

Publication of name and identifying  
particulars of complainant prohibited  
by s139, Criminal Justice Act 1985.

Order prohibiting publication of name  
or particulars identifying applicant until trial.

THE QUEEN

v

W (CA298/97)

**Coram:** Richardson P  
Keith J  
Tipping J

**Hearing:** 14 October 1997

**Counsel:** J K W Blathwayt for Applicant  
G J Burston for Crown

**Judgment:** 14 October 1997

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JUDGMENT OF THE COURT DELIVERED BY RICHARDSON P

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This application for leave to appeal against a pre-trial ruling concerns the admissibility of evidence proposed to be given by a psychiatrist in terms of s23G of the Evidence Act 1908.

The applicant has been committed for trial on charges of sexual offending against his granddaughter. The psychiatrist has been treating the complainant and, so it is submitted, in that capacity will have formed the opinion that she has been sexually

abused by her grandfather. The point in issue is whether that precludes the psychiatrist from giving evidence in terms of s23G.

Section 23G(2) provides:

In any case to which this Section applies, an expert witness may give evidence on the following matters:

- (a) The intellectual attainment, mental capability, and emotional maturity of the complainant, the witness's assessment of the complainant being based on -
  - (i) Examination of the complainant before the complainant gives evidence, or
  - (ii) Observation of the complainant giving evidence, whether directly or on videotape:
- (b) The general development level of children of the same age group as the complainant:
- (c) The question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is, from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

It is accepted that the psychiatrist qualifies as an expert within the section and no issue arises as to the admissibility of any evidence he may give pursuant to paras (a) and (b). As to para (c), the argument for the applicant is in essence that even if he confines his evidence to the facts elicited in evidence at the trial, the psychiatrist cannot present himself as an independent mind reaching an informed opinion based on the limited facts available when he has already formed a view based on a much wider range of facts.

The short answer is that s23G(2) is specific as to the matters on which an appropriately qualified expert may give evidence. Crucially in terms of para (c), the evidence on which the expert may express an opinion is confined to evidence relating to the complainant's behaviour, which is given during the proceedings by a witness or witnesses other than the expert. The expert is not entitled to comment on credibility

issues or express an opinion on the complainant's claim that she has been sexually abused. The expert applies his or her professional experience and knowledge of the professional literature in concluding whether that separate evidence of the complainant's behaviour is consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant. Whether or not the expert has previously gained any other information about the complainant's behaviour by pre-trial briefing or earlier professional association is irrelevant to the limited inquiry under para (c). The expert opinion evidence is admissible so long as it is directed and confined to the behaviour of the complainant as described by other persons in their evidence at the trial.

The issue is consistency with that particular evidence. Counsel has to take some care in identifying particular evidence already given and asking as a general inquiry whether that particular evidence is consistent with the behaviour of sexually abused children. In such a situation the risk of the expert's evidence being tainted by earlier knowledge on his or her part is minimal.

Mr Blathwayt pointed to the difficulty of cross-examining the expert. However counsel can properly challenge the basis for the expert's belief, which must be the nature and extent of his or her professional experience, excluding this case, and his or her knowledge of the professional literature. These two markers can be tested and a challenge may also be put forward on the basis of consistency of the behaviour described in the evidence with the behaviour of categories of children other than those sexually abused.

As acknowledged by the Crown, the proposed brief requires some further editing, deleting any reference to prior association of the psychiatrist with the complainant; and the evidence which may eventually be given by the expert will obviously have to be assessed during the trial in the usual way in the light of the evidence which is actually given at the trial by other witnesses.

Leave to appeal is refused.

  
Solicitors:

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Crown Solicitor, Wellington