Evidence of veracity or propensity

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Under the common law, what is labelled by the Act as veracity or propensity evidence was known as evidence of character or credibility.[1] Although these terms are more recognisable labels for the type of information the veracity and propensity rules are concerned with, the scope of the rules under the Act, and how they are applied, is very different from the common law. Although in a broad sense the Law Commission's goal was to simplify and codify this area of the law, the consequence of the demarcation between the two types of evidence has meant the Act's approach is quite unique. Comparisons to the operation of admissibility rules in other jurisdictions are therefore not of assistance, except at the level of policy and principle.

Identifying evidence of veracity or propensity

The scope of the veracity rule

The broad notion of credibility, including both moral and probative credibility, is not what the Act regulates as veracity evidence. Cross-examination which is directed at challenging a witness's evidence by attempting to expose inconsistencies, faulty recall or unreliability of perception is aimed at reducing the credibility of the witness, but it does not invariably concern an attack on the witness's veracity.[2] For example, questioning a witness about the content of a previous inconsistent statement will also not amount to challenging that witness's veracity if the purpose is to prove the truth of the content.[3] Matters put to the witness about their accuracy or reliability are therefore not governed by the veracity rules[4] – although the line between a challenge to reliability and a challenge to veracity may be difficult at times to discern.

Evidence of someone's veracity may be helpfully thought of as a piece of evidence extraneous to the subject matter of the proceedings. The previous definition of veracity in s 37(5) of the Act did not make this entirely clear, stating that "**veracity** means the disposition of a person to refrain from lying, whether generally or in the proceeding". However, the reference in s 38 to "by reference to matters other than the facts in issue" indicated even prior to the 2017 reform that the type of evidence s 37 is intended to cover is narrowly constrained – the sort of

[1] See *Robert Jones Holdings Ltd v McCullagh* [2016] NZHC 2529 at [55](c): "The term 'credibility is not recognised by the Evidence Act. This is not to assert evidence in relation to credibility is not admissible under the Act, but rather to be mindful of the conceptual basis upon which it is admitted." See also Elisabeth McDonald "Assessing a Person's Truthfulness on Either Side of the Tasman: Comparing Concepts of Credibility and Veracity" in Andrew Roberts and Jeremy Gans (eds) *Critical Perspectives of Unifrom Evidence Law* (Federation Press, Sydney, 2017)230.

[2] "Reliability and veracity are distinctly different concepts": *Hannigan v R* [2012] NZCA 133 at [34].

[3] See *Davidson v R* [2008] NZCA 410. Identification of purpose is again critical – even though there may be a dispute about the true purpose of offering the evidence, and should be accompanied by an inquiry into the risk that the fact-finder may use the evidence for an illegitimate purpose: see Richard Mahoney "Evidence" [2008] NZ L Rev 195 at 208.

[4] See Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV37.01(1). See also New Zealand Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [39].

material that at common law would have been within the scope of the collateral issues rule,[5] and what Roberts and Zuckerman refer to as evidence going to a person's "moral credibility".[6] This was confirmed by the majority of the Supreme Court in *Hannigan v R*:[7]

> The veracity rules contemplate evidence being adduced as to the veracity of a witness in relation to matters which have no other relevance to the case at hand. For instance, if a witness has numerous previous convictions for perjury, evidence of those convictions will be admissible as to the veracity of that witness (providing the substantial helpfulness test in s 37(1) is satisfied) even though they do not directly bear on any factual question which is in issue in the proceedings. Likewise, if a witness has a reputation for, and a past history of, scrupulous honesty, evidence of that reputation and past history may be admissible (again subject to the s 37(1) being satisfied) despite having nothing to do with the facts of the case at hand. There can be no doubt that the primary purpose of the veracity rules is to provide for, but also limit by exclusionary provisions, the admissibility of evidence of that kind…*The exclusionary elements of the veracity rules do not operate so as to exclude evidence which is admissible as to the facts in issue*.

In *Hannigan v R* the majority of the Supreme Court said that the fact that a person has a disposition to lie can only be established by evidence of previously told lies.[8] Of the five substantially helpful indicators of veracity listed in s 37(3), only 37(3)(a) (lack of veracity when under a legal obligation to tell the truth) and some examples of s 37(3)(c) (any previous inconsistent statement) meet the majority's description of "previously told lies". But the same cannot be said for any of the other indicators of substantial helpfulness set out in s 37(3). In its 2018 *Issues Paper* the Law Commission sought views as to whether s 37(3)(c) should be removed or amended (at [13.26]) and have now recommended it should be repealed.[9]

In *Pou v R*,[10] the Court of Appeal (when considering whether s 38 needed to be triggered before the Crown were permitted to ask the questions they did), cited *Hannigan* and *Weatherston*, and stated:

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[5] In this sense the Act may well preserve a distinction between matters going to a fact in issue and matters which are collateral (see *Weatherston v R* [2011] NZCA 276 at [59] - [60]; *Weatherston v R* [2011] NZSC 105 at [5]) – although there is debate about the extent to which the drafting of the Act makes this distinction clear – see the discussion in *R v Tepu* [2008] NZCA 460, [2009] 3 NZLR 216 at [21] – [22] and criticism of the case in Richard Mahoney "Evidence" [2009] NZL Rev 127 at 144.

