SUPREME COURT OF QUEENSLAND

CITATION:	*R v D* [2003] QCA 151
PARTIES:	**R** **v** **D** (appellant)
FILE NO/S:	CA No 432 of 2002 DC No 319 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	4 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2003
JUDGES:	Davies and Jerrard JJA and Mackenzie J Separate reasons for judgment of each member of the Court, Davies JA and Mackenzie J concurring as to the orders made, Jerrard JA dissenting in part
ORDERS:	**1. Allow the appeal** **2. Set aside the conviction** **3. Order a new trial**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – GENERALLY – where learned trial judge allowed admission of complainant's out of court statement based on expert evidence that complainant had sufficient intelligence to form memories – where expert evidence also suggested that complainant's ability to retrieve accurate memories was questionable due to contamination of memory by other sources – whether learned trial judge took too narrow a view of expert evidence in admitting the out of court statement CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – GENERALLY – where learned trial judge concluded that expert evidence usurped the role of the jury – where expertise of psychologist not challenged – whether expert evidence outside the experience and knowledge of the jury CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR

GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – where learned trial judge concluded at voir dire that expert evidence would not be admissible at trial as it would usurp the role of the jury – where defence counsel was effectively prevented from calling psychologist as a witness – where evidence of complainant's mother essential to the formation of an opinion by psychologist at trial – whether verdict unreasonable or insupportable having regard to evidence

Criminal Code Act 1899 (Qld), s 668E
Evidence Act 1977 (Qld), s 9A, s 93A, s 98, s 130

Farrell v The Queen (1998) 194 CLR 286, followed
Murphy v The Queen (1989) 167 CLR 94, considered
R v Adams & Ross [1965] Qd R 255, considered
R v Cumner [1994] QCA 270; CA No 108 of 1994, 28 July 1994, followed
R v F. A. R. [1996] 2 Qd R 49, considered
R v Morris; ex parte Attorney General [1996] 2 Qd R 68, considered
R v Swaffield (1997-1998) 192 CLR 159, considered

COUNSEL: T Carmody SC for the appellant
D L Meredith for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **DAVIES JA:** This is an appeal against conviction. It is based on two grounds. They are:

> "(1) Complainant's out of court statement tendered s 93A(1) *Evidence Act* 1977 (Qld) should not have been received into evidence.
>
> (2) The jury's verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence vide s 668E(1) of the *Criminal Code*."

The first of these questions raises a matter argued before the learned trial judge on a voir dire.

[2] I have had the advantage of reading the reasons of Jerrard JA and of Mackenzie J. Their Honours' statement of the relevant facts, the learned trial judge's rulings and the arguments of the parties make it unnecessary for me to repeat them except to the extent that it is necessary to explain these reasons. In what follows I adopt what Jerrard JA has said in [26] to [55] of his reasons.

[3] The voir dire to which I have referred had two purposes relevant to this appeal. The first of these was to decide whether what the complainant said to her mother on 31 January 2002 should be admitted as evidence of recent complaint. Counsel for the appellant sought to exclude it on the basis that the nature of the mother's questions which elicited this complaint were such as to suggest answers implicating the appellant. The appellant succeeded in that application.

[4] The second purpose of the voir dire was to determine the admissibility of the complainant's evidence sought to be admitted pursuant to s 93A of the *Evidence Act* 1977 (Qld) ("the Act"). Two possible bases of exclusion were suggested. The first was s 9A of the Act. And the second was s 98 of that Act. Section 130, which may also have been relevant, was not referred to.

[5] Section 9A provides:

> "(1) This section applies if -
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> (a) a court is deciding whether a person who does not understand the nature of an oath has sufficient intelligence to give reliable evidence;
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> or
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> (b) the evidence of a child less than 12 years is admitted.
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> (2) Expert evidence is admissible in the proceeding about the witness's level of intelligence, including the witness's powers of perception, memory and expression, or another matter relevant to the witness's ability to give reliable evidence."

[6] It can be seen that s 9A(1)(b) applies only if the evidence of a child less than 12 is admitted; that is, it applies in the trial hearing. The question posed by s 9A(1)(a) is the question, under s 9A, which arose on the voir dire; that is, whether the complainant had sufficient intelligence to give reliable evidence.[1] In determining that question expert evidence was admissible about the matters referred to in s 9A(2).

[7] The respondent called Mrs R, a psychologist experienced in child psychology, to give evidence about, amongst others,[2] the matters referred to in s 9A(2). Her evidence appeared to focus, in this respect, on the complainant's "powers of … memory"; in particular her power of memory retrieval.

[8] Her final conclusion on this question, in my opinion, appears in her answer to the question whether she was able to express an opinion on the complainant's ability to give reliable evidence and in her answer to some questions which followed. In answer to this question Mrs R said:

> "… it's my opinion that she has sufficient intelligence to … form accurate memories of her direct experience. … I personally think that the problem here is in how … those memories are being retrieved … through the … line of questioning that has happened. I think that the other very relevant aspect is the emotional context, … all around the retrieval of those memories and there's … lots in … that transcript, even to the point of actual physical violence and things all occurring at the same time as … this was all being brought up, … which I think would have put … enormous … emotional … factors in the aspect of that information being … retrieved from her."

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1 It was common ground that the complainant did not understand the nature of an oath.

2 The admissibility and relevance of her evidence to the question under s 98, though raised, seem to have been lost sight of by counsel for the appellant, and consequently by his Honour, during the course of argument in the voir dire. I shall return later to that question and also to s 130, the application of which does not appear to have been adverted to.

[9] His Honour then asked some questions which included the following and which elicited the following answer:

> "And the next question, assuming the trial goes ahead this afternoon, which is about nine months later? -- Nine months later. I think that - I personally think she would have … difficulty being able to distinguish between her actual experience and … all this information that she … may have got from other sources."

[10] His Honour appears to have reached the view that the complainant had sufficient intelligence to give reliable evidence because Mrs R had expressed the view that she had sufficient intelligence to **form** accurate memories of her direct experience. His Honour then proceeded to rule against exclusion of the evidence otherwise admissible pursuant to s 93A because, as he put it:

> "The child's got the capacity and that's what she said."[3]

His Honour's reference to "she" was plainly a reference to Mrs R.

[11] However in my respectful opinion, that was to take too narrow a view of Mrs R's evidence, even so far as it related only to the matters referred to in s 9A(2). As appears from what Mrs R said elsewhere in her evidence, what she meant when she said that the complainant had sufficient intelligence to form accurate memories of her direct experience was that the complainant had sufficient intelligence to lay down accurate memories. But what she was saying in addition, in the passages I have quoted, was that she doubted the complainant's ability to retrieve those memories accurately because they had been contaminated by what had come from other sources, in particular from her mother but also from what she had seen or heard of the assault on the appellant which, she may have thought, was a form of punishment for the appellant's wrongful conduct. It was, it seems, the complainant's intellectual immaturity and emotional dependence, which Mrs R thought restricted her capacity to retrieve such uncontaminated memories.

[12] What Mrs R did not say, because she was never asked, was the basis for her opinion; whether it was, for example, based on empirical studies or had some scientific basis or was simply common sense. That was probably because neither party wished to question her expertise to give this evidence.

[13] I agree, with respect, with Kirby J[4] that it is right for a trial judge "to approach with caution any attempt to call evidence which could have the effect of usurping the jury's function in reaching their ultimate conclusion as to whether a witness was telling the truth or not". But that caution does not entitle a judge to exclude or disregard expert evidence about a witness' power of memory retention, in deciding a question under s 9A(1), because he thought that would be to usurp the role of the jury. That would be contrary to the express statement in s 9A(2) of the admissibility, and presumably the relevance, of such evidence upon the question which arises under either s 9A(1)(a) or s 9A(1)(b).

[14] However there is, in my opinion, a distinction which should be made, in considering evidence tendered as expert evidence about a witness' power of memory, between

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3 As noted earlier, his Honour did not go on to consider the admissibility of this evidence under s 98, which had been raised, or s 130 which had not.

