

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

BQ

APPELLANT

AND

THE KING

RESPONDENT

BQ v The King
[2024] HCA 29
Date of Hearing: 10 May 2024
Date of Judgment: 14 August 2024
S173/2023

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

G A Bashir SC with G E L Huxley and N A Wootton for the appellant
(instructed by Legal Aid NSW)

H R Roberts SC with M L Millward for the respondent (instructed by
Solicitor for Public Prosecutions (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

BQ v The King

Evidence – Criminal trial – Expert evidence – Opinion evidence – Credibility evidence – Admissibility – Where s 79(1) of *Evidence Act 1995* (NSW) provides exception to opinion rule for evidence of opinion that is based wholly or substantially on specialised knowledge based on training, study or experience – Where s 108C of *Evidence Act* provides similar exception in case of credibility rule – Where appellant convicted of multiple child sexual offences against two nieces – Where respondent adduced evidence from expert witness concerning possible responses of victims of child sexual assault – Where expert gave opinion about circumstances of and responses to child sexual assault in "intra-familial" context – Where expert gave evidence that intra-familial child sexual assault often takes place within family home with other family members proximate – Whether expert evidence went beyond accepted area of expertise and was therefore inadmissible – Whether miscarriage of justice arose from failure to give general and particular directions to jury to limit use of expert evidence.

Words and phrases – "area of expertise", "behaviour of perpetrators", "child sexual assault", "credibility", "credibility rule", "direction", "evidence", "expert evidence", "expert witness", "illegitimate use", "intra-familial context", "opinion rule", "responses of victims of child sexual assault", "specialised knowledge", "wholly or substantially based".

Evidence Act 1995 (NSW), ss 79, 108C.

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ. At the appellant's trial for child sexual offences alleged to have been committed against two of his nieces, the respondent adduced evidence from an expert witness, Associate Professor Rita Shackel. The appellant's principal contention is that portions of Associate Professor Shackel's evidence, which the appellant characterised as referring to the typical behavioural patterns of perpetrators of child sexual abuse, went beyond her accepted area of expertise concerning how victims of child sexual abuse may respond to that abuse and were therefore inadmissible. The appellant also contended that various directions should have been given to the jury to limit the use of Associate Professor Shackel's evidence, including telling the jury that her evidence "sa[id] nothing about the credibility of the complainant(s)".

2 For the reasons that follow, none of the appellant's contentions are made out. All of the evidence of Associate Professor Shackel that was adduced at the appellant's trial concerned the possible responses of victims of child sexual assault and was within her accepted area of expertise. There was no occasion to give a direction that Associate Professor Shackel's evidence "sa[id] nothing about the credibility" of the complainants. To the contrary, her evidence was relevant to the jury's assessment of the complainants' credibility. Otherwise, in the context of the appellant's trial, there was no appreciable risk of the jury putting Associate Professor Shackel's evidence to an illegitimate use that would warrant giving any particular direction to the jury. The appeal should be dismissed.

Background

3 In 2018, the appellant, BQ, was arraigned before a jury panel in the District Court of New South Wales on an indictment that charged him with 11 child sexual offences under the *Crimes Act 1900* (NSW). Seven of the counts concerned his niece BB.¹ Those offences were said to have been committed between 1 January 2007 and 28 January 2010 when BB was 10 to 13 years of age. The other four counts were said to have been committed against BB's sister, AA, between 1 February 2009 and 26 December 2012 when AA was five to nine years of age.

1 The publication of the identity of AA or BB or any information that is likely to lead to their identification is prohibited: *Crimes Act 1900* (NSW), s 578A(2); *Children (Criminal Proceedings) Act 1987* (NSW), s 15A(1)(a).

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

2.

4 On 30 August 2018, the appellant was found guilty of nine counts on the indictment and acquitted on the other two counts, both of which concerned BB. He was convicted and sentenced to a substantial term of imprisonment.

5 On 3 March 2023, the New South Wales Court of Criminal Appeal: granted the appellant an extension of time within which to appeal against his convictions; allowed his appeal in part; quashed his convictions on two counts concerning AA; substituted a verdict of guilty for a lesser offence on one count; entered a verdict of acquittal on the other count; and remitted the matter to the District Court for the appellant to be re-sentenced. In doing so, the Court dismissed a ground of appeal concerning the admissibility of part of the evidence of Associate Professor Shackel and refused leave to raise a ground of appeal to the effect that the trial judge's failure to direct the jury about the potential misuse of Associate Professor Shackel's evidence occasioned a miscarriage of justice.

6 On 7 December 2023, the appellant was granted special leave to appeal from the Court of Criminal Appeal's decision in this Court on both of those grounds.

The prosecution and defence cases

7 The appellant is married to the daughter of AA and BB's paternal grandparents. The appellant and his wife have two children around the same ages as AA and BB. The extended family was described as "very close".² From around the end of 2007 to September 2012, the appellant and his immediate family lived in AA and BB's paternal grandparents' house occupying a large bedroom with an adjoining lounge area. From the time of the separation of AA and BB's parents in 2004 until December 2012, AA and BB often stayed at their grandparents' house.

8 At the appellant's trial, the respondent relied on direct evidence from AA and BB in support of each count, as well as evidence of uncharged acts which were admitted both as "context evidence" and as evidence that, alongside the charged acts, was said to demonstrate the appellant's alleged tendency to have a sexual interest in AA and BB and act upon that interest. The appellant gave evidence at his trial denying that any of the sexual acts occurred. He also relied on his good

2 *BQ v The King* [2023] NSWCCA 34 at [23].