[6] Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 347.

[7] [2013] NZSC 41, [2013] 2 NZLR 612 at [120] and [138] (emphasis added). In that case the defendant was convicted of burning down his house on 21 June. To help prove the case, the Crown alleged that the defendant had failed in an attempt to burn down the house on the previous day, 20 June. In a statement to the police made a few days after the 21 June fire, W (the defendant's wife) said that on 20 June she waited in the car while the defendant went into the house. At the trial W testified that on 20 June the defendant went "into the property". This answer was equivocal because it could be interpreted as meaning that although the defendant went onto the property, he did not go into the house. When cross-examined by the defence, W said that on 20 June she had the key to the house and thus the defendant could not have gone into the house. The jury asked for clarification whether the defendant went into the house on 20 June. The trial judge permitted the prosecutor to re-examine W on the issue. W was never declared hostile. In re-examination the prosecutor asked leading questions by repeating portions of W's prior statement and asking if W remembered telling the police that the defendant went into the house. In his closing address to the jury the prosecutor said that W was "all over the place" regarding the issue whether the defendant went into the house; that although counsel was not suggesting that W was a dishonest person, W was doing what she could to assist the defendant; that W was friendly to the defence; and that the jury ought to have real doubt as to W's reliability.

[8] *Hannigan v R* [2013] NZSC 41, [2013] 2 NZLR 612 at [121].

[9] *The Second Review of the Evidence Act 2006* (R142, 2019) at [14.46].

[10] [2014] NZCA 294 at [42] (emphasis added).

> The authorities are clear that the veracity rules are not generally engaged when evidence or cross-examination is merely directed at disputing the truth of a fact in issue. *Rather the veracity rules come into play when it is intended to introduce collateral material designed to show that the witness or defendant has a disposition to refrain from lying in terms of s 37(5) of the Evidence Act or, conversely, a disposition to tell lies.* This will usually be the case where the collateral material has no other relevance to the case.

Evidence that will help bolster the credibility or truthfulness of a witness is not caught by s 37. Unless another applicable rule is engaged (hearsay or opinion, for example) such evidence is admissible subject only to ss 7 and 8.[11]

The concluding clause of s 37(5) was amended by clause 13(2) of the Evidence Amendment Act 2016. Section 37(5) now reads: "For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying". The removal of the words "whether generally or in the proceeding" is seen as consistent with the approach in *Hannigan*.[12] However, the fact that the definition applies to "veracity" wherever it is used in the Act (as compared to the opening words of s 4 "unless the context otherwise requires") may require a change of approach that was perhaps unintended by this reform (see for example, s 35(2)).[13]

In *R v Katipa* Downs J said this about the revised s 37(5):[14]

> Subsection (5) confirms what is otherwise obvious: s 37 is concerned with a person's disposition or propensity to refrain from lying, and hence with evidence that might otherwise have little relevance or probative value to an issue in dispute. Put more directly, the section permits the introduction of otherwise potentially inadmissible evidence to the effect a witness is habitually truthful or untruthful; hence its requirement for substantial helpfulness.

In *Bader v R* however,[15] the Court of Appeal described, without comment on this definitional point, the decision of the trial judge to allow the Crown to respond to the defendant's "attack on the veracity of three [Crown] witnesses by suggesting each had a motive to lie".[16] The Crown wanted in response to produce statements of other employees who had made similar complaints about the defendant, with the judge concluding that "the proposed cross-examination should be permitted on the basis that it was substantially helpful to the assessment of the witnesses' veracity."[17] In my view, all of this evidence fell outside of the definition of veracity evidence, and was admissible (or not) subject only to ss 7 and 8 (and, in the particular case, s 18).

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[11] See for example *R v J (CA693/17)* [2018] NZCA 343 at [52].
[12] *Hannigan* at [137].
[13] The definition of veracity is now included in s 4 of the Act, which means it applies to all provisions of the Act unless "the context otherwise requires". The change to the s 37(5) definition was intended to clarify that the veracity rues do not deal with "the truthfulness of the evidence that has been given" in the particular case – however case law indicates that challenges to "probative credibility" are sufficient to engage the exception in s 35(2).
[14] [2017] NZHC 2169 at [8] (emphasis in original).
[15] [2017] NZCA 389.
[16] At [35].
[17] At [36].