4 In *Farrell v The Queen* (1998) 194 CLR 286 at 299.

the capacity of a witness to retrieve an uncontaminated memory in circumstances such as this, on the one hand, and, on the other, the possibility that a witness, may not in fact have an accurate memory because of the possibility that it has been contaminated by other events. The first of these is a matter on which, pursuant to s 9A, expert evidence may be given. The second is, in general, a question for the jury but it may be that, even on this question, expert evidence may be relevant. Counsel for the appellant did not seek to make this distinction, or at least to make it clearly, in his cross-examination of Mrs R. Nor did he invite the learned trial judge to make any such distinction and his Honour does not appear to have done so.

[15] It is unclear how the voir dire or the trial would have been conducted and determined if this distinction had been adverted to or Mrs R's expertize questioned. As it turned out, because his Honour took the view that Mrs R's evidence usurped the role of the jury, he expressed at least the tentative view that he would not have admitted it in the trial. However, had he accepted that Mrs R's evidence was expert evidence which went to the complainant's limited capacity to retrieve memory, he would also have concluded that her evidence did not usurp the role of the jury and that, consequently, it would be admissible in the trial. But, of course, it could only have been relevant evidence at the trial if the evidence of the complainant's mother, S, was also admitted.

[16] I turn now to the possible relevance of Mrs R's evidence to the application of s 98 and s 130. As already mentioned, s 98 was relied on by the appellant at the outset of the voir dire but seems to have been lost sight of later. Section 130 was not relied on.

[17] Section 98 of the *Evidence Act* permits a court to reject a statement such as the evidence given pursuant to s 93A if "it appears to it to be inexpedient in the interests of justice that the statement should be admitted". Section 130 provides that:

> "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

[18] In my opinion it would be a rare case in which a court will exclude a statement, otherwise admissible pursuant to s 93A, pursuant to either the discretion conferred by s 98 or that conferred by s 130. It is most unlikely that it will ever be excluded on the basis that its prejudicial effect exceeds it probative value because in almost all cases the probative value of such a statement is very high. And the mere fact that, as may have been the case here, the witness, though available to give evidence in the trial, is unable, for one reason or another, to be effectively cross-examined, will not, without more, ordinarily be sufficient to attract the exercise of that discretion.[5]

[19] Though s 9A does not exclude consideration of whether expert evidence is admissible, either in considering the application of s 98 or s 130, or at the trial, upon

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[5] An apparently contrary, though obiter view was expressed by Fitzgerald P in *R v F.A.R.* [1996] 2 QdR 49 at 54 - 55; perhaps expanding on his earlier view in *R v Cumner* [1994] QCA 270; CA No 108 of 1994, 28 July 1994. However in that case both Pincus JA (at 61) and I disagreed with that view. My own statement in that case that the exercise of discretion under these sections will almost always turn on reliability (at 61) was not intended to emphasize the importance of reliability in the exercise of discretion but to imply that I found it difficult to see any other basis for exclusion.

matters, other than those referred to in s 9A(2), which may affect the reliability of a witness' evidence in a specific case, I think it follows from what I have said that I think it unlikely that, had all matters relevant to Mrs R's expertize been adverted to, her evidence would have resulted in exclusion of the complainant's s 93A statement under either s 98 or s 130. But the failure to advert to these matters may have affected the way in which the trial was conducted.

[20] His Honour concluded that Mrs R's evidence usurped the role of the jury without considering the distinction to which I have referred and without considering what evidence she might have been able to give which would be relevant to the discretion under s 98. Moreover neither party had objected to Mrs R giving the evidence which she gave so the question whether it was based on matters outside the experience and knowledge of a jury[6] was not considered.

[21] Mackenzie J has expressed the view that her evidence was not outside the experience and knowledge of a jury because he described it as "merely a conclusion that where the underlying hypothesis is … that a child of the age of the complainant who has an idea put into her head may incorporate that fact into an account of events and that, if the child is a child who is eager to please, the risk is even higher, it is not something beyond the experience of an average juror". That may possibly be correct. But it seems to me to be at least as likely that Mrs R's evidence was based on matters outside the knowledge and experience of a jury and that, if her expertize had been questioned, this would have become evident.

[22] On a number of occasions during the course of her evidence Mrs R was referred to various studies and she expressed views which relied on her own experience. Had her expertize to give this evidence been questioned she may well have referred to established patterns of behaviour in children or studies done on the effect of extraneous contaminating facts on memory retrieval of susceptible children or of children of the complainant's age generally.

[23] What does seem likely is that the way in which the voir dire was conducted and his Honour's somewhat premature and possibly incorrect conclusion that Mrs R's evidence would not be admissible at the trial, because it usurped the role of the jury, effectively prevented the appellant from considering calling Mrs R at the trial and, consequently, of reconsidering his objection to the admission of S's evidence. S's evidence would have been essential to the formation of any relevant opinion by Mrs R at the trial.

[24] If S had given evidence at the trial, whether or not Mrs R also did, I think that a reasonable jury might not have been prepared to accept the complainant's evidence given under s 93A beyond reasonable doubt.[7] And as the acceptance of that evidence was essential to the appellant's conviction it follows, in my opinion, that the conviction should be set aside.

[25] On the other hand, for reasons which appear from what I have already said, I do not know whether Mrs R's opinion would be properly receivable as expert evidence if the basis for it were examined or whether, if it were received, the complainant's

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6 *Murphy v The Queen* (1989) 167 CLR 94 at 111; *Farrell v The Queen* supra at 292 - 293, 300, 322.

7 *R v Storey* (1978) 140 CLR 364 at 376; *Festa v The Queen* (2001) 208 CLR 593 at [127], [206], [229].

s 93A statement would be excluded. More importantly, it is unclear whether, if S were to give evidence the appellant would be acquitted. Consequently I would order a new trial. However I agree with Mackenzie J that this is the kind of case in which the Director of Public Prosecutions may wish to consider whether, having regard to the difficulties inherent in the complainant's evidence, and to the need for the complainant to give evidence again, it is in the public interest that the appellant be retried.

Orders

1. Allow the appeal.
2. Set aside the conviction.
3. Order a new trial.

[26] **JERRARD JA:** On 2 December 2002, D was convicted by a jury of the offence of unlawfully and indecently dealing with J, a child under the age of 12 years. The offence was alleged to have been committed on or about the 30th day of January 2002 at Winwill via Grantham. He has appealed against that conviction, and seeks leave to do so on the following two grounds. The first is that the complainant child's out of court statements, contained in video recorded interview or a video conversation with her conducted by a Police Officer on 2 February 2002 and tendered pursuant to s 93A(1) of the *Evidence Act* 1977 (Qld), should not have been received into evidence. The second ground is that the jury's verdict should be set aside because it is unreasonable or cannot be supported having regard to the evidence.[8]

The Evidence before the Jury

[27] The evidence led before the jury on the trial was in fairly short compass. J who was six and a half at the date of trial, gave evidence by way of video link and presumably did so as a special witness and pursuant to s 21A in Part 2, Division 4, of the *Evidence Act*. She was asked some limited questions in evidence in chief and in cross examination. The bulk of what she could say about the charge was put before the jury via the video tape made on 2 February 2002. Additionally, her mother, S, gave evidence, as did her then partner, M, and the appellant.

The Agreed Background Events

[28] The offences were said to have occurred at the residence S and M shared in January 2002, at Winwill. The matters which were common ground between all the adult witnesses in the evidence the jury heard can be summarised as follows. S was living with M in Winwill, and at the relevant time they had two boarders, DR and PM. The child J, then living with her mother, had her own room adjoining the bedroom shared by her mother and M. Access from J's bedroom to her mother's could only be gained through the lounge room.

[29] D had met M in about mid 2001, and over time had become a regular visitor to that household. He was not in any permanent employment, and visited on occasion both in the day time and at night. By about October 2001 visits were perhaps once per week.

[30] The child J was friendly with D, who would on occasions play ball with her, help her feed the horses, and colour in with her. When she went to bed she would give

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[8] Section 668E(1) of the Criminal Code, which also provides that a conviction should be set aside if the court on an appeal is of the opinion that there was a miscarriage of justice "on any ground whatsoever".

him, as with all of the people in the room, a hug. She occasionally called him "papa" or "poppy", apparently suggesting he was a grandfather; and he was the oldest of the male persons she regularly saw at that house.

