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

NOTE: PUBLICATION OFNAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS, OF COMPLAINANT(S) PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE DISTRICT COURT
AT AUCKLAND,

CRI-2016-004-007358
[2018] NZDC 11626

THE QUEEN

v

[TRENT MAY]

Hearing: 1 June 2018

Appearances: E Smith for the Crown
P Winter for the Defendant

Judgment: 15 June 2018

JUDGMENT OF JUDGE W P CATHCART
[REASONS]

Summary of ruling

[1] Mr [May] is charged with offending against two complainants. The first complainant, [M], was aged [under 15] years of age at the time of the alleged offending in 2015 and 2016. She is Mr [May]'s step-granddaughter. He faces charges that he sexually abused her, supplied her cannabis and showed her objectionable images.

[2] Mr [May] also faces charges in relation to his biological granddaughter, complainant, [E]. She was aged [under 15] years of age at the time of the alleged

offending between 2005 and 2008. Mr [May] faces charges he sexually abused her and assaulted her.

[3] Additionally, Mr [May] faces charges under the Films, Videos and Publications Act 1993 for possessing objectionable images. These images were located on Mr [May]'s computer when the police executed a search warrant at his address in [date deleted] 2016 following [M]'s complaint. The various images have been formally classified as "objectionable". The possession charges are captured in charges 11-23 inclusive of the Crown charge notice dated 8 February 2018.

[4] As per classification decisions by the Office of Film and Literature Classification, the various images are divided into two categories:

- The first category relates to videos that are sexually explicit and involve the crime of bestiality depicting sex acts with animals (bestiality images).

- The second category depicts images of men sexually abusing young girls. One of the images in the second category does not explicitly show abuse but is a sexualised image of a young girl focussing on her naked genitals (child sexual abuse images).

[5] Mr [May] faces a separate charge for each video or image.[1] He seeks severance of the possession of objectionable image charges from the otherwise joint trial. The possession charges are represented by charges 11-24 inclusive of the Crown charge notice dated 8 February 2018.[2] Mr Winter, on behalf of Mr [May], limits the severance application to these charges.[3]

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[1] Charges 11, 12, 13 and 18-24 inclusive relate to the bestiality images. Charges 14-17 inclusive relate to the child sexual abuse images.

[2] Initially Mr [May] also sought severance of charge 8 which is an allegation he exhibited or displayed to [M] images on his computer illustrating persons having sexual activity with animals. He no longer seeks to sever charge 8.

[3] Defendant's supplementary submissions in support of pre-trial applications dated 21 May 2018 at [20].

[6] I reached the view the possession charges relating to bestiality images should not be severed from the joint trial. And that the remaining possession charges relating to child sexual abuse images should be severed from the joint trial. My reasons follow.

[7] Also, the Crown sought a direction under sections 103-105 Evidence Act 2006 that [E] gives her evidence-in-chief by way of an evidential interview (EVI). Mr [May] previously consented to [E] giving her evidence from behind a screen. But he opposes the EVI mode of evidence. I reached the view that the mode of evidence direction sought was justified. My reasons follow.

Further background

[8] The sexual offending against [M] is alleged to have occurred between [date deleted] 2015 and [date deleted] 2016. She will give evidence that during aspects of the offending against her Mr [May] on several occasions showed her objectionable images on a computer screen of animals having sex with humans. This allegation is captured by charge 8 which is to remain as part of the joint trial.

[9] The showing of these images is part of [M]'s narrative. In her original interview, [M] said Mr [May]'s showed her the images "a lot" of times.[4] It is also direct evidence in relation to charge 8.

[10] Mr [May], through his counsel, advised me there will be no challenge to the proposition [M] viewed such images. Mr Winter does not have formal instructions to agree to the stipulation Mr [May] "showed or exhibited" those images to [M]. However, Mr Winter's written memorandum came close to such a concession. In those submissions, he represented that bestiality images were "either seen by or shown to" [M] on the occasions she described in her evidential interview. As noted later, an agreed fact Mr [May] "showed or exhibited" such images to [M]—an element of charge 8—may change the analysis. In the end, I was required to determine the application in the absence of such a stipulation.