3.

character, being his lack of prior convictions, as supporting the credibility of his denials and rendering it improbable that he committed the offences charged.

9 It is unnecessary to describe the direct evidence given by AA and BB in support of each count in detail. It suffices to state that seven of the counts as well as the uncharged acts that AA and BB described were said to have taken place in their grandparents' house. The sexual acts mostly occurred with other family members present in the house and often with family members present in the same room but unaware the offending was taking place surreptitiously, such as under a blanket while watching television. In relation to one of the other four counts, AA said that the appellant touched her while she was "driving" an old car on a farm owned by her grandparents outside of the town in which they lived. In relation to the two counts of which the appellant was acquitted by the jury, BB said that the alleged sexual acts took place when she was with the appellant in his utility vehicle.

10 The honesty and reliability of AA and BB's evidence was of obvious importance to the respondent's case. One issue that arose at the trial concerned the timing of AA and BB's disclosures of the appellant's alleged offending. AA complained to her mother about the appellant in early 2014 and was interviewed by the police shortly thereafter. Later in 2014, BB provided the police with a statement denying that the appellant had ever "touched" her. However, during a trial of the appellant in 2016 on counts that only concerned AA, BB made a second statement to police in which she said that the appellant "touched [her] like he touched AA". That statement and BB's subsequent disclosures about the appellant resulted in a mistrial.

11 The retrial the subject of this appeal took place in 2018. In his closing address to the jury, counsel for the appellant described the delay of approximately two years between the alleged commission of the last offence against AA and her disclosure of that offending to her mother and the circumstances of BB's disclosure as "extraordinary". The cross-examination of AA was to the effect that, even though she trusted two of her aunts who were nearby when the appellant allegedly committed one of the counts, she did not disclose that offending to them and was otherwise compliant with the appellant's instructions.

Associate Professor Shackel's evidence

12 Associate Professor Shackel is an Associate Professor and Associate Dean in the School of Law at the University of Sydney. She has Bachelor's and Master's degrees in Psychology, a Bachelor of Laws and a PhD. Her PhD thesis concerned

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

4.

the use of expert testimony in child sexual assault cases, which involved a review of psychological and other related research and what that body of research demonstrated with respect to "how victims of child sexual assault respond to their victimisation" as well as "how well-understood victims' responses are in the community". Associate Professor Shackel explained that she had reviewed studies that were based on interviews with victims of child sexual assault as well as interviews with offenders "about how they offended".

13 Prior to the appellant's trial, the respondent gave notice that it intended to adduce evidence from Associate Professor Shackel on two topics, namely "how victims of childhood sexual assault as a class respond to and disclose their victimisation" and particular "matters relevant to [AA and BB's] conduct during and after the alleged assaults", including whether such conduct was consistent with her conclusions about victims as a class. Over objection, the trial judge allowed Associate Professor Shackel to give evidence on the former topic but rejected her evidence on the latter topic.

14 Associate Professor Shackel told the jury that there are no typical responses of a child to being sexually assaulted but instead responses will vary and depend on the individual characteristics of the child, the relationship between the child and the perpetrator and the broader family and social context. She explained that "it is not uncommon for children not to resist" and "it is not uncommon for children to acquiesce and to comply [with] directions and requests of a perpetrator". She also stated that there are various factors that inhibit victims from "tell[ing] anybody about what is happening to them and ... mak[ing] an official report".

15 Associate Professor Shackel also told the jury that one way of categorising the research was to differentiate between "intra-familial" and "extra-familial" cases of child sexual assault. She was asked by the Crown Prosecutor what the research had demonstrated with respect to the effect an "intra-familial situation [in which such abuse occurs] has on the way that children behave". Associate Professor Shackel responded by explaining that the familial context of sexual abuse gives rise to certain factors that inhibit the child from responding to or resisting the abuse. She observed that "the research shows us that in the context of intrafamilial child sexual assault, the abuse often takes place within the home" and "in the course of everyday activities: bathing, putting children to sleep, watching TV, playing with children". She noted that for children in such contexts, there was a blurring of "normal interaction and appropriate interaction" with "touching".

5.

16 In both the Court of Criminal Appeal and in this Court, the appellant contended that this part of Associate Professor Shackel's evidence was inadmissible because, in opining on where intra-familial child sexual abuse often takes place, she moved from expressing an opinion about the responses of victims of child sexual abuse to opining about the behaviour of perpetrators of such abuse. The appellant also made the same point in relation to the next part of Associate Professor Shackel's evidence, which was as follows:

"Q. What you've told us is that the research has found it's not uncommon for sexual assaults to happen in the family home. Is that right?

A. That's correct. Yes.

Q. Does the research say anything about the assaults that happen in homes, whether or not it's uncommon that they happen in proximity to other people in the home?

A. The research increasingly is pointing to the fact that one of the strongest risk factors for child sexual assault taking place is opportunity, and that opportunity is linked to families, cohabitation, and the familiarity of the offender to the location. So that opportunity often means that the sexual assault will take place within the family home in the course of day-to-day activities with other people also in the home doing their day-to-day activities."