[31] The weekly evening visits often included a BBQ and the consumption of a carton of beer between the four males. On an evening approximately one week prior to 30 January 2002 one of those evenings occurred, and D stayed over night at the Winwill household. He slept on one or other of the two couches in the lounge room. On his account to the jury he woke during the night to hear J crying in her room. He knocked on her mother's door and called out, but was unable to rouse S. He then went to J's door and asked her was she all right, and was told by J "no, monsters are after me". He walked to the child's bed to comfort her, and at first sat, and then laid down, on the bed next to her. J fell back to sleep and D got straight up off the bed and left the room. He had at all times remained on top of the covers. The child was underneath them.

[32] It was common ground that the next morning he told S that J had been upset during the night, that he said he had attempted to wake up S and M but failed, and he had lain with J in her bed because she had been having nightmares about monsters. It was also common ground that S told him never to do that again. S's evidence to the jury was that she did not believe for one minute that D had attempted to awaken herself and M, because "I've never slept through J crying ever" (AR 109). Her evidence was that she spoke with J that same afternoon, and asked her if D had "touched her in any way"; and the child said "no". The jury were told that the prosecution did not suggest that any impropriety had happened on that occasion.

[33] On 30 January 2002 the same group of people had a similar evening. Those present were D, M, S, and the boarders DR and PM. Alcohol was consumed and S played a guitar. She and J sang. J went to bed later than usual at about 8.30 pm. D again stayed overnight, again sleeping in the lounge.

The Video Taped Conversation

[34] Accounts of what occurred that night differ. J's description in the video taped interview, when asked how come "D" (whom she said she had called "poppy") was not friends anymore, was "cause he done that". The transcript (AR 236) records that when asked what he had done, she replied "[indistinct] little, oh, down here and like he tickled my bottom". When asked "did he?" she replied "and [indistinct] in my [indistinct]". The learned trial judge suggested during a voir dire that the video tape actually recorded her first statement as being "put his tongue in my little fanny and like he tickled my bottom" (AR 32); and that the second statement was "and tongue in my fanny". (AR 33). When asked when this happened, she said it was "oh, just last night or something like that", and when asked how it happened, said "cause I was laying with him".

[35] Her other answers to the questions asked of her by the investigating detective from the Gatton CIB indicated that she was well orientated as to time, place, and events, and quite an alert little girl. She described where she lived, her age, date of birth, the people she lived with, her relationship with D, games she played with him, and a night she woke up "crying up in the lounge room" (AR 237), "cause I was too scared about giants". She described having got up and gone into the lounge room and "then I cried." She went on "and then he, no, and then he just done it. Laid with him and he done it". In response to some rather leading questioning, she said

she had lain down with D on the couch, had been crying because she was scared of giants, and when asked what he had done to her, she said "I just sat up really". She went on "he was tickling my bottom [indistinct] that". When told she had said something about his kissing her, she said "he kissed me like and he put his tongue at the same time like"; and was interrupted with the question "whereabouts, on your lips"? and she replied "yeah". She then specified "no, on my tongue". (This all appears at AR 239).

[36] Having been reminded by the questioner that she said "he kissed you and you said he fiddled with your bottom", she was then asked "was there anything else"? She replied "yeah I feel [indistinct] and then I just felt yucky". Asked again if he did anything else, and reminded that "you said something about your fanny", she replied "he went to [indistinct] with his tongue."

[37] When asked if she had had any pants on she replied "yeah", and in response to further questions, said that "they were still on me" and that "he just pulled them down up (sic) to me knees". She said that the appellant then said "I'll lay in your bedroom", or "Lay in your bedroom now".

[38] Her evidence when cross examined by video link, and when then living on Lamb Island with her father, showed that she recalled living "at Grantham" with her mother "quite a long time ago", and attending pre-school at Grantham. She remembered and "D", who was "the one who did yucky touching to me what I was talking about in the other building". That was her evidence in chief. In cross examination, she agreed with the suggestions that a "Dave", and another fellow named Paul (whom she named), were living at the house at Grantham; and that the night on which "that happened", she had been up "way past" her bed time, there had been a sing along that went "till pretty late", and she woke up because she had a nightmare about a giant that night. (A number of leading questions were asked in cross examination too).

[39] She described having gone to her mother's room first and been a little bit scared to go to her because "they were sleeping, right", and how she had seen D on the lounge and told him that she had a nightmare. She denied that he said "go and wake your mum up"; and said instead that "and then he just - and then I just [indistinct] with him and straight away pulled my pants down and did yucky touching". It was suggested to her that the appellant "never did any of that bad touching or that yucky touching that you say he's done to you"; when she agreed she understood that question, and was asked if she still said it happened, she said "yes".

[40] The remainder of the evidence heard by the jury included evidence from S that she had been told something (apparently by M) the next morning, which made her understand D had again lain with J despite the warning not to, and she had then ordered D out of the house. M swore J said nothing about D to him, and D denied any accusation of his having lain with J was made that morning, or that he was ordered out. The evidence of M supported him. That afternoon, and after (pre) school, S "discussed the matter" with J (AR 114), took her "straight to the doctor", and to the police a day later or so. It was agreed that on that morning J had made "no voluntary complaint" to S or M about D when she got up out of bed.

The Appellant's Evidence about 30 January 2002

[41] D's evidence as to the critical night presented two versions. Both denied any improper touching with J. The first, in evidence in chief, was that he woke up and heard J crying, she came out of her room and went to her mother's door, would not enter her mother's room, and asked if D would wake her mother. He warned J "your mum will be cranky", and suggested J go to the toilet and back to bed. J returned to her room and could be heard sobbing, but D did not enter. He did not attempt that time to wake S.

[42] His second version said that he was awoken by J shaking him, and when told by her that "I'm having dreams again", he told the child to "go and see your mother". J said "I've already been in there. They won't wake up". He told her to go back to bed and that it would be all right, and she went back to bed. He did not try to wake her mother.

[43] D gave some particularly unimpressive and inept answers in cross examination. It was put to him by the Crown Prosecutor that he had settled J down that night by cuddling her on his lap, (it was not clear from where that description came) which he denied, and then put that while cuddling her he had taken advantage of the opportunity to kiss her, and to put his tongue in her mouth. His answer was "I doubt it". The proposition was repeated, and he said "no, I don't think so". It was then suggested that he had pulled the child's pants down around her knees, and he replied "I doubt it". It was put that he had "licked her vagina", and he replied "I don't think so". Finally, it was put that "you fiddled with her backside, and her bottom didn't you?", and he replied "none of that happened". Those answers so barely constituted denials that the jury may have taken them as admissions.

Some Deficiencies in the Case Presented

[44] That was the relevant evidence heard by the jury. There are features in it that cause concern. One is that the Detective who spoke with the child in the video taped interview in February 2000 did not attempt to have her identify the part of her body she called "my bottom", or to enlarge upon what she was describing when she said the appellant tickled her bottom, or with what. Her video taped statements may suggest this was done with his tongue. This is a concern because the prosecution put without objection three particulars to the jury of the charge of indecent dealing (see AR 52 and 195), and one of the three was "tickling her bottom". The Crown case seems to have been that that was a digital touching. The jury found the appellant guilty of all three incidents of "licking the child, of tickling the child's bottom, and of kissing the child" (AR 213). Digital tickling of a child's bottom is something which could occur without indecency.

[45] At the trial J was not asked to explain what "yucky touching" meant, and whether it had occurred with the appellant's hands, tongue, or in some other fashion. She was not asked to described where it occurred on her body. However, the jury did have evidence, if the words could be heard on the video tape, in which she may have described an actual touching of her "fanny" with the appellant's tongue, or his having "went to" do something with his tongue. There seems to have been ambiguity in that interview as to whether there was an actual touching, or only an apparent intent to touch her "fanny", with the appellant's tongue. She was not asked to identify by pointing to it, the part of her body which she called her "fanny".

[46] She **had** given a description, which was more volunteered than led from her, of her being kissed and having D touch her tongue with his. That accusation was made clearly enough in the video taped interview. It is a description of inappropriate behaviour by an adult, by conduct of which the jury might have expected J to be ignorant, unless it had occurred.