[4] EVI of complainant [M] at page 7.

Crown's arguments against severance of the possession of objectionable images charges relating to bestiality

[11] The Crown submits the evidence of Mr [May]'s possession of objectionable bestiality images found on his arrest is a significant piece of circumstantial evidence directly relevant to the jury's assessment of [M]'s credibility. This evidence is not advanced on the footing it constitutes propensity evidence. Admissibility therefore depends on the evidence meeting the threshold of relevance under section 7 and on avoiding exclusion under s 8.

[12] Also, the Crown submitted that if these objectionable image charges are severed from the joint trial [M] might need to give evidence at two separate proceedings. And this Crown counsel contends would be contrary to the interests of justice. The possibility [M] would have to give evidence on severed possession charges cannot be entirely discounted. If Mr [May] denies possession, [M]'s evidence of what was shown to her—as captured by charge 8—may be relevant to proving his possession of similar images between [date deleted] 2015 and [date deleted] 2016.

Mr [May]'s arguments in favour of severance of the possession of objectionable images charges relating to bestiality

[13] Mr [May] submits there is no evidence the objectionable publications relating to bestiality images located on his computer were those seen by or shown to [M]. He argues the Crown is unable to establish that link. And it is more likely the images [M] says she either saw or was shown were deleted as reflected in her evidence.

[14] Mr [May], however, stressed the obvious prejudicial effect of this evidence in the jury's assessment of his denial of sexual offending against [M]. Given the jury will hear evidence in relation to charge 8, Mr Winter stressed the real prejudice lies in the description of the bestiality images covered by the possession charges.

[15] Also, although not argued, the evidence may have an illegitimate prejudicial effect in relation to the jury's assessment of [E]'s allegations given the possession of

the bestiality images evidence has no relevance to that part of the case. The capacity to contain any illegitimate prejudicial effect through s 8, if possible, is vital.[5]

The obvious relevance of the evidence of Mr [May]'s possession of bestiality images

[16] The real probative force of this evidence lies in a simple proposition. The evidence supporting these possession charges stands as a vital piece of evidence that independently corroborates [M]'s credibility on the material issue as to whether her allegation of sexual offending is true. Her evidence of seeing, or been shown bestiality images on the computer during phases of the alleged sexual offending is an unusual circumstantial thread in her account. That thread is independently supported by the existence of like images on Mr [May]'s computer. Also, the probative force is augmented because possession of these objectionable images likely occurred between [date deleted] 2015 and [date deleted] 2016 which substantially overlaps the period of alleged sexual offending against [M].

[17] The intended defence strategy of not challenging [M]'s account she saw such objectionable images on his computer does not go far enough to address the real force of this corroborating evidence.

The obvious prejudicial effect of the evidence of Mr [May]'s possession of bestiality images

[18] The nature of this evidence is not only unpleasant but also of a deviant character. It carries with it the obvious risk of creating prejudice in the mind of a jury who may view Mr [May] with disgust and be overwhelmed by it. The real issue boils down to whether this relevant evidence must be excluded under s 8(1)(a) if its probative value is outweighed by the risk the evidence will "have an unfairly prejudicial effect on the proceeding."

[5] Mr [May] did not argue he was prejudiced because he intends to give evidence on some charges but not others. In any event, that type of prejudice is likely to be persuasive where there are only weak arguments in favour of admission of the evidence; *M v R* (CA/93/17) [2017] NZCA 72 at [30].

[19] The weighing-up process required by s 8(1)(a) is practically identical to the overarching test under s 43 in relation to propensity evidence. As observed in *Mahomed v R*,[6] there is no practical difference between the application of the respective tests. But it must be remembered that s 8(1)(a) applies only to evidence carrying the risk of an "unfairly" prejudicial effect.

[20] There is a risk of unfair prejudice by the very nature of this distasteful evidence and its detailed description. The risk is that the jury might give greater weight to the evidence than is permissible or worse go off the rails and use the evidence in an improper way.