The scope of the propensity rule

Section 40(1) defines propensity evidence as follows:

> Propensity evidence -
> (a) means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved

The definition focuses primarily on *disposition* evidence being evidence of a person's propensity, but it also refers to specific acts (such as previous convictions). *One* act (or conviction) may amount to evidence of propensity to behave in that way,[18] and behaviour (or offending) after the particular incident at issue is also caught by the definition,[19] which is broadly drawn. It can apply to categories of evidence that may not previously have been dealt with under the common law "similar fact" rule,[20] as well as encompassing evidence of conduct for which the defendant has been acquitted,[21] and evidence of (mere) allegations.[22]

Whether all evidence of a person's previous conduct is caught by the definition has been the subject of some debate at appellate court level. This issue has arisen in relation to prosecution evidence offered about the defendant's past conduct. If such information is propensity evidence, in the absence of s 41 applying,[23] the evidence is subject to the admissibility rule in s 43. To the extent that the standard for admission in s 43 is higher than that found in s 8, the prosecution may prefer to have the evidence fall outside the definition.

Evidence that is "part of the narrative" is propensity evidence

On 19 December 2007, Mr and Mrs Mahomed had left Tahani in their van in the car park of a shopping centre in Otahuhu while the couple were there selling jewellery. It was a warm day and only one window was slightly down. Tahani was probably there for approximately three hours before being discovered by a security officer from the shopping complex who called 111. Tahani was crying and her face was covered in perspiration. Before police arrived, Mr Mahomed returned to the van, got into an argument with the security officer about whether Tahani was in fact perspiring, and then left. In the judgment, this is referred to as the "van incident". The issue before the Supreme Court was whether the evidence relating to the van incident was admissible at trial, and if so, on what basis and what directions, if any, were required from the trial judge.[24]

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[18] See *R v Mata* [2009] NZCA 254 at [55]; *Patten v R* [2014] NZCA 486 at [27].
[19] Ibid at [45] and *Solicitor General v Rudd* [2009] NZCA 401 at [27]; *Narayan v R* [2013] NZCA 24 at [8].
[20] Helen Cull and Jonathan Eaton "Veracity and Propensity" in New Zealand Law Society *Evidence Act 2006: Intensive* (NZLS, Wellington, 2007) 61 at 91.
[21] *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298; *Marsich v R* [2012] NZCA 470. For a discussion of the pre-Act position Elisabeth McDonald "The Admissibility of 'Acquittal Evidence' in Criminal Trials: Toward Reform" (2003) 34 VUWLR 639 and Richard Mahoney "Evidence" [2001] NZ L Rev 85 at 89-91.
[22] *Sharoon v R* [2014] NZCA 545 at [19].See also Andrea Ewing "Disputer Propensity Evidence" [2013] NZ L Rev 35.
[23] See below at 5.5.2(1).
[24] *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [22]. The Court of Appeal had twice held that the evidence was not propensity evidence and subject only to ss 7 and 8, and agreed that a specific "propensity direction" was not necessary given the way the evidence was used – see *Mahomed v R* [2009] NZCA 477 at [46], [2010] NZCA 419 at [90] – [91] and generally Elisabeth McDonald "*Mahomed*: Future Application" [2011] NZLJ 385.

The majority of the Supreme Court however held that the evidence was propensity evidence and was inadmissible except in relation to the charges of failing to provide the necessaries of life. They found that there was a miscarriage of justice since the judge had not identified for the jury that the evidence was only admissible for this one purpose.[25] In particular, the judge should have reminded the jury that evidence of a negligent or uncaring attitude towards Tahani was not in itself sufficient to sustain a murder charge.[26] However, the majority applied the proviso to s 385(1) and dismissed the appeal.

The minority took a "broad and literal" approach to the definition of propensity evidence,[27] which meant that the van incident fell within s 40. The minority also agreed with the decision of the Court of Appeal that the evidence was admissible in relation to all charges as evidence that showed a willingness to expose Tahani to risk.[28]

During the course of their decision the minority described certain types of evidence that had been categorised as evidence of bad character under the common law.[29] This includes traditional "similar fact" evidence where probabilities and coincidence provide its relevance - for example, D sexually assaults C. B then comes forward and says that D assaulted him in the same way in a similar context six months earlier.