The Evidence Not before the Jury

[47] What follows is not written as a criticism of D's counsel at his trial. The experienced senior counsel who argued the appeal did not make trial counsel's conduct of the trial a ground of appeal.[9] What the jury did not hear, and what was established in the voir dire held before the learned trial judge, was that S's statement made to the police made 18 February 2002 recorded that on the morning of 31 January 2002, M had told S "D has laid with her again", and that when J came home from school that day the following conversation occurred:

> "Question: Did D lay with you again?
> Answer: Yes.
> Question: Did he touch down there?
> Answer: No.
> Question: J if anything has happened you have to tell your mother because that's what mums are for. If anything has happened it is not your fault.
> (J just agreed with me like she knew what I was telling her).
> Question: Did you know that when I was little I had bad touching done to me, and the first thing I did was told my mum. My mum made everything better because that's what mums are for. Bad touching can even be if someone puts their tongue in your mouth.
> Answer: Yeah D done that and down there too (indicating her vagina).
> Question: Are you telling the truth, because you could get D in lots and lots of trouble if you are telling lies.
> Answer: I am telling the truth."

S's statement described how at that point, she saw J was getting upset, and gave her a cuddle, telling J she believed her and was proud of her for being truthful and honest.

[48] Counsel did not establish before the jury the fact that the child answered "no", when first asked that afternoon whether the appellant did "touch down there" on the critical night. Nor was it established before the jury that S had explained in her own questioning to her daughter that "bad touching" included if "someone puts their tongue in your mouth", before receiving a description of that being done by the appellant. Nor did counsel establish before the jury what was apparently made clear in the cross examination at the committal hearing, namely that the conversation between S and J had lasted that afternoon for about a half hour, and that it was after perhaps 15 minutes of questioning that the child had indicated by her answers that the appellant had put his tongue in her mouth, and on her vulva. That fact that her statements implicating the appellant developed in response to very largely unrecorded questioning of that length and nature, and after she had first exculpated him, was a matter prima facie relevant and admissible before the jury.

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[9] The decision in *TKWJ v R* (2002) 193 ALR 7, and the remarks at [8], [16], [81], and [111]-[112] therein, would have made that difficult.

[49] The reason that evidence was not put before the jury was that the appellant's counsel at his trial had persuaded the judge to exclude the evidence of S, concerning that "fresh" complaint made to her. It was excluded on the basis that the complaint was the result of suggestive or leading questions.[10] Having had that evidence excluded, defence counsel had a very limited basis on which to question S. Counsel for the Crown had very fairly foreshadowed that difficulty for the defence during argument on the application to exclude J's complaint to her mother; however, defence counsel made one of the kind of tactical decisions "routinely made by trial counsel by which their clients are bound".[11]

The Voir Dire

[50] Defence counsel instead had led evidence on a voir dire, in an endeavour to have the video taped conversation excluded as well. In support of that application, counsel called evidence from the psychologist Mrs R, who on 4 November 2002 had carried out a psychological assessment as to J's "capacity to act as a reliable witness", on a reference to Mrs R made by the Director of Public Prosecutions. Mrs R had supplied two reports advising that J's verbal intelligence was average, and that she had sufficient intelligence, language, and memory skills to provide a reliable account of her experiences; and also that she was eager to gain approval, and sensitive to the tone of voice used by Mrs R when J was attempting to gain approval. Mrs R's second report, provided after viewing the video tape and statements from S and M, noted that J had not spontaneously reported the alleged wrong doing by D prior to her mother's questioning, and that "bad touching" had been discussed with J in relation to the incident the week earlier. Mrs R advised that it was likely that J would feel guilty if joining D on the couch on a second occasion, and that the mother's questioning of J "and the context in which this occurred can be seen as having possibility created presses (sic) on the child which might influence her account of events"[12].

[51] Armed with those reports, defence counsel began the voir dire with a description of his purpose being to demonstrate, by evidence from Mrs R, that J's video taped statements were unreliable, and for reasons other than J's level of intelligence (AR 12 at L.30-40). However, the trial judge made it clear on a number of occasions that he considered that the court was not entitled to receive opinion evidence from Mrs R on any topic wider than whether the child had sufficient intelligence to give reliable evidence (AR 12 L 42, AR 13 L20, AR 14 L1, AR 54 L40, AR 55 L1 and L10-15). Those views were expressed before and during the evidence of Mrs R, and included the view of the learned trial judge that Mrs R was being asked to express an opinion on issues of credibility, or the truthfulness of witnesses, which opinions were inadmissible.

[52] Defence counsel accordingly narrowed his proposition intended to be established by the evidence of Mrs R, to be that J did not have sufficient intelligence to give reliable evidence. This issue, identified by the learned judge as the only one properly before the judge on the voir dire, reflects terms in s 9A(1)(a) of the *Evidence Act*. The evidence led from Mrs R to support counsel's narrowed proposition contained a number of propositions; some based on her own clinical assessment of J, and some on her 30 years of experience with children and adults in

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10 Reliance was placed on *R v Adams & Ross* [1965] Qd R 255, at 263 and 264, per Gibbs J.

11 *TKWJ* at [8].

12 Report dated 26 November 2002.

psychological practice. Her academic qualifications include a Master of Clinical Psychology (University of Queensland), and membership of the Clinical College of the Australian Psychological Society.

Opinion Evidence of a Psychologist

[53] The propositions, (taken from her evidence in the voir dire), included:

- that J is an insecure child who seeks approval, and that her mother's comments when speaking that afternoon (31 January 2000) would "press" (sic) more on J than they would with some other children. J is very "susceptible" to that sort of questioning;[13]
- that the most reliable account from a child will be what is told spontaneously in the child's own way, and closest to the relevant event;[14]
- that S's first conversations, questioning J about what had happened on the occasion of D's admitted lying on J's bed, had the capacity to plant in J's mind the concept that "D" did "bad touching";[15]
- that the questioning on the afternoon of 31 January 2000, when it continued after J said "no", had the capacity to plant the concept that J's mother did not believe J's denial that there had been "touching down there";[16]
- that continuing to question J at that time put pressure on J, and "reassurance" of J by her mother's recounting her own experience could have suggested to J that something more was expected of her;[17]
- that cuddling J and saying "I am proud of you" would be behaviour capable of re-enforcing the notion that J should continue to make those accusatory statements;[18]
- that the occasion of that second questioning was likely to be confusing to J;[19]
- that the other information that the child had received (in the course of being questioned by her mother), could be assimilated into J's memory of events and contaminate the memory;[20]
- that the way that information was obtained from J had the prospect of some contamination of her memory;[21]
- that there was an identifiable problem with the questioning of J that had taken place, and that a relevant matter was that there were enormous emotional factors now surrounding the retrieval of the memories J held;[22]
- the emotional factors involved included J's knowledge, made apparent in passages in her video taped interview which were excluded from the jury on defence counsel's application, that S, M and the two other men had severely assaulted D on the night of Friday 1 February 2002. Amongst other things he was deprived of his liberty, and threats were made to kill him. He complained to the police. J had seen he was injured and may have understood he had been "punished";

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13 At AR 50.
14 At AR 61.
15 At AR 45.
16 At AR 47.
17 At AR 47.
18 At AR 60.
19 At AR 48.
20 At AR 61.
21 At AR 62.
22 At AR 67.

- that J would now have difficulty in the witness box being able to distinguish between her actual experience of events and all the information she may have absorbed from other sources;[23]
- that J has sufficient intelligence to form accurate memories of her direct experiences. This last proposition is the only one the learned judge thought relevant and admissible.