[21] In the end, however, this risk is capable of being addressed through firm and tailored judicial directions that bind the jury to a limited and legitimate use of the evidence. Moreover, given that charge 8 will remain part of the joint trial, and there is to be no challenge to [M]'s evidence about at least seeing this pornography on the computer, the distasteful element of this bestiality image evidence will be before the jury. The evidence relating to Mr [May]'s possession of bestiality images is not excluded under s 8(1)(a) because the unfairness element is eliminated by judicial directions concerning limited use of the evidence. Jury obedience to such directions must be assumed.

[22] But every trial judge in this situation looks for ways to minimise such risks. I thus raised the possibility the Crown's position may be met with an agreed fact that [M] was shown bestiality images by Mr [May] as she claims. As noted earlier, the defence came close to such a concession. But, Mr Winter advised he had no instructions to agree to that fact. Yet, an acceptance of that fact provides the corroborative-link sought by the Crown. And it meets Mr [May]'s concern about heightened prejudicial effect. Regrettably no such agreed fact was forthcoming.

[23] For all those reasons, the evidence relating to Mr [May]'s possession of objectionable publications concerning bestiality images is admissible in the joint trial. Severance of those charges is contrary to the interests of justice.

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[6] *Mahomed v R* [2011] NZSC 52.

Is the evidence of Mr [May]'s possession of objectionable images relating to child sexual abuse images admissible as propensity evidence in the joint trial?

[24] The answer to this question determines whether severance of the charges of possession of objectionable images relating to child sexual abuse should be granted. As noted earlier, many of the objectionable publications in this category show young girls engaged in sexual activity. For example, showing a young teen or older child posed on a bed with no pants on and her genitalia is on display; showing an older man performing cunnilingus on a prepubescent girl; or showing a very young girl holding a man's penis.[7] These objectionable image charges are represented by charges 14-17 inclusive.

[25] The Crown argued this body of evidence constitutes relevant propensity evidence of Mr [May]'s unusual sexual interest in young girls and it should be admitted via the rubric of s 43 Evidence Act. Mr [May] argued the evidence is not admissible under propensity principles and the charges ought to be severed from the joint trial. I agree with the defence position. My reasons follow.

Relevant legal principles

[26] As is prescribed by statute, propensity evidence is evidence that tends to show a person's propensity to act in a certain way or to have a particular state of mind.[8] In determining the relevancy of the propensity evidence, the Court is required to consider the nature of the issues at the trial.[9] 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.[10]

[27] The guiding principles for the admission of propensity evidence are set forth in *Mahomed v R.*[11] The rationale for the admission of orthodox propensity evidence rests on the concept of linkage or coincidence. The greater the linkage or coincidence

[7] Crown submissions on pre-trial matters dated 11 May 2018 at [4.26].
[8] Evidence Act 2006, s 40(1)(a)
[9] Evidence Act 2006, s 43(2)
[10] Evidence Act 2006, s 43(1)
[11] *Mahomed v R* [2011] NZSC 52

provided by the propensity evidence, the greater the probative value that the evidence is likely to have.[12] The strength of that linkage is analysed through the rubric of the s 43(3) factors.

[28] As a matter of logic, the level of particularity in the propensity evidence reflects the strength of the link between that evidence and the factual matrix of the offences charged. Thus, relevant propensity pattern must have some specificity about it.[13]

[29] A cautious approach, however, is warranted in admitting evidence relating to a defendant's possession of objectionable publications especially in cases involving allegations of sexual offences against children. As observed by the Court of Appeal in *R v W* (a pre-Evidence Act 2006 decision):[14]

> Common sense would seem to suggest that an accused who is shown to take a keen interest in child pornography may be more likely to sexually offend against a child than one who exhibits no such interest, but of course it by no means follows that he has done so at all or on a particular occasion. Moreover, the introduction into a trial of evidence concerning the possession of such pornography by a person accused of child sexual offending will, by virtue of its unpleasant and deviant character alone, be calculated to prejudice the jury against him and may imperil the fairness of the trial. A cautious approach should therefore be taken to an application such as that made by the Crown in the present case.

[30] This warning continues to have resonance under the Evidence Act.[15] That warning is reflected in the case law trend which requires a specific level of particularity to link this kind of propensity evidence to alleged sexual offending. In my view, the Crown's argument fails to satisfy that trend. An examination of the trend is necessary.