The minority also expressed the view that evidence involving earlier acts committed against the same complainant is caught by the definition in s 40. For example, intra-familial sexual abuse where a victim is unable to give a coherent account of what happened and why without discussing the underlying family dynamics.[30] However, outside of the definition may be evidence of past acts where this evidence is admissible for a reason unrelated to the defendant's propensity to act or think in a certain way. The example given is the prosecution bringing evidence of an earlier offence committed against the murder victim, where the alleged motive for murder is that the defendant wished to avoid prosecution for the earlier offence.[31]

The net of s 40 is therefore cast wide.[32] There is no room for a different approach (classifying the evidence as "background" or part of the "narrative") on the basis that it is not being offered for a propensity purpose.[33] However, although the minority stated that the purpose of offering the evidence is not the key to whether or not s 43 applies,[34] it will sometimes be difficult to argue the evidence falls outside the definition without referring to purpose. Indeed the examples given of what might fall outside the definition are arguably still evidence that demonstrates a defendant's propensity to behave in a particular way. As noted above, the examples include: evidence that goes to motive (which may or may not be closely linked in

[25] *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [16].
[26] Ibid at [15].
[27] Ibid at [84].
[28] Ibid at [70].
[29] Ibid at [50] – [58].
[30] Ibid at [90]. See also *R v R* [2008] NZCA 342. But see *R v Martin* [2013] NZCA 486 at [24].
[31] *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [52] and [56].
[32] It includes evidence of items in the defendant's possession that demonstrate a disposition or propensity – including naked photographs of young children and girls' underwear: *Snell-Scasbrook v R* [2015] NZCA 195; *Parry v R* [2016] NZCA 72.
[33] Richard Mahoney "Evidence" [2011] NZ L Rev 547. See however, *MacDonald v R* [2011] NZCA 312 at [31] and *G (CA883/2010) v R* [2011] NZCA 395 at [20] - [21], both decided after the Supreme Court decision in *Mahomed*.
[34] *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [60].

time to the alleged offending);[35] and, evidence that the defendant was in prison at a relevant time (if related to motive, for example).[36] What the minority is clear about is that what is within the definition is evidence of other misconduct which explains the background of the offending or the relationships between those involved or is evidence of "events…so interconnected with the offending that the jury will not be able to understand properly without hearing evidence about those events".[37]

Evidence of a person's propensity to be accurate or reliable will fall within the propensity rules – although only subject to ss 7 and 8 if not about a defendant's (or complainant in a sexual case) accuracy. If it is not evidence of a *general* disposition to be accurate (or inaccurate) then it is outside s 40.

Propensity evidence offered for a non-propensity purpose

Despite the breadth of the definition (which refers both to a person's actions and their state of mind), in some cases evidence about a defendant's previous conduct, or state of mind, has been held to fall outside s 40(1) and admissible subject only to ss 7 and 8.[38] Such decisions seem in contradiction to the view expressed by the minority of the Supreme Court in *Mahomed* that "evidence which tends to show a propensity by the defendant to act towards or think about the defendant in a particular way is necessarily within the definition of 'propensity evidence' irrespective of why the Crown wishes to lead the evidence."[39]

The Court of Appeal's decision in *Perkins v R* has been cited in support of the argument that evidence of the defendant's previous conduct towards a complainant is not always propensity evidence[40] – such as when it is relevant not as "orthodox similar fact" evidence,[41] but rather to explain the complainant's behaviour when it is seemingly "otherwise inexplicably passive in the face of the violence".[42] In *Perkins*, which primarily dealt with the nature of the trial judge's directions, the Court seems to treat relevant background evidence offered to support the complainant's evidence as falling outside of the definition of propensity evidence.[43] Such an approach is at odds with that taken in *Mahomed*, in which the Court specifically considered the classification of "background" evidence. However it is also the case that the inquiries in s 43(3) are of limited efficacy when the propensity evidence is not dependent on coincidence reasoning for its probative force.[44]

In *H (CA227/2018) v R*, the defendant was charged with sexual offending against two of his step daughters.[45] Both he and his wife had previously pleaded guilty to several charges of quite