[54] The other propositions Mrs R advanced would, if accepted in their entirety or the greater part of them, be relevant to an assessment of the reliability of J's accusatory statements made to her mother, to the police officer, and in cross examination. They appear to answer the description of expert testimony on a subject susceptible of expert testimony[24], and on matters outside the experience and knowledge of the judge and jury.[25] The evidence was opinion evidence of a person, whose expertise on children's behaviour and mental processes went beyond the experience and knowledge of lay persons without that expertise, which revealed things about both the mental processes of children generally and about the child J in particular, of which the judge and jury would not otherwise have been aware; and of which they should have been aware when assessing all of J's statements.[26]

[55] The prosecution established in J's evidence in chief that she could remember speaking with a police officer, but did not ask her whether what she told the police officer was the truth. Nor was she asked if she could remember what she had said. That circumstance, established when J gave evidence before the jury, can be added to the matters relevant to the reliability of J's statements and identified in Mrs R's evidence, and to the circumstance of J's initial denial of any touching "down there", and the circumstance that it was D who raised the topic of his sharing her bed with J the first time this had occurred. The combination of circumstances existing at the time of the voir dire make relevant some of the provisions of the *Evidence Act* to which I now turn.

Evidence Act provisions, and Their Construction

[56] Section 9 provides:

> "(1) This section applies if the court considers a person called as a witness in a proceeding (the "*witness*") does not understand the nature of an oath.
>
> (2) The court must explain to the witness the duty of speaking the truth.
>
> (3) Whether or not the witness understands the duty of speaking the truth, the court must receive the witness's evidence even though it is not given on oath.
>
> (4) Subsection (3) does not apply if the court is satisfied the witness does not have sufficient intelligence to give reliable evidence."

Section 9A of the Act provides:

> "(1) This section applies if –
>
> (a) a court is deciding whether a person who does not understand the nature of an oath has sufficient intelligence to give reliable evidence; or

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23 At AR 68.

24 *Murphy v R* (1988-1989 167 CLR 94 at 127 per Deane J.

25 *Murphy* at p 111 per Mason CJ and Toohey J.

26 *R v Y* (1995) 81 A Crim R 446 at 449 per Helman J giving the judgment of the Court.

> (b) the evidence of a child less than 12 years is admitted;
> (2) Expert evidence is admissible in the proceeding about the witness's level of intelligence, including the witness's powers of perception, memory and expression, or another matter relevant to the witness's ability to give reliable evidence.

[57] Section 21A of the Act makes provision for the admission of evidence from children under 12 years, they being by definition contained in that section "special" witnesses whose evidence can be presented by video tape.[27] Section 93A in Part 6 of the Act provides for the admission of statements contained in "documents" (which include video tapes), where the statements are those of a child under 12 and concern facts about which direct oral evidence from the child would be admissible.

[58] Admissibility of such statements depends upon certain conditions, including that a child whose statement is so admitted be called as a witness if so required by another party to the proceeding. The object of the section is to allow a child's statement made contemporaneously with and about relevant events, or made to a person investigating the matter to which the proceeding relates, to be admitted as the child's evidence in chief. When the child is called for cross examination, the provisions of s 21A apply. The combined effect of s 93A and s 21A give courts considerable powers to receive the evidence of relatively young children, in circumstances where the capacity to test the accuracy of their statements by the traditional means of cross examination of them as witnesses on oath in open court can be greatly reduced.

[59] The Act specifically gives discretionary powers to trial courts to ameliorate any injustice which may potentially result from the absence of evidence in chief or cross examination in the usual manner. Section 98 provides:

> "(1) The court may in its discretion reject any statement or representation notwithstanding that the requirements of (part 6) are satisfied with respect thereto, if for any reason it appears to be inexpedient in the interest of justice that the statement should be admitted."

Section 130 provides:

> "Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence."

Construction of these Sections

[60] With respect to s 98, the term "inexpedient" can mean "not suitable, advisable, or judicious" (Collins English Dictionary, Australian Edition); or "disadvantageous in the circumstances, unadvisable, impolitic." (Shorter Oxford English Dictionary). Either construction might mean it was "inexpedient" to admit video statements pursuant to s 93A where there is a reason for concluding the truth will not be ascertained if evidence is received in that manner.

[61] In *R v F.A.R* [1996] 2 Qd R 49 Davies JA, (at page 61) with whom Pincus JA agreed on this point, wrote that the question whether the discretion under s 98 (or s 130) should be exercised to exclude a statement otherwise satisfying the

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[27] Queensland Courts have a general power given by s 39R in Division 4 of the *Evidence Act* to direct that person to give evidence by audio visual link to the court room. Section 21A gives the court other powers to assist child witnesses.

requirements of s 93A would almost always turn on its reliability. He added that there would be many factors which might affect that question. In *R v Morris* [1996] Qd R 68 Dowsett J, whose judgment was that of the court, wrote (at page 75) that:

> "I do not imply that inherent unreliability may not be a basis for the exercise of the discretion under s 98. Circumstances may arise in which the statement itself appears to be so unreliable, either because of its contents or because of the way in which it was obtained, that it ought not to be received for reasons directly related to the interest of justice."

[62] With respect to s 130, the unfairness invoking the exercise of the statutory discretion would be the variety discussed in *R v Swaffield* (1997-1998) 192 CLR 159, and particularly at 189; namely a concern with not jeopardising an accused person's right to receive a fair trial. As the joint judgment of Toohey, Gaudron, and Gummow JJ records, unreliability is regarded as a touchstone of unfairness.

[63] In *R v Cumner* (CA No 108 of 1994, judgment delivered 25 July 1994) the majority (Fitzgerald P and Demack J) regarded as relevant to whether the person charged there could receive a fair trial, the fact that it was impossible for that person to challenge or test by cross examination the statements recorded by video tape and led on the trial. That child witness was unable to recall the incident which formed the subject of the charge, or to recall being interviewed by the police, or what she said in the course of the interview. The majority held that those circumstances, together with the circumstances identified in the judgment in that case of Davies JA, namely that the evidence was the uncorroborated and untested statement of a six year old made nine months after the incident, and when the child's mother had asked her almost every day for some two months whether the appellant in that case had touched her on, or in, the vagina, meant that the evidence of the video taped statement should not have been received.

[64] With respect to s 9 and s 9A, s 9A(2) applies both to all adult witnesses and to all children who do not understand the nature of an oath, **and** to the evidence of a child less than 12. There is no obvious legislative assumption in s 21A that a child under 12 necessarily will not understand the nature of an oath. Some will and some will not. That question could arise for decision under s 9(1) for a child under 12, just as it would for an older child or an adult. This means that the provisions of s 9A(1)(a) do not necessarily apply to children under 12. The remarks of the learned trial judge suggest that he considered they do.

[65] The point of all this is that there is no reason why the expert evidence made admissible by s 9A(2) is necessarily limited, in the case of a child under 12, to evidence on the issue of sufficiency of intelligence to give reliable evidence. The language of s 9A(2) can, and should, be understood as making expert evidence admissible in the proceeding about:

- the witness's level of intelligence including, the witness's powers of perception, memory, and expression;
- (or any) other matter relevant to the witness's ability to give reliable evidence.

[66] That construction of s 9A would allow the court to receive expert evidence about the ability of a particular child to make statements, either video taped or otherwise, about the matters in issue which are reliable; that is, which can safely and justly be relied upon. Where the court finds an inability to do that, or where a real risk of

unreliability is shown to exist, a court is empowered to make discretionary orders under s 98 or s 130. The matters establishing the unreliability upon which the discretion given by those two sections can properly be exercised might often be proven by evidence led under s 9A(2), and that construction of s 9A(2) is congruent with the authoritative interpretations of s 98 and 130 in *F.A.R, Morris,* and *Cumner*.

[67] It follows that the learned trial judge misdirected himself as to the nature of the inquiry he could undertake. He was entitled to receive expert evidence upon, and inquire into, the matters relevant to J's ability to give reliable evidence. The evidence led in the voir dire demonstrated a number of matters relevant to a lack of such ability which existed in this case and that the video taped statements could not safely and justly be relied upon. The learned judge should have concluded pursuant to s 98 that for that reason it was inexpedient in the interest of justice to admit the video taped statement pursuant to s 93A. The judge was not asked to do so because he had already clearly intimated his views to counsel as the evidence was taken, and he was not assisted by any submissions made to him about either section 98 or s 130, or the cases referred to herein.