17 Associate Professor Shackel then explained that some victims of child sexual assault had an ambivalent response to being sexually assaulted by "someone that they trust [and] love". The Crown Prosecutor asked her whether the research showed that it was at all "uncommon for a child to perhaps feel positive towards the sexual assault". In response, Associate Professor Shackel explained that there were examples of research where victims "have described some positive feelings about the abuse, and that adds to their confusion, because it's not uncommon for perpetrators to make a child feel like they're different or special, and that's the way in which they can actually access the child, and that's also a way in which they can keep the abuse secret". She said this left the child feeling "ambivalence because of all of those mixed emotions around the abuse and the way that they're being treated".

18 Associate Professor Shackel was not cross-examined.

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

6.

Closing addresses and summing up

19 In her closing address, the Crown Prosecutor referred to the evidence of BB in support of one of the counts to the effect that, while other children were present in the room, the appellant touched BB when she was under a blanket. The Crown Prosecutor noted that there was "no evidence of BB saying anything, crying out or making it known in any way what was occurring" but submitted that, based on Associate Professor Shackel's evidence, "the Crown would say that's not unusual". Later in her address, the Crown Prosecutor summarised Associate Professor Shackel's evidence and submitted that, based on her evidence, it was "not unusual for children to make a delayed complaint" and "not unusual for children, when they are involved in this sexual abuse in an intrafamilial situation to not respond in any way to try and stop the abuse".

20 In his closing address, counsel for the appellant addressed the honesty and reliability of AA and BB's evidence in a manner consistent with the points that have already been noted.³ Counsel for the appellant did not refer to Associate Professor Shackel's evidence.

21 In summing up to the jury, the trial judge referred to the delay between the alleged sexual acts committed by the appellant and the disclosures made by AA and BB. His Honour told the jury that "[t]here may be good reasons why a victim of sexual assault may hesitate in making or may refrain from making a complaint about such an assault" and that "Associate Professor Shackel gave some evidence about these matters". Later in the summing up, the trial judge referred to Associate Professor Shackel's evidence, explained the nature of expert evidence in general terms and directed the jury that, if after having given careful consideration to the expert evidence they do not accept the evidence, they do not have to act upon it. The trial judge told the jury that "[t]he expert evidence here is before you as part of all the evidence to assist you in understanding how children who are victims of sexual assault may react to such abuse, both at the time and afterwards".

22 The trial judge also mentioned Associate Professor Shackel's evidence when summarising the Crown Prosecutor's closing address to the jury. His Honour noted that the Crown Prosecutor reminded the jury that Associate Professor Shackel's evidence was that "it's not unusual for the children to freeze and not move and to acquiesce in what's being suggested to them, and also that complaints

3 See above at [11].

7.

in those circumstances can be delayed, and that they come out in a piecemeal fashion".

23 Counsel for the appellant did not seek any direction or redirection in respect of Associate Professor Shackel's evidence.

The Court of Criminal Appeal's reasoning

24 As noted, at his trial, the appellant objected to the entirety of Associate Professor Shackel's evidence being adduced. However, in the Court of Criminal Appeal, the appellant refined his position by accepting that Associate Professor Shackel was appropriately qualified to give evidence about the responses of victims of child sexual assault but contended that she was not qualified to give opinion evidence about, inter alia, the behaviour of perpetrators of child sexual assaults. In doing so, the appellant sought to align his submissions to conform with the reasoning of two earlier decisions of the Court of Criminal Appeal, namely *Aziz (a pseudonym) v The Queen*⁴ and *AJ v The Queen*.⁵ In *Aziz*, a majority of the Court of Criminal Appeal rejected a challenge to similar evidence given by Associate Professor Shackel, which contended that her evidence was not opinion (or credibility) evidence based on specialised knowledge that satisfied s 79 (or s 108C) of the *Evidence Act 1995* (NSW) but was instead only a form of "literature review" of the opinions of others.⁶ The Court in *AJ* followed *Aziz*, but found that, in that case, it was not established that Associate Professor Shackel had the appropriate specialised knowledge to give evidence about the offending patterns of perpetrators of child sexual assault.⁷

25 Thus, in the Court of Criminal Appeal, the appellant in this case contended that the part of the evidence given by Associate Professor Shackel that referred to the common circumstances in which child sexual assault takes place was outside

4 (2022) 110 NSWLR 317.

5 (2022) 110 NSWLR 339; see *BQ* [2023] NSWCCA 34 at [4]-[5], [216]-[217], [220].

6 *Aziz* (2022) 110 NSWLR 317 at 333 [80], 335 [92], 338 [109]; see also at 338 [105], [107].

7 *AJ* (2022) 110 NSWLR 339 at 359-360 [82]-[85], 370 [130], 376 [162], 378 [170].

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

8.

her expertise in the same way that evidence of perpetrator behaviour was held to be outside her expertise in *AJ*.⁸

26 The Court (Davies and McNaughton JJ, R A Hulme A-J) rejected this contention.⁹ The Court concluded that this part of Associate Professor Shackel's evidence was "very likely to have been obtained by her study of the cases which are the basis of the research" and was "so closely related to the general discussion of the reactions and behaviour of children, that the evidence was not objectionable", but even if her evidence was inadmissible, no miscarriage of justice was occasioned.¹⁰ The Court also rejected the appellant's contention that a miscarriage of justice arose because Associate Professor Shackel did not explain to the jury what she meant by "intra-familial relationships".¹¹ The Court did not accept that any further directions were required to be given by the trial judge in relation to Associate Professor Shackel's evidence.¹²

27 In this Court, both parties embraced *Aziz* and *AJ*, but differed about their relevance and application to the present circumstances. Caution should be exercised in applying *Aziz* and *AJ* in contexts such as the present, notwithstanding the apparent similarity between the issues in those cases and this appeal and the fact that they concern the same expert witness. Ascertaining the proper scope of an expert witness' evidence will depend upon the evidence led about the witness' expertise in the particular proceedings and the evidence as given in those proceedings.