[35] But see *R v Martin* [2013] NZCA 486 at [24].
[36] *Mahomed* at [52] and [60], although note the observation at [90](c) which seems to suggest the contrary.
[37] Ibid at [90](d).
[38] *Nand v R* [2015] NZCA 521, *T (CA871/2012) v R* [2015] NZCA 83; *R v Paewhenua* [2017] NZHC 1773 at [50]; *Hastings v R* [2015] NZCA 180 at [29]; *A (CA237/2015) v R* [2016] NZCA 134 at [38]; *Donald v R* [2017] NZCA 120 at [11]; *R v Beazley* [2015] NZHC 2723 at [24].
[39] At [61]. See also *R v M* [2017] NZHC 184 at [16]
[40] The language "relationship propensity evidence" is sometimes used: see *R v Coe* [2018] NZHC 502 at [31] and *Mu v R* [2018] NZCA 440 at [14].
[41] [2011] NZCA 665.
[42] At [22]. Cited in *Hastings v R* [2015] NZCA 180 at [28].
[43] At [24].
[44] *R v Martin* [2013] NZCA 486 at [22]. See also *R v Ashby* HC Whangarei CRI 2009-027-3088, 13 December 2010.
[45] [2018] NZCA 266 (pre-trial application for leave to appeal dismissed: *H (SC70/2018) v R* [2018] NZSC 89).

serious neglect (including locking the children in their filthy bedrooms) in relation to the girls and their siblings. The Court of Appeal upheld the pre-trial decision that evidence of the neglect convictions (and the facts of that offending) should be admissible without the need to apply s 43. The Court said (at [11]):

> We accept *Mahomed* is the starting point. That case held that notwithstanding the fact the challenged evidence involves the same complainant and defendant, the propensity rule was the correct analytical route. However, it is recognised that because the relevance of this type of contextual evidence is not sourced in linkage and coincidence, many of the s 43 factors will not be of assistance. The analysis will mirror that which would occur under ss 7 and 8 of the Act.

Although also considering the factors in s 43 for completeness, the Court commented on the importance of admitting contextual evidence to assist juror understanding of complainant behaviour, without the need to effectively "shoe horn" the evidence in through the strictures of s 43 (at [19]):

> We consider in cases of this type, a complainant should not be unfairly limited in giving evidence by artificial restrictions on what he or she can refer to. The alleged sexual abuse here occurred at a time when the girls were experiencing such treatment from their parents that is disclosed in the neglect conduct. When assessing the veracity of their complaints, including how they reacted to Mr H's alleged sexual abuse and how likely it is to have occurred, a complainant must be entitled to explain, and a jury must be entitled to know, the dynamics of the household. Otherwise the case has an air of unreality.

In *P (CA354/2017) v R*, the appellant appealed his convictions for a number of charges relating to family violence, including three breaches of a protection order.[46] With regard to those charges, evidence of his alleged controlling behaviour towards the complainant was offered to respond to his explanations as to why the breaches occurred. The appellant argued such evidence was propensity evidence which resulted in gratuitous character blackening (and was in fact excluded at the second trial dealing with charges on which the jury had not been able to reach agreement).

The Court of Appeal noted that in cases of domestic violence it is useful for the jury to hear evidence of the defendant's previous conduct and establish context. Such "relationship evidence" the Court said "is not propensity evidence in the traditional sense", despite falling within the scope of s 40, because it does not primarily depend on ideas of linkage and coincidence: at [33]. Citing *Perkins* and *Mahomed*, and echoing the comments in *H (CA227/2018) v R*, the Court stated (at [34]):

> The factors set out in s 43(3) will generally be of less significance in determining the probative value of the evidence than it would be in cases where ideas about linkage and coincidence are relied on. It is generally accepted that there is little room for unfair prejudice in respect of relationship evidence, as against evidence led for the purpose of coincidence reasoning, because "the wrongfulness of the defendant's conduct will usually be closely connected to the core elements of the case against [him or her]".

The Court concluded that some of the contested evidence was relationship evidence that gave context to the circumstances in which the allegations were made, finding that such background

[46] [2018] NZCA 361.

information provided important context for the allegations of breaching the protection order. It was not unfairly prejudicial: at [35] – [36].

In *Tahau v R* the Court of Appeal agreed with the pre-trial decision that evidence of the defendant telling the complainant (in a rape case) that he had just been released from prison for "bashing a nigger" was admissible subject only to ss 7 and 8.[47] The Court held that such evidence was probative to the assessment of the complainant's credibility (as to why she did not call out during the alleged sexual violation) and not unfairly prejudicial: at [12]. The actual details of the defendant's recent release from prison was not admitted. The Court was of the view that the directions as to use of the evidence, in which the trial Judge said that "the only reason you heard about [the defendant's] claim that he had been in prison before, was because the Crown put it to you that that was an explanation for [her] behaviour … whether that comment he made was true or not… is entirely irrelevant", were sufficient to guard against any illegitimate prejudice.[48]

See similarly *R (CA89/2018) v R* in which the Court of Appeal agreed with the Crown that the defendant's viewing of pornography in the months proximate to the offending "was plainly relevant and probative of whether the complainant was telling the truth".[49] No analysis of the information as propensity evidence was undertaken.