[68] With respect to s 130, the evidence of Mrs R as to J's likely difficulty in distinguishing between memories based on actual experience and contaminated memories, made it likely that cross examination would serve no real purpose as a means of eliciting the actual truth. In all the circumstances the learned judge should have been satisfied pursuant to s 130 of the Act that it was unfair to D to admit the video tape. The judge made plain that his conclusions that he was bound to ignore Mrs R's evidence, and that it would not be admissible before a jury, were ones he felt forced upon him by the absence of any authority to the contrary cited to him. The learned judge himself remarked after hearing Mrs R's evidence that he would regard any conviction as an unsafe and unsatisfactory one, and further upon the incongruity of his being able to exclude the complaint made to S because of suggestive questioning, but not the interview with the police two days later.

[69] I would allow the appeal on the first ground. In the circumstances there seems no point in ordering a retrial and having J give evidence again; and I would simply order that the appellant's conviction be quashed.

[70] **MACKENZIE J:** This is an appeal against conviction of an offence of unlawfully and indecently dealing with a girl under the age of 12. The complainant was aged six years and eighth months at the time of the offence and seven years six months when she gave evidence. The grounds of appeal (substituted by leave for the original grounds) are:

> "(1) Complainant's out of court statement tendered s. 93A(1) *Evidence Act* 1977 (Qld) should not have been received into evidence.
>
> (2) The jury's verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence vide s., (sic) 668E(1) of the *Criminal Code*".

[71] The appellant was a friend of the *de facto* husband of the child's mother. As he did on other occasions, on the night of the alleged offence he had slept overnight at their home after he had drunk and socialized with his friend and others who lived in the house. The mother of the girl said that she did not drink alcohol but was part of the group on that evening.

[72] According to the appellant's account in his evidence in chief he had heard the girl sobbing during the night. She came out of her room and went to the door of her mother's room but did not go in. According to the appellant she came to him and asked him to wake her mother. At first he said that he would but later said to the girl that her mother would get cranky. He said that the girl went to the toilet and then back to bed. He said he heard her sobbing after that but did not go into her bedroom.

[73] In cross examination he said that he had been woken by the girl shaking him. She was sobbing and said she was having dreams again. He told her to go to her mother but the girl said she had already done so but she would not wake up. According to the appellant he then told her to go back to bed. By the time she went back to bed she had settled down.

[74] The particulars of the offence alleged were that the appellant had licked the girl between her legs, tongue kissed her on the mouth and tickled her bottom when she lay next to him on the couch. These were consistent with evidence in a video-taped interview of the girl by a police officer two days after the offence was alleged to have happened, which was admitted pursuant to s 93A of the *Evidence Act*. In this case the child was treated as a special witness under s 21A and gave her oral evidence by video link. In her oral evidence the girl referred only to "yucky touching" without being asked to describe what it consisted of.

[75] The appellant submits that evidence contained in the video-taped interview should have been excluded. Section 93A provides that in any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document (which includes a video-taped recording) shall, subject to other provisions in Pt 6 of the Act, be admissible as evidence of the fact if:

(a) the maker of the statement was a child under the age of 12 years at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and

(b) the statement was made soon after the occurrence of the fact or was made to a person investigating the matter to which the proceeding relates; and

(c) the child is available to give evidence in the proceeding.

[76] Section 93A(2) also makes statements to the child recorded in the document, in response to which the statement of the child was made, admissible in evidence if the other person is available to give evidence. These conditions of admissibility were satisfied. Section 98, which is also in Pt 6, permits a court to reject any statement notwithstanding that the requirements of Pt 6 are satisfied, if for any reason it appears to be inexpedient in the interests of justice that the statement should be admitted. Section 130 of the Act, which is in a different Part, provides that nothing in the Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit the evidence.

[77] Section 9A renders expert evidence admissible in the proceeding about the witness' level of intelligence, including the witness' powers of perception, memory and expression, or another matter relevant to the witness' ability to give reliable evidence if, *inter alia*, the evidence of a child less than 12 years is admitted. A *voir dire* was conducted in which a psychologist experienced in working with children

gave evidence. The essential area of attack by defence counsel in the *voir dire* was that the process by which information was obtained by the mother from the child about what had happened may have contaminated the child's account of what had happened later given in the video-taped interview, especially since, in the psychologist's assessment, the child was a child who sought approval of adults and was responsive to cues in the tone of voice of the person speaking to her. The psychologist's proposition was that this characteristic increased a person's susceptibility to fulfil the questioner's apparent expectations.

[78] The learned trial judge was troubled from the outset by the defence proposition that the evidence of the psychologist was admissible in the context of s 9A, on the issue of reliability or, perhaps, the truthfulness of the allegations made by the child, as opposed to having sufficient intelligence to give reliable evidence. The written submission relied on in support of the application on the *voir dire* showed that one aspect of the application was a submission that the discretion under s 98 to exclude the evidence should be exercised (Section 130 was not specifically mentioned in the written outline or oral submissions on the *voir dire*).

[79] The clearest articulation of the basis of the application during the *voir dire* appears in a passage where defence counsel was responding to a provisional expression of opinion by the learned trial judge that evidence of the psychologist was inadmissible because it went beyond the scope of what was permissible. The passage is as follows:

> "I have submitted at the start of this matter that section 9A subsection 2 of the Evidence Act provides that expert evidence is admissible in proceedings about the witness's level of intelligence, including the witness's powers of perception, memory and expression, or another matte[r] (sic) relevant to the witness's ability to give reliable evidence. Your Honour, it's been my intention in conducting this cross-examination, as I set out in my outline of submissions, that there are serious issues concerning the making of this complaint by this child, that there has been questioning of the child on one prior occasion, specifically with specific references to the accused, specific references to sexual conduct; a week later we find the same situation. There's a persistence of the questioning and it's submitted to your Honour that this is a matter that the Court would be assisted by the experience of an expert, and that is why I sought to cross-examine Mrs R about this matter today. That's the basis – it is my submission that it is permissible."

[80] The learned trial judge also expressed as his "present inclination" that the evidence would not be admitted before the jury, except in respect of issues permitted by s 9A. He ruled against excluding the s 93A tape recording, apparently on the basis that the psychologist had said that the child had the "capacity" to give reliable evidence. This appears to have been perceived to be the end of the inquiry. There were also indications in observations made more than once by the learned trial judge that he nevertheless considered the prosecution case to be on a shaky foundation.

[81] Although the witness statements of the girl's mother and her *de facto* husband were not formally tendered during the *voir dire* they were cross examined on by defence counsel and discussed in other respects. Neither person was called to give evidence on the *voir dire*. One feature of the material was that on a previous occasion the

appellant had been sleeping at the house and the following morning related to the two adults that there had been an occurrence during the night where the girl had woken up because she was having nightmares. He said that on that occasion he had lain with the girl in her bed. He was then told, according to each of them, in strong terms not to do so again. When the girl was spoken to by her mother about that occasion, she confirmed that she did have a nightmare and that the appellant had lain with her in her bed. The statement continues:

> "I also asked her if [the appellant] had done any bad touching to her which she told me that he hadn't".

[82] The girl's mother's statement concerning the morning after the incident to which the charge relates is relevantly as follows:

> "On the Thursday morning I got up at about 7.00am to get [the complainant] ready for School. I got [my *de* facto] to go in and wake [the complainant] to get her out of bed. [He] came back in to me about one minute later and said to me, '[the appellant] has laid with her again.'
>
> I left it at that and sent [the complainant] off to School to think about what we should do. [The appellant] was still asleep on the couch when [the complainant] went to School.
>
> When [the appellant] woke up I gave him a verbal serve and was very upset with him. I said to him, 'What are you doing laying with [the complainant] again after I have told you not to.'
>
> I told [my *de facto*] to get [the appellant] to leave in no uncertain terms and for him to never set foot on our place again.
>
> Also while I was abusing [the appellant] he denied any wrong doing towards [the complainant], but he did admit that he had laid with her. [He] said, 'Yeah I know I fucked up, and I am sorry.'
>
> [My *de facto*] then gave [the appellant] a lift somewhere.
>
> [The complainant] got home from School that day at about 3.15 p.m. and I said to her, 'Did [the appellant] lay with you again.'
>
> [She] said, 'Yes.'
>
> I said, 'Did he touch down there.'
>
> [She] said, 'No.'
>
> I said, '… if anything has happened you have to tell your mother, because that's what mum's are for. If anything has happened it is not your fault.
>
> [She] just agreed with me like she knew what I was telling her.
>
> I said, 'Did you know when I was little I had bad touching done to me, and the first thing I did was told my mum. My mum made everything better, because that's what mums are for. Bad touching can be even if someone puts their tongue in your mouth.'
>
> [She] then said, 'Yeah, [the appellant] done that and down there to.' (Indicating her vagina)
>
> I then said to (her), 'Are you telling the truth, because you could get (the appellant) in lots and lots of trouble if you are telling lies.
>
> [She] said, 'I am telling the truth.'
>
> I could see that [she] was getting upset, so I gave her a cuddle and I told her that I believed her and that I was proud of her for being truthful and honest.