The case law trend

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[12] *Mahomed v R* [2011] NZSC 52 at [3]
[13] *Mahomed v R* [2011] NZSC 52 at [3]
[14] *R v W* (CA55/02), 16 May 2002.
[15] *[Case name removed] v R* [2016] NZCA 72 at [24].

[31] Three cases demonstrate the trend: *D(CA86/201) v R,*[16] *D (CA801/2013) v R,*[17] and *[D] v R.*[18] I examine each below.

D(CA86/201) v R [19]

[32] The defendant faced two counts of a sexual nature in relation to a 15-year-old male. Also, he was charged with sexual grooming of the young man and indecently assaulting him. The trial judge admitted 15 counts of possessing objectionable publications in the joint trial. Those charges related to images found on the defendant's home computer after his arrest on the grooming and indecent assault charges.

[33] The Court held the only basis on which joinder could have been justified was if the evidence of the possession of the objectionable images was admissible as propensity evidence. The Court accepted the propensity evidence could be relevant to the indecent assault and grooming charges because it tended to show he had an unusual sexual interest in young boys and was relevant to the complainant's credibility. So far Mr [May]'s case is on the same footing.

[34] However, whilst accepting the evidence of the possession of objectionable images qualified as propensity evidence, the Court held its probative value was diminished by several factors.

[35] First, the temporal link between the time the objectionable images were last accessed and the alleged sexual offending was not strong.[20] The forensic evidence showed that the images were last accessed in 2009 whereas the sexual offending did not occur until August 2011.[21]

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[16] *D(CA86/201) v R* [2013] NZCA 260.
[17] *D(CA801/2013) v R* [2014] NZCA 369.
[18] *[D] v R* [2016] NZCA 72.
[19] *D(CA86/201) v R* [2013] NZCA 260.
[20] At [37].
[21] On the temporal link factor, Mr [May] is on weaker ground because the Crown's case against him shows the images were likely on Mr [May]'s computer between 1 January 2015 and 19 July 2016 which substantially overlaps the period of the alleged sexual offending.

[36] Second, the Court held there was no direct link between the possession of the objectionable images and the alleged sexual offending. There was no evidence the complainant was shown images on the computer as a prelude to a sexual advance.[22] That missing link was telling.

[37] The Court made other points. It considered there were differences between the alleged sexual offending and the extreme nature of some of the objectionable images. The more extreme images were not probative of the lesser form of non-penetrative activity alleged by the complainant. The inclusion of the more extreme images was likely to be highly prejudicial to the minds of jury members.[23] And the evidence was not critical to the Crown's case on the sexual offending. In the end, the Court was satisfied the "relatively low"[24] probative value of the evidence was outweighed by the risk of unfair prejudice to the defendant.

D (CA801/2013) v R [25]

[38] In *D (CA801/2013) v R*, the appellant had been convicted on four charges (three of which were representative) of sexual violation by rape; four representative counts of sexual violation by unlawful sexual connection; four representative charges of inducing a child to perform an indecent act; one charge of indecency by way of anal intercourse; and five charges of assault on a child, three of which were representative. The victims were the defendant's stepson and stepdaughter.

[39] Significantly, the Crown's case was the appellant showed both the stepson and stepdaughter child pornography on his computer; images of adult males have vaginal and/or oral sex with young children. Also, on various occasions, he used tape to tie his stepdaughter's hands or gag her.

[40] Evidence of the appellant's conviction on 20 charges of possession of objectionable publications was ruled admissible as propensity evidence prior to trial. The shocking objectionable images showed males engaged in sexual activity with

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[22] *D(CA86/201) v R* [2013] NZCA 260 at [39].
[23] At [41].
[24] At [43].
[25] *D(CA801/2013) v R* [2014] NZCA 369.

infants and children. And most of the images showed infants or children who were restrained and gagged during the appalling criminal activity.[26] But, again this was a case that established a direct link between the objectionable images and the sexual allegations. Both victims had been shown such images.