However, in *O (CA736) v R*[50] the President of the Court of Appeal stated (the majority chose not to consider the point as they were in agreement with the decision to exclude):

> [I]t is also clear that if Crown evidence in a criminal trial is propensity evidence concerning the defendant, it must go through the s 43 enquiry even if the Crown seeks to adduce it for a non-propensity purpose. That is because of the risk of illegitimate propensity reasoning by the jury. If Crown evidence is not propensity evidence in law, its admission will still of course depend on a s 8 evaluation. If such evidence might nonetheless be thought by a jury to be probative of a propensity, despite proper direction, that will be a matter weighing against admission under s 8.

The President emphasised the significance of the evidence being probative of the defendant's particular propensity ("or requisite tendency") which has relevance to the acts or state of mind involved in the alleged offending (citing *Mahomed* at [19]). This analysis seems to encourage narrowing the application of the definition of propensity evidence in s 40(1), in reliance on "particularity".[51]

Evidence of behaviour of the defendant which is an integral part of the complainant's account is not propensity evidence

In *Grooby v R* the complainant (R) gave evidence that she had been sexually assaulted by an older man (G]) whom the family was staying with, acts which R said occurred shortly after G had attempted to have oral sex with her sleeping and heavily intoxicated father.[52] The Court of Appeal held that this evidence (of G's sexual activity with R's father) was "an integral part of

[47] [2018] NZCA 538.
[48] At [15].
[49] [2018] NZCA 341 at [65].
[50] [2018] NZCA 434 at [14].
[51] A similar analysis was undertaken by the Court of Appeal in *Thompson v R* [2018] NZCA 620 at [19].
[52] [2018] NZCA 344.

her account" (at [23]), finding that although background of narrative evidence can fall within the propensity rules, "the disputed portion of R's evidence is properly understood as her description of what happened to her rather than as background or relationship evidence and it did not fall to be considered under ss 40 and 43" (at [28]).

Evidence of state of mind

Possession of objectionable material by a defendant may demonstrate a relevant propensity to have a particular state of mind – that is, a sexual interest in young children.[53] Photographs of a defendant's previous breaches of safety practices were treated as evidence of the defendant's "state of mind and knowledge" caught by the definition in s 40. In *R v Burr* Brown J adopted the distinction made by the Supreme Court in *Mahomed* between "evidence demonstrating a propensity to have a particular state of mind, and evidence which merely shows that, at a particular time (such as when the alleged offence occurred), a person (such as a defendant) actually had a state of mind which may be relevant to an issue in this case. Examples of the latter class of (non-propensity) evidence would presumably include anger, lust or a desire for revenge."[54] As the Court of Appeal held in *Rei v R*, "knowledge of a *particular fact* is not propensity evidence."[55]

Propensity evidence going to someone's state of mind could include: a love of violence, a lack of inhibition, a hatred of women or an unrealistic optimism.[56]

Propensity to be accurate or reliable

In considering s 40(4), it must be remembered that s 37(5) defines veracity as the disposition to refrain from lying. There can be no suggestion that a person's veracity has anything to do with his or her disposition to be accurate, or his or her accuracy on any particular occasion. Thus, in giving priority to the veracity rules, s 40(4) is not purporting to affect evidence relating to a person's ability to give an accurate account when honestly attempting to do so. This means that evidence about person's propensity to be accurate or inaccurate would continue to be governed by the rules controlling propensity evidence. Section 40(4) would not give priority to the veracity rules in such a case.

Following the decision in *Hannigan* and the amended definition of veracity in s 37(5), evidence of previous behaviour of the defendant that indicates the defendant is not telling the truth about their involvement is not veracity evidence. However, it would be unhelpful (and difficult) to subject this kind of propensity evidence (a lack of a propensity to be reliable) to a s 43 analysis. Such evidence may not indicate a propensity for accuracy and reliability, but rather whether the defendant is giving a reliable account of the facts in issue. Such an analysis would put such evidence outside both the veracity and propensity rules and admissible subject to ss 7 and 8 (unless some other rules also applied, such as the hearsay or opinion rules).[57]

[53] *Snell-Scasbrook v R* [2015] NZCA 195 at [36]; *Parry v R* [2016] NZCA 72 at [22].
[54] [2015] NZHC 1623 at [44], citing Richard Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014) at EV40.02(4).
[55] [2012] NZCA 398, (2012) 25 CRNZ 790 at [34], cited in *Tihi v R* [2016] NZCA 211 at [13]. See also *Gosnell v R* [2014] NZCA 217, [2014] 3 NZLR 168 at [33]; *R v Tainui* [2008] NZCA 119.
[56] Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV40.02(4).
[57] In *R v MS* [2017] NZHC 184 at [17] Palmer J said: "In addition I suggest that only evidence tending to show a propensity which is relevant to the alleged offending has to be assessed under s 43. The admissibility of evidence