> [My *de facto*] and I discussed our options and on Saturday 2/2/2002 I went to the Gatton Police station with [the complainant] and she was spoken to by Detective NEUMANN."

[83] Her *de facto* husband gave a statement about seven months after the incident containing the following version of events:

> "In the morning I woke up at about 8.00am and [my *de facto*] got me to get [the complainant] out of bed and ready for School which I did. I noticed that when I got up [the appellant] was lying on a smaller couch in the lounge room. I got [him] up and took him back into town and dropped him off at his place. I then returned home to Winwill and [the complainant] hadn't gone to School.
> [My *de facto*] told me that [the complainant] had something to tell me. [The complainant] was with [her] when [she] told me.
> I said to [the complainant]? 'What is it.'
> [She] said, '[The appellant] licked me on the wee.'
> I said, 'You're not telling me a lie are you.'
> [She] said, 'No, I'm telling the truth.'
> [My *de* facto] and I spent the day coming to terms with what [the complainant] had told us and working out what we should do about it.
> I am aware that she later reported the matter to the Gatton Police."

[84] The two versions of events are irreconcilable. It is also apparent from the statement of the girl's mother that the complainant at first gave a negative answer to a leading question about whether the appellant had touched her "down there". After an explanation that the mother had been a victim of sexual abuse when she was a child and explaining that she had told her mother who had "made everything better" and an explanation that bad touching could even be if someone put their tongue in your mouth the girl then said that the appellant had done that and "down there too", indicating her vagina. While the first part of the response relates to a particular form of conduct described by the mother, the second is in the form of a volunteered statement that he had interfered with her in the vaginal area and probably, in context, with his tongue.

[85] As previously mentioned, the learned trial judge appears to have focussed on the question whether the evidence of the psychologist was admissible and its relevance to the issue of whether the child had sufficient intelligence to give reliable evidence. The broader issue of whether there were grounds for excluding the s 93A statement became somewhat lost, having regard to the way the discussion developed.

[86] With regard to admissibility of the psychologist's evidence, *Farrell v The Queen* (1998) 194 CLR 286 is of particular assistance because it is concerned with expert evidence concerning reliability of a witness, unlike many of the other authorities which are concerned with confessions. Evidence was led concerning the key witness' alcohol and drug abuse, and of an anti-social personality disorder. Gaudron J at 292 adopted a proposition of Lord Pearce in *R v Toohey* [1965] AC 595, 608 to the effect that medical evidence tending to show that a witness suffered from a disease, defect or abnormality of mind was admissible on the issue of reliability of a witness' evidence.

[87] Her analysis referred to the concepts of impaired capacity to give accurate evidence because of a disease, defect or abnormality of mind and impaired reliability of the evidence. She said at 292:

> "In the present case, the evidence of [the doctor] fell somewhat short of evidence of the complainant's impaired capacity to give accurate evidence. It simply raised the possibility of his being impaired in that way on account of alcohol and substance abuse. It also raised the probability of greater unreliability of the complainant's evidence on account of his anti-social personality disorder than in the case of persons who do not suffer from that disorder. In principle, however, there is no reason why expert evidence should be excluded, although it does not disclose a witness' impaired capacity, if, nevertheless, it discloses the existence of a disability the likely consequences of which bear on the reliability of that witness' evidence and extend beyond the experience of ordinary persons."

[88] With respect to the evidence tendered concerning alcohol dependence and substance abuse, she said that the doctor's evidence did not extend to any distinct consequence of it which might be beyond the experience of ordinary persons but merely left open the possibility of impaired memory, which she thought was "well within the experience of ordinary persons". With respect to evidence of the witness' anti-social personality disorder, she characterized it as going beyond mere description of anti-social behaviour which might be within the experience of ordinary persons, since it was evidence concerning a distinct disability, one feature of which was that persons with it were inherently less truthful than the average person. She thought that was a matter not within the experience of ordinary persons and therefore relevant and admissible.

[89] Callinan J at 322 adopted the position that, in a case where evidence of the existence or possible existence of a disorder or disability affecting the capacity of a witness to give relevant evidence, expert evidence on human conduct and psychological or physical factors which may lead to certain behaviour relevant to credibility was admissible, provided the testimony went beyond the experience of the trier of fact.

[90] Kirby J who agreed with Callinan J added at 299:

> "The trial judge was right to approach with caution any attempt to call evidence which could have the effect of usurping the jury's function in reaching their ultimate conclusion as to whether a witness was telling the truth or not. The problem confronted by the court in a case of this kind is that of reconciling two rules of evidence liable to come into conflict. The first is that the assessment of credibility is a matter for the tribunal of fact (here the jury). In the present state of science it may not be usurped by technology …. Nor may it be assumed by witnesses, including expert witnesses, offering their opinion on the accuracy, consistency and believability of the testimony in question, however derived. On the other hand, the study of human behaviour, including psychology, is an accepted scientific discipline. It is one upon which the frontiers of expert knowledge are constantly expanding. If it were necessary in every trial to confine the tender of psychological and psychiatric evidence to cases where a physiological injury could be objectively demonstrated, decision-makers (including juries) might be deprive of

> relevant evidence. In particular, where established patterns of human behaviour have been studied, analysed and scientifically described, it is appropriate that evidence about them should be available to the decision-maker. It is not then admitted to usurp the decision-maker's ultimate assessment of the credibility of the witness. Principle, and a recognition of the imperfections of the science, deny that consequence. For every pattern of human behaviour, there will be exceptions.
>
> …
>
> …, in principle, while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on psychological and physical conditions which may lead to certain behaviour relevant to credibility is admissible, provided that (1) it is given by an expert within an established field of knowledge relevant to the witness' expertise; (2) the testimony goes beyond the ordinary experience of the trier of fact; and (3) the trier of fact, if a jury, is provided with a firm warning that the expert cannot determine matters of credibility and that such matters are the ultimate obligation of the jury to determine."

[91] I have read the reports of the psychologist and the transcript of her evidence. Having done so I have some difficulty persuading myself that as her evidence stood at its completion, it was "expert" evidence for the purposes of the rule relating to admissibility of expert evidence. That is not to question in any way her professionalism. It is merely a conclusion that where the underlying hypothesis is, as I understand it, that a child of the age of the complainant who has an idea put into her head may incorporate that fact into an account of events and that, if the child is a child who is eager to please, the risk is even higher, it is not something beyond the experience of an average juror.

[92] It is unnecessary for the purpose of determining the matter to attempt to define exhaustively what is comprised in the notion of "level of intelligence" for the purposes of s 9A. It is sufficient to say that the particular evidence sought to be led was not admissible as expert evidence. However, while the focus was on issues relating to s 9A(2) the broader issue of whether the discretion to exclude the evidence pursuant to s 98 should have been exercised was raised in the written submissions. The discretion in s 98(1) then falls for consideration. It is a wide discretion to reject a statement, notwithstanding that the requirements of Pt 6 are satisfied, "if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted."