Associate Professor Shackel's evidence was credibility evidence

28 One issue that arose in this Court was whether Associate Professor Shackel's evidence, including her evidence the subject of complaint on appeal, was "credibility evidence", that is, whether her evidence was "relevant only

8 *BQ* [2023] NSWCCA 34 at [221]-[222].

9 *BQ* [2023] NSWCCA 34 at [234]-[239].

10 *BQ* [2023] NSWCCA 34 at [240].

11 *BQ* [2023] NSWCCA 34 at [223], [237].

12 *BQ* [2023] NSWCCA 34 at [276].

because it affect[ed] the assessment of the credibility of the witness or person",¹³ namely AA and BB. The respondent contended that it was. The appellant did not accept that contention, but rather sought to characterise Associate Professor Shackel's evidence as "educative", being material designed to prevent inappropriate inferential reasoning processes based on common misconceptions about how victims of child sexual abuse respond to and disclose such abuse.

29 Except as "otherwise provided" by the *Evidence Act*, evidence that is relevant in a proceeding is admissible.¹⁴ Relevant evidence in a proceeding is "evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding".¹⁵ Evidence is not "taken to be irrelevant only because it relates only to ... the credibility of a witness".¹⁶ Two of the rules established by the *Evidence Act* that "otherwise provide[]" are the opinion rule, which renders evidence of an opinion not admissible "to prove the existence of a fact about the existence of which the opinion was expressed",¹⁷ and the credibility rule, which renders "[c]redibility evidence about a witness" not admissible.¹⁸

30 There is an exception to both rules, which in the case of the opinion rule is found in s 79 and in the case of the credibility rule is found in s 108C, such that both the opinion rule and the credibility rule do not apply to evidence of a person's opinion that is "wholly or substantially based" on specialised knowledge based on their "training, study or experience".¹⁹ In the case of the credibility rule, the exception in s 108C also requires that the evidence be capable of "substantially

13 *Evidence Act 1995* (NSW), s 101A(a).

14 *Evidence Act*, s 56(1).

15 *Evidence Act*, s 55(1).

16 *Evidence Act*, s 55(2)(a).

17 *Evidence Act*, s 76(1).

18 *Evidence Act*, s 102.

19 *Evidence Act*, ss 79(1), 108C(1)(a)-(b)(i).

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

10.

affect[ing] the assessment of the credibility of the witness"²⁰ and be the subject of a grant of leave.²¹

31 Both ss 79 and 108C contain provisions confirming what is included in the scope of evidence of a person's opinion being "wholly or substantially based" on specialised knowledge, that is, based on the person's "training, study or experience".²² Thus, at the time of the primary judge's decision, s 79(2) provided as follows:

"To avoid doubt, and without limiting subsection (1):

- (a) a reference in that subsection to specialised knowledge includes a reference to specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse), and
- (b) a reference in that subsection to an opinion of a person includes, if the person has specialised knowledge of the kind referred to in paragraph (a), a reference to an opinion relating to either or both of the following:
 - (i) the development and behaviour of children generally,
 - (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences."

Section 108C(2) was in similar terms.

32 This aspect of the exception to the opinion rule for expert evidence (ie, s 79(2)) and the entirety of the exception to the credibility rule for expert evidence

20 *Evidence Act*, s 108C(1)(b)(ii).

21 *Evidence Act*, s 108C(1)(c).

22 *Evidence Act*, ss 79(2), 108C(2).

(ie, s 108C) were inserted into the *Evidence Act*²³ following the recommendations of a joint report of the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission published in December 2005 ("the ALRC Report").²⁴ The ALRC Report addressed, inter alia, the admissibility and use of expert evidence concerning children's development and behaviour.²⁵ It noted that such evidence can be relevant to a range of issues in legal proceedings, including a fact in issue, such as whether inferences can be drawn from evidence of the behaviour of a child towards a person alleged to have assaulted the child, and the credibility of a child witness.²⁶ It noted that sometimes Australian courts were reluctant to admit expert evidence on child development and behaviour, including typical patterns of behaviour and responses of child victims of abuse,²⁷ even though such evidence could be important in "assisting the tribunal of fact to assess other evidence or to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour".²⁸

33 In seeking to characterise Associate Professor Shackel's evidence as "educative" and resisting any suggestion that it was being adduced for reasons affecting AA and BB's credibility, the appellant relied on Heydon J's discussion of a certain kind of expert material in *Aytugrul v The Queen*.²⁹ His Honour noted that such material did not establish "adjudicative facts", that is, "facts which are in issue or are relevant to a fact in issue", but instead consisted of expert material that would

23 By the *Evidence Amendment Act 2007* (NSW), Sch 1 [34], [51], with effect from 1 January 2009. The corresponding provisions in the *Evidence Act 2008* (Vic) were created by the enactment of that Act, which relevantly came into operation on 1 January 2010.

