the same general period of about 1992 to about 1996. (The approximation is due to them having been young children at the time and no longer sure exactly of how old they were).
>
> [Complainant 2] and [complainant 3] are [relationship deleted] and [complainant 4] is their [relative]. [Complainant 1] is a [relative] of [complainant 2] and [complainant 3]. [Details deleted]. The [families] were very close and are described as being like one extended family.

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[2] *R v Banks* [2011] NZCA 469 at [12].
[3] Crown memorandum in support of joinder application dated 8 July 2017 at [2] – [12].

[Complainant 2] was born on [date deleted]. She is now aged [age deleted] years. The charges cover the period when she was aged between about six and 10 years. The charges allege:

(i) Touching her genitalia (charge 1);

(ii) Oral sexual connection (by his mouth on her genitalia) (charge 2);

(iii) Making her touch his penis (charge 3); and

(iv) Rubbing his penis against her genitalia on two occasions (charges 4 and 5).

The defendant was a family friend and was living during this period at the house of [complainant 2's relation]. [Relationship details deleted]. Most of the incidents occurred when [complainant 2] was visiting her [relations's] house.

[Complainant 3]

[Complainant 3] was born on [date deleted]. She is now aged [age deleted] years. The charges cover the period when she was aged between about four and eight years. The charges allege:

(i) Touching her genitalia on two occasions (charges 6 and 7).

The first incident occurred at [complainant 3's] family's house when the defendant was visiting. The second incident occurred at [complainant 3's relation's] house where the defendant was living.

[Complainant 4]

[Details deleted]. [Complainant 3] is now aged [age deleted] years. The charges cover the period when she was aged between six and 10 years. The charges are both representative and allege:

(i) Touching her genitalia (charge 8); and

(ii) Digital penetration of her anus (charge 9).

The incidents occurred at [complainant 3's relation's] house where both she and the defendant were living.

The scope of the dispute on the admissibility of the propensity evidence

[11] Mr Clarke for Mr [Whiu] properly conceded that the Crown has established an arguable case that the three sets of historical allegations made by [complainants 2, 3 and 4] demonstrate a propensity by Mr [Whiu] to sexually offend in a domestic setting towards female children whilst in the same living environment as Mr [Whiu].

[12] Whilst Mr Clarke accepts that the allegations by [complainant 1] qualify as propensity under s 40, he challenged the Crown contention that her evidence is

cross- admissible under s 43 as propensity evidence in relation to the allegations by [complainants 2, 3 and 4]. The scope of the admissibility dispute was correspondingly narrowed.

The relevant legal principles

[13] In determining the relevancy of this propensity evidence, I am required to consider the nature of the issues at the trial.[4] The overarching principle is that relevant propensity evidence is to be admitted only if it has a probative value in relation to an issue in dispute which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.

[14] The rationale for the admission of orthodox propensity evidence rests on the concept of linkage and coincidence. The greater the linkage or coincidence provided by the propensity evidence the greater the probative value the evidence is likely to have.[5] The strength of that linkage is to be analysed through the rubric of the s 43(3) factors. As a matter of logic, the level of particularity in propensity evidence reflects the strength of the link between that evidence and the factual matrix of the offence as charged. Thus, the relevant propensity pattern must have some specificity about it.[6]

The rubric factors in s 43

[15] Mr [Whiu] denies that any of the alleged acts of sexual abuse occurred in relation to all complainants. The relevancy of the propensity evidence to the determination of the key issues in the case thus is obvious.

[16] Connection in time between the proposed propensity evidence and the offending narrative is a relevant consideration under s 43(b). Here, the gap between the alleged sexual abuse against [complainant 2, 3 and 4] and the allegations by [complainant 1] is 11 years; an appreciable gap. Mr [Whiu] submitted this gap constituted an insufficient connection in time.

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[4] Evidence Act 2006, s 43(2).
[5] *Mohamed v R* [2011] NSC 52 at [3].
[6] *Mohamed v R* [2011] NSC 52 at [3].