The dividing line between evidence of veracity and evidence of propensity

A person may have a propensity to do certain things, but they may also have a propensity to say certain things, including untruths. The Act provides (in s 40(4)) that when the evidence to be offered "is solely or mainly relevant to veracity" it is governed by the veracity rule in s 37, not the propensity rule in s 40.[58] This also means that evidence about a person's probative credibility (their propensity to be accurate or reliable) would remain to be considered under the propensity rules.[59]

Evidence of a person's previous convictions may therefore be either propensity or veracity evidence, depending on purpose or relevance – of it evidence only of accuracy about a fact in issue it is arguably outside the definitions of both rules (especially post the proposed reform).

The Supreme Court's decision in *Wi* required a discussion of whether evidence of a defendant's lack of previous convictions were properly classified as veracity or propensity evidence.[60] In finding that it "is debateable whether evidence that a defendant has no previous convictions, either generally or of a particular (dishonesty) kind, tends to prove that the defendant has a disposition to refrain from lying",[61] the Court was of the view that "the simple fact that a defendant has no previous convictions cannot sensibly be regarded as having the heightened probative force required by the substantially helpful test."[62] The Court held that evidence of lack of convictions is relevant propensity evidence:[63]

> While it can always be said that there is a first time for everything, evidence that a defendant has never been convicted of any, or any relevant, offence tends to show he has never committed any such offence. Its tendency to show that may be slight but, logically and as a matter of experience, this kind of evidence does have some tendency in that direction. Once this point is reached, the remaining question is whether evidence which tends to suggest a defendant has never committed any, or any particular, crime tends to show that the defendant did not do so on the occasion or occasions charged. Again, the tendency of the evidence to show this is slight, perhaps very slight, but we do not consider it can properly be said that this kind of evidence has no such tendency whatever.

The decision reaffirmed the common law position that allowed a defendant to offer evidence of lack of previous convictions as "good character" evidence, although clarifying that such

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which tends to show a propensity which is completely irrelevant to the alleged offending, but is sought to be admitted because it is relevant to something else of consequence to the determination of the proceeding, [for example, the credibility of the complainant] would have to be assessed on the standard grounds set out in ss 7 and 8 of the Act in terms of relevance and unfair prejudice." (Palmer J's decision to sever the charges and exclude the propensity evidence was upheld on appeal: *R v M (CA93/2017)* [2017] NZCA 72.)

[58] This provision appears to have been overlooked in relation to evidence of a complainant's veracity, which was considered under s 44 – see further below and Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EA44.03. See also *Cable v R* [2011] NZCA 330 at [18].

[59] Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV40.05(3).

[60] *R v Wi* [2009] NZSC 121, [2010] 2 NZLR 11. See also *Gharbal v R* [2010] NZCA 45 at [30] and [105]; *R v Lahina* [2008] NZCA 251 at [45].

[61] *R v Wi* [2009] NZSC 121, [2010] 2 NZLR 11 at [11]. See Rosemary Pattenden "No previous convictions as evidence of good character – New Zealand" (2010) 14 E&P 169.

[62] *R v Wi* [2009] NZSC 121, [2010] 2 NZLR 11 at [11].

[63] Ibid at [16]. The Court also held, at [20], that such evidence should not be excluded under s 8.

evidence is now relevant as *propensity* evidence under the Act.[64] As to whether the jury needed to be directed as to the use of such evidence (to credibility or guilt), the Court stated:[65]

> It must be obvious to a jury that evidence that the defendant has no previous convictions is adduced for the purpose of suggesting that he or she is thereby the less likely to have committed the offence charged. Defence counsel will almost certainly have addressed them to that effect. It hardly needs the judge to remind them of the point. To be balanced, a reminder might well have to be accompanied by an invitation to compare the weight (stated implicitly or expressly to be slender) of this evidence with the weight the jury finds in the evidence adduced by the Crown. Such a direction might not be particularly helpful to the defendant and, in any event, the jury might consider that the judge, by directing on such a small and obvious point, was somehow suggesting it had more force than it deserved.

The use of the word "character" when considering admissibility questions is probably best avoided. The evidence will go to propensity, veracity or neither (just accuracy or reliability about a fact in issue). References to "attacking character" risks merging the concepts of propensity and veracity, which should be avoided. In *Roberston v R* the Court of Appeal engaged with the appellant's argument that the admission of the defendant's pre-trial statement that "I'm not [that] kind of person" could also be used (unfairly) to "attack Mr Roberston's character".[66] The Court pointed out correctly that the evidence could not be used as veracity evidence, as that is seemingly the concern being raised. However, the evidence was clearly propensity evidence, and should have also operated to engage s 41. It could never have amounted to veracity evidence, of the collateral kind.