24 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report (2005) ("ALRC Report") at 29 [9-1], 31 [12-7].

25 See ALRC Report at 314-320 [9.138]-[9.158].

26 ALRC Report at 314-315 [9.139].

27 ALRC Report at 316 [9.144], 319 [9.156].

28 ALRC Report at 319 [9.155].

29 (2012) 247 CLR 170 at 200-201 [69]-[70].

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

12.

assist the court or the tribunal of fact to "assess" those adjudicative facts.³⁰ Heydon J referred to evidence adduced about "infantile amnesia"³¹ and the relevance of "battered woman syndrome" to the defence of duress as examples of such material.³²

34 The evidence adduced from Associate Professor Shackel was similar to the expert material described by Heydon J in *Aytugrul*, being material that assisted the jury in their assessment of the facts in issue. However, that does not mean that Associate Professor Shackel's evidence was not credibility evidence. As noted, to be admissible, all evidence (including the expert material described by Heydon J in *Aytugrul*) must be relevant,³³ even if it is only relevant to the credibility of a witness.³⁴ There is no doubt that the facts in issue in the appellant's trial included whether he committed the alleged sexual acts upon AA and BB.³⁵ The evidence of Associate Professor Shackel was material that bore upon the assessment of the honesty and reliability of AA and BB and was thus evidence that could rationally affect, at least indirectly, the assessment of the probability of whether the alleged sexual acts were committed by the appellant. For example, Associate Professor Shackel's evidence had the capacity to rebut an attack on AA and BB's credibility because of their delay in disclosing the appellant's alleged sexual acts, as was in fact made by counsel for the appellant.

35 The opinion rule found in s 76 of the *Evidence Act* "direct[s] attention to why the party tendering the evidence says it is relevant".³⁶ Similarly, to address the exception to the opinion rule in s 79(1) of the *Evidence Act*, it is necessary "to

30 *Aytugrul* (2012) 247 CLR 170 at 200-201 [70].

31 *Aytugrul* (2012) 247 CLR 170 at 200 [69], citing *R v BDX* (2009) 24 VR 288 at 298-305.

32 *Aytugrul* (2012) 247 CLR 170 at 200 [69], citing *R v Runjanjic* (1991) 56 SASR 114.

33 *Evidence Act*, s 56(1).

34 *Evidence Act*, s 55(2)(a).

35 See *Hughes v The Queen* (2017) 263 CLR 338 at 349 [16].

36 *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 602 [31].

identify why the evidence is relevant".³⁷ The Crown Prosecutor's closing address to the jury confirmed that the respondent only sought to rely on Associate Professor Shackel's evidence to rebut anticipated attacks on the honesty and reliability of AA and BB's evidence. Both at the trial and on appeal to the Court of Criminal Appeal, there was no identification by any party of any use to which Associate Professor Shackel's evidence might be put other than to assess the honesty and reliability of AA and BB's evidence. It follows that Associate Professor Shackel's evidence was "credibility evidence"³⁸ (as well as "opinion evidence"³⁹). Even so, and leaving aside the particular portions of Associate Professor Shackel's evidence to which objection is taken and which are addressed next, her evidence fell within the exceptions to those rules described above. Her evidence concerned the development and behaviour of victims of child sexual assault and was "wholly or substantially based" on her specialised knowledge on that topic based upon (at least) her "study".⁴⁰ Otherwise, no issue was raised in the Court of Criminal Appeal about the satisfaction of the balance of the requirements of s 108C of the *Evidence Act*.

Associate Professor Shackel's evidence was admissible

36 The principal basis for the appellant's contention that the above portions of Associate Professor Shackel's evidence were inadmissible was that, similar to *AJ*, those portions involved Associate Professor Shackel testifying to the behaviour of perpetrators when it was not demonstrated that she had any specialised knowledge in that field. Neither in the Courts below nor in this Court did the respondent contend that Associate Professor Shackel had such specialised knowledge. However, the respondent contended that, unlike the evidence found to be inadmissible in *AJ*,⁴¹ that part of Associate Professor Shackel's evidence that is objected to in this Court did not concern the psychology of perpetrators but was

37 *Dasreef* (2011) 243 CLR 588 at 602 [31].

38 *Evidence Act*, s 101A(a).

39 *Evidence Act*, s 79(1).

40 *Evidence Act*, s 79(1).

41 See *AJ* (2022) 110 NSWLR 339 at 354 [66], 360 [85], 370 [130]; see also at 378 [170].

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

14.

instead directed to how victims of child sexual abuse respond to the circumstances that often arise with intra-familial abuse. The respondent's submission should be accepted.