[17] Significantly, however, the Crown intends to lead evidence that the police and CYF investigated Mr [Whiu] in 1996 about aspects of the allegations made by some of [complainant 2, 3 and 4], but no charges were pursued. The Crown submitted Mr [Whiu] was aware of the general thrust of that investigation because he acknowledged in his police interview he had been "accused in the past". The Crown argued this investigation explains the gap in time. Eleven years later, the Crown says Mr [Whiu] resumed his unusual predilection against [complainant 1] and continued it for more than eight years until she complained.

[18] I accept, as recognised by the Court of Appeal in *R v Bevin,*[7] that a long period of good behaviour when a tendency is not evident increases the prospect of the earlier offending being one–off or the defendant's mental state having changed.[8] In *Bevin*, the gap between the alleged sexual abuse against young girls was lessened because of the similarities between the earlier event and the fact that the offender in that case admitted that he continued to have an inappropriate interest in girls.

[19] Here, the Crown has evidence from which one can draw the inference that Mr [Whiu's] unusual predilection was arrested for a time temporarily because he must have appreciated he was under suspicion. Moreover, the unusual tendency to sexually abuse young girls with whom an offender has ongoing contact in the family home is a state of mind that is not necessarily amenable to a connection in time analysis. The more current allegations by [complainant 1] arguably demonstrate the Crown's inference that Mr [Whiu] had a past, current and ongoing sexual interest in such young girls.

[20] Also, the underlying pattern is that all of the complainants essentially allege regular, ongoing abuse in homes where Mr [Whiu] was residing at the time. The complainants, [complainant 1] and [complainant 4], allege the ongoing abuse occurred in the same household as Mr [Whiu]. The complainants, [complainant 2] and [complainant 3], allege a smaller number of incidents said to have occurred when they visited the house where Mr [Whiu] was living.

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[7] *R v Bevin* [2014] NZCA 637.
[8] *R v Bevin* [2014] NZCA 637 at [20].

[21] There are obvious differences between the specific allegations by each complainant. [Complainants 2, 3 and 4] do not allege attempted penile penetration of the vagina or anus, whereas that is alleged by [complainant 1]. However, the underlying pattern is similar. All allege touching of their genitalia in one form or another. The complainants, [complainant 1] and [complainant 2], allege Mr [Whiu] rubbed his penis against their genitalia with [complainant 1] also alleging attempted rape. Both [complainant 1] and [complainant 4] allege anal contact in addition to genital contact.

[22] Material differences cannot be ignored in the s 43 assessment. This is because significant differences in the nature of circumstances in the acts sought to be relied upon as propensity evidence can weaken the probative value that can fairly be put on the similarities.[9] But, the degree of similarity is not diminished because the alleged index offending is arguably a progression from propensity offending.

[23] The Court of Appeal in *Rhodes v R*[10] warned about drawing a distinction based on severity when the relevant acts fall within the same spectrum or category of offending. Drawing such a distinction is an artificial approach. Also, it is inconsistent with the statutory focus which is on the propensity to act in a certain way or have a particular state of mind and the extent of the relevant similarities. Moreover, the alleged propensity here is an unusual predilection of sexual interest in young girls, which in and of itself may constitute a sufficient degree of specificity to qualify as admissible propensity evidence.[11]

[24] Thus, whilst there is a difference in the severity of the acts alleged by [complainant 1], the probative value of the evidence lies in the similar underlying pattern of behaviour on the part of Mr [Whiu] which exhibits an inappropriate sexual interest in young girls with whom he had ongoing contact in the family home.

[25] Mr [Whiu] sensibly acknowledged the number of complainants in this case is a factor which increases its potential probative value.

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[9] *R v S* CA561/11 [2011] NZCA 612 at [47].
[10] *Rhodes v R* [2012] NZCA 269 at [20].
[11] *Metcalfe v R* [2011] NZCA 627 at [11].

[26] With respect to the frequency of the allegations, Mr [Whiu] submitted that taken as a whole it is a neutral factor in determining the probative value of the propensity evidence. However, when it is combined with the other relevant factors, it points to admissibility of the propensity evidence.