[41] In *D (CA/80/2013) v R*, the level of particularity in the propensity evidence was striking. In addition to the direct link factor, there was similarity in the ages of the children involved, similarity of anal penetration of a young boy by a male, and similarity in the restraint and gagging of the children.

[D] v R [27]

[42] The Crown relied heavily on *[D]* in this case. Mr [Defendant] was convicted following a jury trial on three charges of sexual violation and 11 charges of indecency against three young male complainants including his son.

[43] On appeal, he challenged the admissibility of the propensity evidence relating to pornographic images located on his computer. The type of objectionable images ranged between sexualised posing to sexual activity between children and adults. The ages of the children depicted ranged from young children to teenagers. Most of the images were of boys.

[44] Of the three complainants, two said Mr [Defendant] exposed them to images of naked children on his computer. One of those complainants said he was made to masturbate Mr [Defendant] or perform oral sex on him when viewing these images. The other complainant described Mr [Defendant] bullying him into looking at images on his computer of naked or near naked children. The third complainant gave no evidence he was shown any such images.

[45] The Court addressed several of the cases mentioned thus far. The Court was satisfied the objectionable publication evidence was properly admitted.

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[26] [2014] NZCA 369 at [9]
[27] *[D] v R* [2016] NZCA 72.

[46] Significantly, the Court held the evidence from the two complainants who were shown images provided a direct link between Mr [Defendant]'s possession of objectionable images and the sexual offending charges. The Court held it was implausible to suggest it was a mere coincidence that when Mr [Defendant]'s home was searched he had images and videos on his computer depicting activities of adult males and young boys that were either identical to, or very like, those described by two of the three complainants.

[47] Other points were made. The fact the images seen by the boys were less serious and of a different nature from the objectionable images later found on Mr [Defendant]'s computer was not decisive. Also, the 10-year gap between the last date of the offending and the location of the objectionable material on the computer was not fatal.[28] Finally, the prejudicial effect of the evidence was reduced in *[Defendant]* because the evidence was admitted in the form of an agreed statement of facts.

[48] I accept a s 43-rubric-analysis is a fact-specific inquiry. But the above cases reveal a reasonably clear trend. The trend shows admission of this kind of propensity evidence in child sex abuse trials has been approved where there is a direct link between that evidence and the alleged sexual offending. In each one of the three cases above, the respective complainant testified he or she had been shown such images as a prelude to the sexual offending or to groom them into such activity. Here, that direct link factor is missing.

Analysis

[49] I accept the objectionable image material has some probative value because in and of itself it demonstrates Mr [May]'s unusual predilection towards a sexual interest in young girls. Mr [May]'s possession of these objectionable images points to a paedophiliac mindset which can be both persistent and is exceptionally unusual. It is clearly relevant probative evidence on the material issue as to whether the sexual acts occurred. Also, I accept there is a close temporal link between the propensity evidence and the alleged sexual offending. But a direct link is missing.

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[28] At [29]; *Snell-Scasbrook v R* [2015] NZCA 195 at [36].

[50] [M] was shown bestiality images. But she does not allege Mr [May] showed her objectionable publications involving sexual exploitation of young girls.

[51] [E] alleges that Mr [May] exposed her to "porn" whilst indecently assaulting her in [location deleted].[29] At a later point, [E] elaborated and said Mr [May] did not start making her watch pornography until both had moved to [location deleted]. She said Mr [May] would buy pornography journals on Sky and Mr [May] wanted her to watch it.[30] But, child sexual abuse pornography was not shown or exhibited to her.

[52] Unlike the case law trend, there is simply no evidence from [E] or [M] that either was shown the objectionable images as a prelude to, or as part of, the alleged sexual offending against them. It does not appear in either narrative. The probative value of the propensity evidence is significantly diminished by the absence of that direct link.

[53] Thus, the probative force of this propensity evidence is not high. In contrast, the prejudicial effect of this evidence on Mr [May] is considerable. In the language of s 43, this evidence does not have sufficient probative value to outweigh the risk it may have an unfairly prejudicial effect on Mr [May]. It fails admission at that hurdle.

[54] The propensity evidence that founds charges 14-17 is inadmissible in the joint trial. Accordingly, those charges are severed from that trial.