37 In *AJ*, the portions of Associate Professor Shackel's evidence found to be inadmissible were answers to questions that asked "*why*" perpetrators of child sexual assault chose "brazen settings" to offend and whether the presence of other persons was "*necessarily a deterrent*" to such offending (emphasis added).⁴² Although those questions were described as relating to the "behaviour of perpetrators",⁴³ they invited Associate Professor Shackel to opine on the psychology of perpetrator behaviour, which was relevant to addressing an anticipated submission that it was implausible that the alleged offender in that case might have behaved in the way the prosecution alleged.⁴⁴ Hence, in *AJ*, the Court contrasted Associate Professor Shackel's lack of demonstrated expertise in relation to the topic of offending patterns of perpetrators with that of forensic psychologists and psychiatrists who often address topics such as the "recidivism of sexual offenders".⁴⁵

38 In the first part of her evidence set out above to which objection is taken,⁴⁶ Associate Professor Shackel was asked about how children may respond to sexual abuse in an intra-familial context. Associate Professor Shackel replied by observing that "the research shows us that in the context of intrafamilial child sexual assault, the abuse often takes place within the home" and "in the course of everyday activities", which for the child involves a blurring of "normal interaction and appropriate interaction" with "touching". In that answer, Associate Professor Shackel addressed how child victims may respond in an intra-familial context. There was nothing objectionable in Associate Professor Shackel contextualising the effect of her research by explaining that (not surprisingly) such crimes often

⁴² *AJ* (2022) 110 NSWLR 339 at 354 [66], 370 [130]; see also at 378 [170].

⁴³ *AJ* (2022) 110 NSWLR 339 at 354 [66].

⁴⁴ *AJ* (2022) 110 NSWLR 339 at 354 [68].

⁴⁵ *AJ* (2022) 110 NSWLR 339 at 359-360 [83].

⁴⁶ See above at [15].

take place in the home, which is an important part of the context in which child victims respond.

39 The position is less clear, but ultimately no different, with the next part of Associate Professor Shackel's evidence set out above to which objection is taken.⁴⁷ The Crown Prosecutor asked Associate Professor Shackel whether the research she had studied found that it was common for child sexual abuse to be committed in the family home in proximity to "other people". At one level, the question might be understood as seeking to elicit evidence about the offending patterns of perpetrators of child sexual assault akin to the evidence of "brazen settings" of offending that was adduced in *AJ*.⁴⁸ However, the significance of Associate Professor Shackel's evidence that such offending is often committed while other family members are proximate is that it reinforces the otherwise normal domestic contexts in which such abuse may occur and in which victims may or may not respond. This is made clear by the questions and answers that immediately followed, which concerned the possible ambivalence of a child victim about their abuse at the time it was committed and their possible affection for their abuser.

40 The portions of Associate Professor Shackel's evidence to which objection is taken did not involve Associate Professor Shackel straying beyond her demonstrated area of expertise in relation to the responses of victims of child sexual assault to opine about perpetrator behaviour, that is, the psychology of perpetrators, as was found to have occurred in *AJ*. Instead, Associate Professor Shackel's evidence explained that her research included many cases where intra-familial child sexual assault was committed "within the family home in the course of day-to-day activities" and with other family members proximate.

41 The appellant also contended that the Court of Criminal Appeal engaged in speculation in concluding that Associate Professor Shackel's description of where such abuse commonly takes place was "very likely to have been obtained by her study of the cases which are the basis of the research".⁴⁹ That contention has no substance. As noted, Associate Professor Shackel gave evidence that she had analysed research that included interviews of perpetrators discussing how they

47 See above at [16].

48 See *AJ* (2022) 110 NSWLR 339 at 354 [66].

49 See *BQ* [2023] NSWCCA 34 at [240].

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

16.

offended and their experiences and strategies in offending. It is difficult to see how one could analyse research into the responses of victims of child sexual assault without being apprised of the circumstances in which such abuse occurs. No further elucidation was required by Associate Professor Shackel to demonstrate that her answers were "wholly or substantially based" on her specialised knowledge.⁵⁰

42 The appellant was also critical of the Court of Criminal Appeal for supposedly treating these aspects of Associate Professor Shackel's evidence as admissible because they were "so closely related to the general discussion of the reactions and behaviour of children, that the evidence was not objectionable".⁵¹ It is correct that a body of evidence does not become admissible merely because it is "closely related" to another body of admissible evidence; however, the appellant's criticism to that effect does not fairly reflect the Court of Criminal Appeal's reasoning. The parts of Associate Professor Shackel's evidence to which objection was taken were simply part of her evidence that addressed the responses of victims of child sexual assault committed in an intra-familial context.

43 Lastly, the appellant repeated a separate criticism that was made in the Court of Criminal Appeal to the effect that, to the extent Associate Professor Shackel's evidence concerned child sexual assault committed in an intra-familial context, it was inadmissible because she did not specify what form of relationships were encompassed by the phrase "intra-familial". This failure was said (somehow) to result in there being a failure to demonstrate that Associate Professor Shackel's opinion was based on her specialised knowledge based on "training, study or experience".⁵² This contention should also be rejected. Associate Professor Shackel's reference to "intra-familial" clearly referred to events occurring within a family, and that concept was given context by her explanation of the family settings in which child sexual assault commonly takes place. As noted by the Court of Criminal Appeal, "[t]he question of who might fall within the scope of 'intrafamilial' will vary from family to family and case to case" such that "[i]t is

50 *Evidence Act*, s 79(1); *Dasreef* (2011) 243 CLR 588 at 604 [37].

51 *BQ* [2023] NSWCCA 34 at [240].

52 *Evidence Act*, s 79(1); see *Dasreef* (2011) 243 CLR 588 at 605 [42].

17.

not helpful to be prescriptive in that way".⁵³ Given that the appellant was AA and BB's uncle and given the undisputed evidence concerning the living arrangements at their grandparents' house, their relationship with the appellant was clearly familial and it was well open to the jury to proceed on that basis.