[27] Mr [Whiu] accepted there is no specific suggestion of collusion or suggestibility between the complainants. Of course, contact between any of the complainants would not be unusual especially given their relationships. And, speculation that the allegations may be the result of collusion or suggestibility is always considered to be insufficient.[12]

[28] When all of these relevant factors are combined it pointed conclusively to the admission of the propensity evidence. I concluded that the allegations of sexual abuse made by [complainant 1] have a high probative value on whether the sexual acts occurred in relation to all of complainants and vice versa. The heightened probative value of the evidence thus outweighed the risk it may have an unfairly prejudicial effect on Mr [Whiu's] case.

[29] A proper-use direction to the jury will adequately restrict jurors from engaging in any improper reasoning processes. In the face of such a direction, it can be assumed the jury will not have the tendency to give disproportionate weight in reaching a verdict on the separate charges.

[30] Issue (a) therefore was answered "yes".

Issue (b): Do the circumstances relating to the statement by [complainant 5] provide reasonable assurance the statement is reliable?

[31] Under s 18(1), I must be satisfied that the "circumstances relating to the statement [by [complainant 5]] provide reasonable assurance that the statement is reliable." If that statement passes through the hearsay portal, it is not the end of the matter as reflected in Issue (c).

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[12] *Y (CA611/10) v R* [2010] NZCA 458 at [21].

[32] My function under s 18(1) is a gate-keeping role.[13] The ultimate assessment of reliability is a jury issue. In essence, what is required is a scrutiny of the circumstances surrounding the statement and a contextual assessment as to whether there is a "reasonable assurance" that the statement is reliable.[14]

[33] The Supreme Court in *R v Gwaze* considered the s 16 "circumstances" relate not only to the reliability of the evidence as a record of what was said but also to the contents, nature and making of the statement, stating: [15]

> The definition of "circumstances" for the purpose of hearsay evidence makes it clear that the inquiry into reliability must include not only accuracy of the record of what is said and the veracity of the person making the statement, but also the nature and contents of the statement, and the circumstances relating to its making.

[34] As noted earlier, [complainant 5] was the central complainant in respect of the assault allegations, as reflected in charges 6 to 8 of the Crown's charge notice dated 19 August 2016. However, parts of her statement relate to the sexual allegations by [complainant 1] (pages 1 to 4). The Crown seeks that this portion of her statement be admitted as hearsay evidence at the trial of the sexual allegations.[16]

[35] In this area, [complainant 5's] statement provides evidence of two incidents. First, she refers to seeing Mr [Whiu] with his pants down standing between the legs of [complainant 1] who was lying on a table with no pants on. That observation corroborates the evidence of [complainant 1], who refers to that incident in her evidential video interview.

[36] The second incident relates to an occasion when [complainant 5] says [complainant 1] could not be found but then came out of Mr [Whiu's] room and was accused by his mother of being a "dirty dog". [complainant 5's] observation corroborates the specific evidence of [a further Crown witness]. Also, it corroborates

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[13] *Adams v R* [2012] NZCA 386 at [26].
[14] *TK (CA94/2012) v R* [2012] NZCA 185 at [23].
[15] *R v Gwaze* [2010] 3 NZLR 734 at [45].
[16] The Crown accepts that part of [complainant 5's] statement is presumptively inadmissible under s 35(2) of the Evidence Act. The Crown's hearsay application thus focused on those parts of [complainant 5's] statement which contained direct evidence about her observations of Mr [Whiu's] conduct towards [complainant 1].

the general evidence of [complainant 1], when she described in her evidence that at times she was "missing" in Mr [Whiu's] room with him.

[37] In summary, [complainant 5's] evidence about these two incidents is directly relevant to issues in dispute in the trial relating to whether certain acts alleged by [complainant 1] occurred. It also is compelling evidence against Mr [Whiu].

Circumstances relating to [complainant 5's] statement:

(a) Nature of the statement

[38] [Complainant 5] made a formal written statement as part of a police investigation. It was recorded by a police officer. There is little ground to suggest any concern about the accuracy of the record of this statement. Mr [Whiu] argues that the form of the statement does not enable an assessment to be made of the questions asked and [complainant 5's] demeanour in contrast to an evidential video interview. That is true; but it is a question of fact and degree. The nature of the statement gives no cause for real concern about the accuracy of the record for the purposes of admissibility. The issues raised by Mr [Whiu] are more properly a matter for the jury as the final arbiter on reliability.