Mode of evidence application: Should a direction be made that [E] give her evidence in chief by way of EVI?

[55] By the time of trial, [E] will be [over 21] years of age. A consent order was made that [E] give her evidence in the courtroom from behind a screen. However, the Crown also applies for [E]'s evidence-in-chief to be given by way of an evidential video interview (EVI). Mr [May] opposes the EVI procedure.

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[29] Complainant [E]'s EVI page 4, line 6.
[30] Complainant [E]'s EVI page 40, line 17; page 43, lines 16,19.

[56] The Crown argues an amalgam of points: First, [E] will be asked to give evidence about alleged offending that occurred a decade or more ago that compels her to remember details about something that happened when she was a mere child.

[57] Second, the EVI would minimise the stress upon her in giving evidence by limiting the time and extent to which she would have to talk about these matters.

[58] Third, if the EVI is not played [E] will be expected to give evidence about alleged offending over a span of several years at various locations and to varying degrees.

[59] Fourth, Crown counsel argued that *viva voce* evidence would effectively, submit [E] to "a memory test" and "open her up to potential lengthy cross-examination if she says something that is even slightly inconsistent with the EVI transcript."[31]

[60] I must confess this argument is troubling. It tends to suggest it is not in the interests of justice to subject a complainant to scrutiny as to her reliability if the mode of evidence allows for the possibility of inconsistencies between her *viva voce* evidence and EVI transcript. That argument has more to do with protecting the strength of the Crown's case than with the need to minimise stress on [E] or to promote her recovery from the alleged offending. Also, the argument tends to undercut the fairness-of-trial factor because a complainant's scrutiny as to reliability is fundamental to a fair trial. The Crown's argument on this point overstepped the mark.

[61] Fifth, the Crown argued that [E] has difficulty talking about some of the incidents and blank-outs as a coping mechanism. The Crown relies on the following examples in her EVI:[32]

> (a) [Near the start of the interview, when the complainant talks about a relative suggesting her earlier complaint was a lie, she said]:[33]
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> … I really think, not much more I can remember now. I can, it's just I'm going to flake out…added stress makes me blank out and I don't want to blank right now, I don't want to blank.

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[31] Crown submissions on pre-trial matters dated 11 May 2018 at [5.6].
[32] Crown submissions on pre-trial matters dated 11 May 2018 at [5.7].
[33] Page 7 of the EVI transcript.

(b) [She explained what she meant by this later in the interview]:[34]

> … I just go through a stage where I either my anxiety levels get too high or my fear or my, like, you know, scared levels get too high whereas, um it's kind of called, well, what is called rage, so it's blind rage so pretty I'll, I'll be listening to what he said and then just my entire head will go blank …
>
> … pretty much when it gets to him doing sexual stuff to me I will see the first part of it and then I will blank out…

[62] Mr [May] takes a different view. He characterises the EVI as lengthy, confusing and rambling. It covers a total of 88 pages of transcript. He says the questioning and explanations are not chronological. He submits that the use of the EVI will only confuse the jury which puts him at risk. Ironically, he argues it would be more helpful to the jury if [E]'s evidence-in-chief is led in a chronological and logical fashion. Also, contrary to the Crown's protective argument, he emphasises he is entitled to test not only [E]'s credibility but also her reliability by comparing her evidence from the EVI with her *viva voce* evidence.

[63] Also, Mr [May] submits [E]'s preferences have been canvassed and she wishes for no more than a screen which is to be provided.

Relevant legal principles

[64] Section 103 Evidence Act allows a broad fact-specific enquiry. It vests a general and unfettered discretion in the trial Judge once power to make a direction is established.[35]

[65] In *R v GJ*,[36] Katz J observed:

> It is now widely recognised … that the requirement to give evidence orally at a trial can place a considerable stress on some witnesses. This can impact on the quality of the evidence they are able to give, which potentially undermines the truth finding process and the just determination of proceedings.

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[34] Pages 37 to 60 of EVI transcript.
[35] *R v O(CA433/2012)* [2012] NZCA 475 at [37].
[36] *R v G J* [2014] NZHC 2276 at [3].