44 The Court of Criminal Appeal did not err in rejecting the appellant's complaint about the admissibility of Associate Professor Shackel's evidence.

No further direction was required

45 The appellant contended that a miscarriage of justice was occasioned by the trial judge's directions to the jury. The appellant contended that a miscarriage arose from the failure of the trial judge to give a general direction to the jury of a kind that he contended should be given in a criminal trial where expert evidence concerning the behaviour and responses of children to being sexually assaulted is adduced. The appellant also contended that a miscarriage of justice arose from the failure of the trial judge to give a particular direction, the necessity for which was said to arise from the evidence adduced and the submissions made at the appellant's trial.

The proposed general direction

46 The proposed general direction was to the effect that: Associate Professor Shackel's evidence was only led for an "educative" purpose in relation to inferences that might be drawn from children's behaviour; her evidence "says nothing about the credibility of the complainant(s)" and was not led by the respondent for the purpose of addressing their credibility; and it would be wrong to reason from any correlation between what the research has found as to how children may respond to abuse and how AA and BB say they responded to the appellant's alleged sexual acts "that the complainant(s) must be telling the truth".

47 The appellant referred to a decision of the Supreme Court of New Zealand in *DH v The Queen*,⁵⁴ which concerned what was described by that Court as "counter-intuitive evidence" adduced from an expert in cases involving allegations of sexual abuse of young people for the purpose of correcting erroneous beliefs or

53 BQ [2023] NSWCCA 34 at [237].

54 [2015] 1 NZLR 625.

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

18.

assumptions that may be held and which, if uncorrected, may lead to illegitimate reasoning.⁵⁵ Similar to this case, the expert in *DH* had opined that the reporting of such abuse was "most commonly delayed", especially where the alleged perpetrator was a family member.⁵⁶ The trial judge in that case had directed the jury that the expert's evidence said "nothing about the credibility, the believability of [the complainant]" and was "completely neutral".⁵⁷ The appeal from *DH*'s conviction following that direction was dismissed.⁵⁸

48 The appellant in this case relied on the Supreme Court of New Zealand's apparent endorsement of two decisions of the Court of Appeal of New Zealand,⁵⁹ which was to the effect that "[w]here counter-intuitive evidence is admitted in a jury trial, the judge must instruct the jury of the purpose of the evidence and that it says nothing about the credibility of the particular complainant".⁶⁰

49 It would have been erroneous and confusing for the trial judge to have given a direction to that effect at the appellant's trial. As explained, the evidence of Associate Professor Shackel did say *something* about the credibility of AA and BB. The very purpose for which her evidence was led was to avoid the jury's assessment of the honesty and reliability of AA and BB's evidence being affected by common misapprehensions, such as there being typical responses of a child to being sexually assaulted and that, commonly, children who are sexually assaulted in an intra-familial context will not acquiesce but instead protest.

50 This highlights the difficulty with the formulation of any general direction for such expert evidence in that the direction might become untethered from the issues and evidence in the trial and may mislead the jury as to the legitimate use to which that expert evidence might be put. As noted, the ALRC Report adverted to

55 *DH* [2015] 1 NZLR 625 at 631 [2].

56 *DH* [2015] 1 NZLR 625 at 639 [45].

57 *DH* [2015] 1 NZLR 625 at 653 [114].

58 *DH v The Queen* [2013] NZCA 670.

59 *M v The Queen* [2011] NZCA 191; *OY v Complaints Hearing Committee* [2013] NZCA 107.

60 *DH* [2015] 1 NZLR 625 at 637 [30(e)].

the possibility that evidence of child behavioural responses to being sexually assaulted may be relevant to a fact in issue, such as whether inferences can be drawn from evidence of the behaviour of a child towards a person alleged to have assaulted the child.⁶¹ For example, it may be that there is expert evidence indicating that a teenage child who is sexually assaulted may commence exhibiting anti-social or oppositional behaviour or that a young child who is sexually assaulted may exhibit sexualised behaviour. If there were evidence of such behaviour of a complainant at a trial, then that expert evidence would not just relate to the credibility of the complainant but might also be directly probative of whether they were abused. On the other hand, in this case, it would have been wrong to direct the jury that the absence of any complaint by AA and BB shortly after the alleged sexual acts took place made it more likely that the sexual abuse occurred. Such a direction would have attributed to Associate Professor Shackel's evidence a force it did not possess and would otherwise invite illogical reasoning.

51 The proper approach in such cases is not to attempt to enunciate a general direction appropriate to all forms of counter-intuitive or educative evidence or to direct the jury that such evidence might be used only to respond to an attack on a complainant's credibility but not to support their credibility. Instead, where necessary, the legitimate and potentially illegitimate uses to which such evidence might be put should be identified and, if there is a sufficient likelihood or risk that such evidence might be put to an illegitimate use, then that may warrant consideration of its exclusion under s 135 or s 137 of the *Evidence Act* or the giving of a direction to the jury to guard against that illegitimate use.

The proposed particular direction

52 The particular direction the appellant contends should have been given by the trial judge accords more with the approach just outlined, although the risks to which it is directed did not arise at the appellant's trial. The suggested direction had three aspects.

53 First, the appellant contended that the jury should have been directed that it would be wrong to use the evidence of Associate Professor Shackel to assume or support the suggestion that the appellant had the tendency asserted by the respondent. Nothing in Associate Professor Shackel's evidence, the Crown

61 ALRC Report at 314-315 [9.139].

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

20.