(b) Contents of the statement

[39] I accept that the subject evidence relates to [complainant 5's] observations of what occurred to [complainant 1] as opposed to what happened to her personally. But this evidence constitutes direct observations by [complainant 5] of what could be considered unusual and therefore memorable events. In fact, [complainant 5] stated she thought it was "weird" observing Mr [Whiu] standing between [complainant 1's] legs.

[40] It is true the statement was not spontaneous or against her interests in any way. But that does not detract from the significance of this direct evidence and its corroborative force. I did not accept Mr [Whiu's] submission that there is nothing particularly noteworthy about these contents.

(c) Circumstances to the making of the statement

[41] According to [complainant 5's] statement, the events occurred in the year 2010 when she was about [age deleted] years of age. She made the statement to the police in [month deleted] 2016 when she was [age deleted] years of age. The delay in time between the events recounted and when the statement was made is not insignificant. Mr [Whiu] argues this delay is exacerbated by the fact [complainant 5] was being asked to recall events when she was at a very young age. Clearly, these are relevant factors in the reliability assessment under s 16.

[42] Also, [complainant 1] did tell [complainant 5] of incidents involving Mr [Whiu] touching her. Mr [Whiu] argues therefore there is a risk [complainant 5's] recall of her observations was influenced consciously or subconsciously by what she was told.

[43] That potential influence cannot be entirely discounted. In her statement, [complainant 5] stated that she did not know what it was she had seen and she could not remember much else about the day aside from that she had gone and watched television. She said that she did not realise what was going on until much later after [complainant 1] told her. She further stated she did not remember whether she and [complainant 1] spoke about this incident afterwards.

[44] In the end, however, I need only be satisfied that the circumstances relating to the statement provide a reasonable assurance that it is reliable. Whilst the above factors are clearly relevant to a final determination of reliability, they do not detract from a conclusion the statement is reliable enough for a jury to consider it and draw their own conclusions as to its weight.

(d) Circumstances relating to [complainant 5's] veracity

[45] Veracity is also a circumstance providing a reasonable assurance of reliability. There is no extrinsic evidence indicating [complainant 5] was not being truthful in what she said she observed. [Complainant 5] is the complainant in relation to the physical assaults allegations. A dislike for Mr [Whiu] thus cannot be entirely rejected as a motive for her alleged observations of Mr [Whiu's] conduct with [complainant 1].

But there is nothing to suggest [complainant 5] was not being truthful in what she said she saw to the extent it would adversely impact on whether the threshold test under s 18 is met.

(e) Circumstances relating to the accuracy of the observations by [complainant 5]

[46] I accept there was nothing of special note in relation to the circumstances around [complainant 5's] observations. It therefore is a neutral factor in the assessment.

Conclusion on Issue (b)

[47] Overall I was satisfied that the circumstances relating to the making of [complainant 5's] statement provided reasonable assurance that it is reliable. The Crown thus satisfied the gateway threshold under s 18. The proper concerns raised by Mr [Whiu] will be tested at trial and the jury will be the ultimate arbiter of reliability.

[48] Issue (b) therefore was answered "yes". Issue (c) required determination.

Issue (c): Should I exclude the statement under s 8 Evidence Act 2006?

[49] As reflected in its language, the focus of s 8 is on whether there is a risk of an unfair prejudicial effect on the proceeding rather than on the defendant. If the probative value of the evidence is outweighed by that risk, I have a duty to exclude it under s 8. The interests of both parties must be considered under a s 8(1)(a) determination.[17] Also, I must take into account "the right of the defendant to offer an effective defence".[18] This last factor loomed large in the determination.

The defence trial strategy remains effective

[50] Mr [Whiu] accepted, as he must, that the inability of his counsel to cross-examine [complainant 5] at the trial does not of itself mean that he cannot

[17] *K v R* [2014] NZCA 393 at [30].
[18] Evidence Act 2006, s 8(2).

advance an effective defence. However, his argument is he will not be able to explore any shortcomings in [complainant 5's] recollection of her observations or the extent to which her description of those events may have been the result of suggestibility and/or collusion following her conversations with [complainant 1]. This is important says Mr [Whiu] because the defence strategy at the trial will be the assault allegations made by [complainant 5] were the catalyst for what Mr [Whiu] says are false sexual allegations by the complainants.