[66] Wide recognition of these problems has led to the principle that there is now no presumption in favour of the ordinary way in giving evidence.[37] The overarching principle (apart from child witness cases) is the need to ensure a fair trial for both the prosecution and the defendants.[38]

[67] Also, I must under s 103(4)(b) have regard to, amongst other things, the views of the witness and the need to minimise stress on her and the need to promote her recovery from the alleged offending. The statutory aim being to consider the witness' views for the purpose of minimising stress. Although I must have regard to those views, I am not bound by them. This must be the case because the trial Judge may, on his or her own initiative, direct the witness is to give evidence in alternative ways provided in s 105.[39]

[68] Also, I accept that under s 103(3)(c) "the trauma suffered by the witness" relates to trauma suffered by the events about which the witness is to give evidence rather than any trauma to be caused by the act of giving evidence.

Analysis

[69] In this case, [E]'s wishes were presented via a job sheet from the officer in charge. In that job sheet, the officer states he went over the options, including video link and screens, with [E]. She said she finds the prospect of giving evidence daunting. She said it would be traumatic for her to manage, particularly as the allegations concern her biological grandfather. She requested the opportunity to give evidence in the courtroom from behind a screen.

[70] The fact that [E] may not have expressly requested the use of the EVI procedure is not fatal. As noted above, I am entitled to consider, and if appropriate, choose a different mode of evidence than that requested considering the circumstances and assessing those factors mandated by s 103.[40]

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[37] *V(CA492/10) v R* [2011] NZCA 525 at [8].
[38] *R v Christian* [2016] NZHC 1568 at [15].
[39] Section 103 Evidence Act 2006.
[40] *Wealleans v R* [2015] NZCA 353 at [22].

[71] In *Wealleans v R*,[41] Mander J dealt with a comparable situation. In that case, the complainant's request was for the use of a screen. However, other material before the Court provided sufficient evidence that the complainant had suffered trauma arising from the events about which she was to give evidence and that this impact could intensify in the presence of Mr Wealleans. The Court of Appeal considered the mode of evidence direction was justified on this material.

[72] On the material before me, power to make the direction exists under s 103(3)(a), (f), (g), (h) and (j). This material makes it reasonably clear [E] may have difficulty in talking about some of the incidents and may "blank out" as a coping mechanism. This may impact on the quality of her evidence potentially undermining the just determination of the proceedings. When this concern is placed in the context she is expected to give evidence against her biological grandfather about his sexual abuse of her, the case points to a real need to minimise stress upon her in giving that evidence. In my view, that will be achieved by utilising the EVI procedure.

[73] I accept the concern [E] may "blank out" is not evidence of trauma as characterised by s 103(3)(c) because it is not trauma suffered by [E] by the events about which she is to give evidence. However, s 103(3)(j) provides that a direction may be given on "any other ground likely to promote the purpose of the Act." And one of the central purposes of the Evidence Act is to help secure the just determination of proceedings by, amongst other things, promoting fairness to parties and witnesses.[42]

[74] Mr [May]'s trial rights are not undermined by this mode of evidence. He will still be entitled to challenge [E]'s credibility and reliability. The fundamental safeguard is to test the credibility and reliability of evidence through cross-examination.[43] That safeguard is maintained here. If as claimed the EVI is too long, confusing and rambling its use is likely to assist Mr [May]'s defence rather than hinder it.

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[41] *Wealleans v R* [2015] NZCA 353.
[42] Evidence Act 2006, s 6.
[43] *R v GJ* [2012] NZHC 2276 at [36].

[75] For all these reasons, the Crown's application for a direction [E] give her evidence-in-chief by way of EVI, was granted.

Conclusion

[76] Mr [May]'s severance application succeeded in part only.

[77] The charges of possession of objectionable publications relating to bestiality images remain part of the joint trial.[44] The remaining charges of possession of objectionable publications relating to child sexual abuse images are severed from that trial.[45]

[78] The Crown's mode of evidence application for a direction [E] give her evidence by EVI was granted.

W P Cathcart
District Court Judge

[44] Charges 11, 12, 13 and 18-24 inclusive.
[45] Charges 14-17 inclusive.