[93] The submission was that the s 93A statement should have been excluded because of its inherent unreliability. The principal authority relied on by the appellant is *R v F.A.R.* (1996) 2 Qd R 49 where Davies JA, in dealing with the emphasis placed in the same case by Fitzgerald P on the inability to cross examine the child at trial, said the following at 61:

> "The question whether the discretion under ss 98 or 130 of the *Evidence Act* 1977 should be exercised to exclude a statement otherwise satisfying the requirements of s. 93A will almost always turn on its reliability; and there may be many factors, including in some cases an inability to test the reliability of the statement by cross-examination, which may affect that question. Nothing said by

> his Honour should, in my view, obscure the importance of the reliability of the statement and the possibility that factors other than an inability to cross-examine upon it may affect that question, or over-emphasize the importance of one of many possible factors affecting that question."

[94] On the same page Pincus JA said that his reasons for agreeing that the appeal should be dismissed were substantially those in Davies JA's reasons. The case does not provide any principle of universal application for exercising the discretion under s 98 or the unfairness discretion preserved by s 130. It is more concerned with making the point that the discretion is not to be circumscribed and that in an appropriate case unreliability is often the important factor in exercising it.

[95] In *R v Morris, ex parte Attorney-General* (1996) 2 Qd R 68 Dowsett J, referring to an argument that a perception that a conviction would be unsafe and unsatisfactory was a reason for excluding a s 93A statement said the following at 75:

> "It cannot be correct to test admissibility by reference to the likely outcome of the case. I do not imply that inherent unreliability may not be a basis for the exercise of the discretion under s. 98. Circumstances may arise in which the statement itself appears to be so unreliable, either because of its contents or because of the way in which it was obtained, that it ought not be received in evidence for reasons directly related to the interests of justice. However, that is not the present case."

[96] In that passage the possibility was plainly contemplated that, in a case where a statement is so unreliable for one of the reasons stated, it would not be in the interests of justice to receive it in evidence, and would be appropriate to exclude it. It is inherent in what was said that any such decision would depend on the evidence in the case. Sufficient unreliability may be demonstrated by evidence admissible under s 9A but need not, in my view, necessarily depend on such evidence being given. Factors demonstrating sufficient unreliability to justify exclusion may equally be apparent from other evidence.

[97] In a case invoking the propositions from *R v F.A.R.* and *R v Morris: ex parte Attorney-General*, the focus would be whether there was such a demonstrated degree of unreliability affecting the s 93A statement as to make it inexpedient in the interests of justice that it should be admitted. That exercise, as I read the record, was not carried out.

[98] Admission of the s 93A statement in evidence had consequences in relation to the conduct of the defence case. It imposed upon the defence the need to make practical choices as to how the case was to be conducted. The defence was left to chose between two courses, each of which had its difficulties. One was to argue that the account obtained by the girl's mother should be excluded as evidence of recent complaint because of the circumstances in which the complaint was elicited (*R v Adams and Ross* (1965) Qd R 255) and not to cross examine the girl's mother about the circumstances in which the complaint was taken, since to do so would invite the risk that the way in which the girl responded to the mother's questions would become relevant. There was a distinct disadvantage in attempting to cross examine selectively about the circumstances because if the girl's mother repeated the evidence in her statement it would become apparent to the jury that the

complainant had apparently volunteered information other than to which she had been led by previous conversation on the part of the mother, on a subject that the jury might think would ordinarily be beyond the knowledge of a six year old child. If this option was pursued there was no room to suggest that the girl's evidence was unreliable because of the manner in which it had been elicited. The other was to allow into evidence the circumstances in which the complaint was taken and run the same risk that the jury may think that the evidence was not wholly the product of the mother's suggestion but the girl's own version of events, for the same reason.

[99] The former course was chosen. No detailed evidence was led in front of the jury about the way in which the complaint came to light. It was only elicited from the girl's mother that the girl had made "no voluntary complaint". No ground was taken and indeed no ground could reasonably be taken that counsel at trial was remiss in approaching the matter that way. He was faced with making one of those hard tactical decisions which counsel must often make in matters of this kind.

[100] It may also be noted that the problems for the defence were later compounded by the accused giving answers in cross examination to questions as to whether he had done the things alleged by the girl in a manner which the jury may well have thought was evasive and did not amount to distinct denials, at least initially. Further, viewing the tape suggests that the child was not overawed by the experience of being interviewed by the police officer. Her manner when she discussed the actual offence may be thought to be more subdued than her mood during much of the tape but that is hardly surprising. The jury may well have concluded from looking at the tape itself without knowing any of the background of how the initial complaint came to light that she was recounting events that had actually occurred to her.

[101] In the circumstances it was not surprising that the jury found him guilty, having regard to the state of the evidence at the time it considered its verdict. Subject to the issue of whether the s 93A tape should have been excluded, I would not consider the verdict was unreasonable and could not be supported by the evidence on that footing.

[102] However the difficult question is whether the trial miscarried because the learned trial judge did not specifically consider the question whether the s 93A statement should be excluded for reasons associated with the manner of obtaining the child's version of events prior to the s 93A statement being taken. There can be no criticism of the way in which the police officer conducted the interview. While some parts of the transcript of the record of interview are marked indecipherable, close listening to the sound track of the tape reveals, in some such areas at least, what appears to have been said by the girl. They are not inconsistent with what the police officer repeated on the tape. There is no substance in the suggestion that he asked leading questions.

[103] As the matter stood at the time when the learned trial judge would have had to consider the issue of exclusion of the evidence, there was the version in the mother's statement about how she questioned the girl about events of the previous night. There was a completely different version of events, given seven months later, by the *de facto* husband as to how the alleged offence came to light. There was the tape itself. The parties were apparently content to have the issue considered on that basis, although the defence also wished to rely on the evidence of the expert witness

as well. However, the issues raised by her are ones that the learned trial judge could properly have factored in from his own experience had he addressed the issue of exclusion of the s 93A statement on the basis of s 98. The fact that there was limited evidence of how the girl's initial complaint was elicited is a problem, in my view, for reasons appearing below.

[104] Where it is alleged that a statement formally complying with s 93A is unreliable because of events prior to its coming into existence, the particular facts of the case will be critical. Questions of degree will be involved. Not all cases where there is evidence that a leading question or leading questions have been asked of a complainant will necessarily lead to the statement being excluded. Where there are different accounts of how the statement came to be made, especially where one has been made a considerable time after the event, it would be within the fact finder's province to accept one in preference to the other. In the present case, according to the complainant's mother's statement, she gave an example of bad touching which the girl immediately said had happened to her but immediately afterwards added an example which differed from anything the mother had said. It described a kind of conduct that the jury might think would ordinarily be unfamiliar to a girl of that age. The statement also discloses that there had been a denial of touching, at least before the definition of what might constitute bad touching other than manual touching was given. Whether that extended definition in the example given which prompted the girl to say that kind of thing had happened to her and the same kind of act was done "down there too" explains the initial denial would be a matter for the tribunal of fact to consider.

[105] Because of the narrow basis upon which consideration of the admission of the s 93A statement was conducted it is speculative what the learned trial judge may have done had his focus been wider. One of the difficulties about the matter is that knowledge of precisely what was said and done by the child's mother, and more particularly, whether things not recorded in her statement were said or done would have been capable of affecting the outcome. Since it can be inferred from the appeal record that the process of obtaining information from the child apparently took longer than the written statement reflects, reliance only on the written statement was likely to provide an imperfect basis to resolve the issue satisfactorily. An opportunity for the learned trial judge to make an assessment of the nature of the process and the possible effect of it on the child, after hearing evidence of precisely what happened, would have been more likely to have produced a reliable result.

[106] Because of those considerations, I would be reluctant to express a concluded view as to the way in which the discretion to exclude the s 93A statement should or would have been exercised, especially as, if there were a new trial, the evidence before the trial judge on a renewed application to exclude it may well be different from that in the application presently under consideration. I am satisfied, however, that consideration of the issue of admission of the s 93A statement miscarried because the learned trial judge was induced to deal with it with too narrow a focus.

[107] Regrettably, on that view, there would have to be a new trial since I am not satisfied that the s 93A statement would inevitably be excluded. However it is the kind of case where the DPP may wish to consider whether, having regard to the complexities inherent in it, the need for the child to give evidence again if the matter does proceed and public interest considerations it is in the public interest that the

appellant be retried. However that is a matter entirely for the prosecuting authorities.

[108] I would order that the appeal be allowed, the conviction set aside and that there be a new trial.