[51] In essence, Mr [Whiu] argues the effectiveness of his defence is compromised if [complainant 5's] statement is admitted as evidence. The admission of the statement would require Mr [Whiu] to confront the further evidence of [complainant 5's] alleged observations of Mr [Whiu's] conduct towards [complainant 1] without the ability to challenge that evidence. In my view, Mr [Whiu's] concern is overstated, as analysed below.

[52] As noted, the central defence theory is that the sexual abuse allegations—including [complainant 5's] alleged observations of Mr [Whiu] conduct towards [complainant 1]—are the product of collusion between various complainants motivated by ill-will towards Mr [Whiu]. It must be acknowledged that [complainant 5's] statement records that [complainant 1] repeatedly told her about Mr [Whiu] touching her. Thus, the defence are entitled to point to that content as a further foundation from which the collusion case theory may be advanced.

[53] Also, Mr [Whiu] intends to plead guilty to the assault charges at the beginning of the trial on the basis of an agreed summary of facts. From that platform, Mr [Whiu] intends to lay out his defence strategy that the assaults led to false sexual allegations by all of the complainants. Plainly, Mr [Whiu] may advance this aspect of the defence strategy even if [complainant 5's] statement is admitted as hearsay.

[54] Moreover, the absence of cross-examination of [complainant 5] on that defence strategy actually places Mr [Whiu] at a distinct advantage in the trial. If [complainant 5] was available, the defence would likely face her denial of any collusion between her and [complainant 1]. The Crown has now lost the opportunity to rebut that case theory. Also, any short-comings in [complainant 5's] observations of Mr [Whiu's]

conduct towards [complainant 1] are arguably subsumed by this collusion case theory.[19]

[55] The admission of the hearsay evidence would bring into play a warning to the jury under s 122 Evidence Act that they should exercise caution before accepting evidence. But the likelihood of that warning does not lower the threshold that must be met under s 18 and ultimately the duty under s 8 to exclude evidence.[20]

[56] Finally, I did not accept Mr [Whiu's] argument that because this case may involve a network of directions to the jury vis–à–vis the number of complaints, there are therefore limits to a jury's ability to "pass the presented evidence through the lens of judicial directions and warnings". Such an argument assumed that juries are unable to deal with directions in moderately complex cases. That submission cannot be accepted.

Conclusion on Issue (c)

[57] In the end, I reached the view that the high probative value of the hearsay evidence was not outweighed by the risk the evidence will have an unfairly prejudicial effect on the proceeding. Issue (c) therefore was answered "no".

Result

[58] My conclusions in relation to the three issues were as follows:

Issue (a): Are the sexual allegations made by [complainant 1] cross-admissible as propensity evidence in the case relating to the sexual allegations made by [complainants 2, 3 and 4]?	Yes
Issue (b): Do the circumstances relating to the statement by [complainant 5] provide reasonable assurance the statement is reliable?	Yes

[19] Mr [Whiu's] defence strategy might be construed as an implied acknowledgement that the circumstances relating to [complainant 5's] statement on the assault allegations provided reasonable assurance of the statement's reliability. I have not construed it as such because the defence argument was that the entire statement did not pass the threshold test under s 18 as reflected in my analysis of Issue (b).

[20] *R v Kereopa* HC Tauranga CRI–2007–087–411, 11 February 2008 at [25].

Issue (c): If the answer to Issue (b) is "yes", should I exclude the statement under s 8 Evidence Act 2006?	No

[59] In accordance with those answers, I ruled that the evidence of the sexual allegations made by [complainant 1], as reflected in charges 1 to 5 in the Crown charge notice dated 19 August 2016, is cross–admissible as propensity evidence inrelation to the other complainants. The interests of justice thus require a joint trial on all sexual abuse allegations. I also granted the Crown's hearsay application.

W P Cathcart
District Court Judge