CASE NOTE

*Gerald McGinley**

R V C

BACKGROUND

THE defendant was charged with five counts of incest of a daughter of a prior marriage. The defendant's daughter was nine years old at the time of the commencement of the alleged offences. Four months later she spoke of the matter to friends at school and subsequently a school counsellor and the police. She was referred by a physician (who had decided not to examine her because of her depressed psychological condition) at the Sexual Assault Referral Service to a child psychiatrist for psychological evaluation.[1]

THE TRIAL

At the trial the child was cross-examined as to her continued visits to her father notwithstanding the alleged sexual conduct and her failure to

---

* LLB (Melb), LLM (Camb); Senior Lecturer, Faculty of Law, University of Adelaide.

1 *R v C* (1993) 60 SASR 467.

complain to her mother or other persons of the conduct. The prosecution was permitted at the trial to introduce expert evidence from the child psychiatrist who had interviewed her, in part to show why there had been no medical examination at the Sexual Assault Referral Service, but primarily to explain the child's subsequent conduct.

In her testimony the psychiatrist gave evidence of the literature and research on child sexual abuse and her own expertise in the area. She gave evidence also of her assessment of the complainant and the reasons for the failure to complain of the father's alleged sexual abuse. The witness testified that the relationship with the father was a physically and emotionally abusive one but that the child also had a special relationship and fondness for her father which led her to continue seeing him. Insofar as the failure to complain was concerned she testified that this was due to the fact that in a parent/child relationship there is an inequality of power in favour of the parent. Further, the child may fear the consequences of disclosure and may feel guilty because of the sexual nature of the abuse.

The Court of Criminal Appeal set the conviction aside and ordered a new trial. One ground for the decision was that the admission of the expert evidence had caused the trial to miscarry. Chief Justice King (with whom Mohr J agreed), after considering United States authority[2] and Canadian decisions[3] accepting such expert evidence, concluded that this evidence was not admissible in South Australia. His Honour considered that it had not been proven at the trial that there was a scientifically accepted body of knowledge concerning the behaviour of child sexual abuse victims regarding their proneness to continue associating with the parent or to refrain from complaining. Even if there were such a body of knowledge in existence, his Honour did not consider that it was an appropriate subject for expert testimony. This was because the proposed evidence was not "so special and so outside the ordinary experience that the knowledge of experts should be made available to courts and juries". The Chief Justice distinguished *R v Runjanjic & Kontinnen*,[4] where the Court of Criminal Appeal accepted evidence of the battered wife syndrome on the basis that such evidence was so surprising and contrary to ordinary expectations that a jury might be misled without the assistance of expert evidence. The learned Chief Justice thought that while most jurors would not have encountered child sexual abuse, they are not ignorant of the behaviour and reactions of

---

2 *People v McAlpin* (CAL 1991) 812 P2d 563.

3 *R v J* (FE) (1990) 74 CR (3d) 269; *R v R* (S) (1992) 73 CCC (3d) 225; *R v C* (RA) (1990) 57 CCC 3d 522.

4 (1991) 56 SASR 114.

children and the effect of family relationships on such behaviour. While experts might give some insights on the behaviour of children, the value of such evidence would not outweigh the impairment of the trial that would result in introducing evidence of this kind into child sexual abuse cases.[5]

Duggan J, in a separate opinion, agreed with King CJ that the witness had not been qualified at the trial to give an expert opinion. His Honour was not prepared to say that such evidence could never be given but that considerable caution should be exercised in deciding on its admissibility. Citing McMullin J in two New Zealand cases,[6] his Honour suggested that expert evidence might be admissible when child psychology is able to show that persons subjected to sexual abuse demonstrate certain characteristics or act in peculiar ways which are "so clear and unmistakable that they can be said to be the concomitants of sexual abuse".

COMMENTARY

The focus of Chief Justice King is on the degree necessary for the expert opinion to assist the jury, namely, that the expert evidence must be extraordinary or contrary to human expectations, that is, counter intuitive. Justice Duggan's emphasis, on the other hand, is the sophistication and accuracy that the psychological evidence must achieve before it is to be of use to the court. In both cases the standard is high. The underlying policy consideration is concern that child sexual abuse cases may become a battleground of confusing expert opinions of questionable forensic value. The admission of such evidence may also constitute an alternative route for otherwise inadmissible evidence. In this particular case the expert witness was, as part of her opinion, permitted to say that she believed the child and also to give hearsay evidence regarding the commission of the alleged offences. South Australia has with recent amendments[7] to the *Evidence Act* 1936 (SA) greatly liberalised the admission of evidence by children and child victims of sexual offences.[8] The corroboration warning has, by and large, been eliminated and evidence of complaints, although not corroborative, are admissible for their probative value. It is now possible for a defendant who does not give evidence under oath to be convicted on uncorroborated evidence, that is neither under oath nor assimilated, as if on

---

5 *R v C* (1993) 60 SASR 467 at 474.
6 *R v B* [1987] 1 NZLR 362 and *R v Accused* [1989] 1 NZLR 714.
7 See *Evidence Act* 1988 (SA) (Act No 32 of 1988).
8 See ss12, 12a, 34ca, 34d.

oath.[9] The position of defendants could be made more precarious if otherwise untested evidence dressed up in persuasive psychological jargon is brought in under the guise that it is the basis of an expert opinion.

Having said this, the psychological research on the so called "battered wife syndrome" has been useful in generating some rethinking of substantive law in the defences of provocation, self defence and duress. The utility of empirical research in child psychology might play a similar useful role. In *R v Corkin*,[10] for example, King CJ, in interpreting s34ca of the *Evidence Act*, admitting evidence of complaints by children in sexual cases for their probative value, thought that such complaints had to satisfy the common law requirements of a prompt voluntary complaint put in the form of a grievance to be admissible under the section. It may be that, insofar as children are concerned, the common law standard needs modification. Expert opinion on the voir dire to assist in the determination of the admissibility of such evidence rather than its weight could play a useful role in the development of the law in this area.

9 See McGinley & Waye, "Recent Developments in South Australian Evidence Law" (1988) 12 *Crim LJ* 317.

10 (1989) 50 SASR 580.