Prosecutor's address or the trial judge's summing up suggested to the jury the possibility of reasoning in that way.

54 Second, the appellant contended that the jury should have been directed that it would be wrong to reason that any correlation between what the research had shown as to how perpetrators commit child sexual abuse, including abuse in an "intra-familial" context, and how the appellant was alleged to have abused AA and BB meant that he must have committed the offences charged or was predictive of how such alleged perpetrators, including the appellant, behaved.

55 Third, the appellant contended that the jury should have been directed that it would be wrong to assume that the appellant fell within the term "intra-familial" and "therefore the evidence was predictive of the conduct of the complainants and the [appellant]".

56 It follows from what has been stated⁶² that it was well open to the jury to conclude that the relationship between the appellant and AA and BB fell within what Associate Professor Shackel described as "intra-familial". Otherwise, the appellant's proposed direction identifies a particular form of illegitimate reasoning that theoretically arose⁶³ from that part of Associate Professor Shackel's evidence that referred to the common circumstances in which "intra-familial" child sexual assault occurs, namely the possibility that the jury might reason that, because the respondent's case against the appellant accorded with those circumstances, the alleged sexual acts were more likely to have occurred. However, there was no realistic possibility or likelihood in this trial that the jury would have employed such illegitimate reasoning. The Crown Prosecutor's address did not make any direct or indirect appeal to such reasoning. Of particular significance is that counsel for the appellant did not seek a direction telling the jury not to adopt such reasoning. Counsel for the appellant was astute in protecting his client's interests at the trial. The failure to seek a direction to this effect during the trial is a strong

62 See above at [43].

63 See, eg, *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at 557-558 [57].

indication that, in the atmosphere of the appellant's trial, there was no appreciable risk of such reasoning being adopted.⁶⁴

57 The Court of Criminal Appeal did not err in refusing the appellant leave to raise a ground of appeal contending that his trial miscarried on account of the trial judge's directions concerning the use of Associate Professor Shackel's evidence.

Undisputed educative evidence

58 The substance of the evidence given by Associate Professor Shackel at the appellant's trial was not disputed and it is difficult to see how it could have been disputed. At the hearing of this appeal, it was queried whether the necessity to call Associate Professor Shackel could have been avoided by the parties reaching an agreement on certain facts⁶⁵ or on directions for the trial judge to give similar to those that can be given by trial judges in New South Wales in relation to consent in sexual assault trials.⁶⁶ The respondent resisted the use of such expedients on the basis that there may be a benefit in terms of persuading the jury not to act on any misconceptions about the possible responses of victims of child sexual assault if they hear evidence from an expert witness explaining why those misconceptions are wrong as opposed to simply being told that by counsel or a trial judge.

59 Initially at least, it is a matter for the parties as to what evidence they will adduce in support of their respective cases. However, the necessity for evidence of opinions based on specialised knowledge to be presented in a form that demonstrates its admissibility⁶⁷ means that the facts to which the opinion relates or which the opinion is adduced to establish should be clearly identified. This clear identification will enable an accused, if they so choose, to admit those facts.⁶⁸ Leaving aside the issue as to whether or not the effect of the admission of such

64 *De Silva v The Queen* (2019) 268 CLR 57 at 70 [35]; *Hamilton* (2021) 274 CLR 531 at 557-558 [57].

65 *Evidence Act*, s 191.

66 *Criminal Procedure Act 1986* (NSW) as current, ss 292-292E.

67 *Dasreef* (2011) 243 CLR 588 at 604 [36], citing *HG v The Queen* (1999) 197 CLR 414 at 427 [39].

68 *Evidence Act*, s 184.

Gageler CJ
Gordon J
Edelman J
Steward J
Gleeson J
Jagot J
Beech-Jones J

22.

facts removes the capacity of the prosecution to call evidence to demonstrate that those facts exist (or to clarify the admission),⁶⁹ at the very least, such admissions would afford greater scope for the exclusion of such evidence,⁷⁰ especially if the probative value of the evidence is outweighed by the danger that the evidence will be unfairly prejudicial to the accused⁷¹ or might cause or result in undue waste of time.⁷² Further, in a case such as this where the expert evidence adduced was also credibility evidence, then, as noted, to be adduced the evidence requires a grant of leave from the Court.⁷³ Such leave can be granted on condition,⁷⁴ and an assessment of whether to grant such leave requires consideration of, inter alia, the effect of adducing the evidence on the length of the trial and the importance and effect of the evidence.⁷⁵ For these reasons, any suggestion, if it was made, that the prosecution has an unfettered licence to adduce evidence of the kind given by Associate Professor Shackel should not be accepted.

Relief

60 The appeal should be dismissed.

69 See *Stubbley v Western Australia* (2011) 242 CLR 374 at 391 [63]; see also at 401-402 [94]. See also *Ali v The Queen* (2005) 79 ALJR 662 at 674 [73]; 214 ALR 1 at 17; *R v Smith* [1981] 1 NSWLR 193 at 195.

70 *Evidence Act*, ss 135, 137.

71 *Evidence Act*, s 137.

72 *Evidence Act*, s 135(c).

73 *Evidence Act*, s 108C(1)(c).

74 *Evidence Act*, s 192(1).

75 *Evidence Act*, s 192(2)(a), (c).