See further the discussion of the division between ss 37 and 40 in the consideration of s 44 (below).

The veracity rules

Once it is determined that the evidence at issue is veracity evidence for the purposes of the Act, the judge must grant leave in order for the evidence to be admitted – which could happen through cross-examination of the witness or by calling another witness to offer the evidence.[67] The admissibility rules governing veracity evidence are different with regard to the veracity of defendants in criminal cases, as compared with any other person (including witnesses). Evidence of the veracity of a maker of a hearsay statement (for the purposes of the reliability inquiry) must also be admissible under the veracity rules.[68]

Veracity evidence about any person

Section 37(1) of the Act provides (emphasis added):

> A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is *substantially helpful* in assessing that person's veracity.

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[64] See Matthew Downs "Evidence Act Update" in *Criminal Law Symposium* (NZLS, Wellington, 2010) 19 at 26.
[65] *R v Wi* [2009] NZSC 121, [2010] 2 NZLR 11 at [38].
[66] [2015] NZCA 72 at [26] – [29].
[67] Note the definition of offer evidence in s 4, which includes "eliciting evidence by cross-examination of a witness called by another party".
[68] *R v Kereopa* HC Tauranga CRI-2007-087-000411, 11 February 2008 at [12].

As long as the evidence meets this heightened relevance standard, it is admissible – subject to s 8. The consequence of this provision is that evidence which at common law might have been excluded because of the operation of the collateral issues rule or the concern about "oath-helping" may now be admitted.[69] The only inquiry is whether the evidence is substantially helpful – that is, does it offer "real assistance to the fact-finder."[70] Some guidance as to when the evidence might meet this heightened relevance test is provided in s 37(3) of the Act.[71]

A number of cases have considered what kinds of convictions indicate a propensity for a lack of veracity. Convictions for theft or conversion, or using a document for pecuniary advantage are probably of that kind,[72] but shoplifting and petty theft may not be.[73] Usually a conviction for other types of offences (indecent assault for example),[74] will not be helpful in assessing a witness's veracity, but the Court of Appeal in *R v Wood* did comment that "[a] lack of trustworthiness may be demonstrated by repeated instances of contempt for the law."[75] In R v *Katipa*, Downs J accepted that evidence about the complainant in a sexual case telling prison officers there was a bomb, knowing there was not one, was admissible under s 37:[76]

> I considered the bomb hoax constituted substantially helpful veracity evidence, as an indicative of a disposition to be untruthful in a prison environment – the same environment as that in connection to the alleged offending.

Downs J further observed that the totality of offending needs to be considered when determining if evidence of the dishonesty convictions is substantially helpful:[77]

> [Counsel for the Crown] submitted individual offences, such as shoplifting and theft, said little about [the complainant's] veracity and could not be substantially helpful. I agree – if each conviction is weighed in isolation. When a person has a not in-extensive history of offences of this nature, with no significant gaps as to commission or obvious reform, cumulative effect is important. This respects the law of evidence's preference for contextual assessment of relevance and probative value, and s 37's focus upon disposition. So, one, two or three offences of shoplifting may say little about a person's disposition to refrain from lying. But 10 such convictions, at regular intervals, may have a different effect. As observed, context is everything.

In *Bader v R* however, the Court of Appeal described, without comment on this definitional point, the decision of the trial judge to allow the Crown to respond to the defendant's "attack on the veracity of three [Crown] witnesses by suggesting each had a motive to lie". The Crown

[69] "[T]he law now differs from the pre-2006 position when cross-examination was permitted but, where denials resulted, evidence contesting those denials was not permitted under the collateral evidence rule. Now, an assessment of the proposed evidence needs to be made both in relation to questions being asked in cross-examination and evidence led by the defence contesting the answers given in cross-examination": *R v Alletson* [2009] NZCA 205 at [31].

[70] New Zealand Law Commission *Evidence: Reform of the Law* (NZLC R55 – Volume 1, 1999) at [152].

[71] See *R v Smith* [2007] NZCA 400 at [16] where the Court stated "The "substantially helpful test" creates a higher threshold than relevance."

[72] *T (CA433/10) v R* [2011] NZCA 89 at [11]; *R v Kereopa* HC Tauranga CRI-2007-087-000411, 11 February 2007 at [12].

[73] *Key v R* [2010] NZCA 115.

[74] *R v Russell* HC Auckland CRI-2006-092-11084, 2 November 2007 at [24] – [32].

[75] *R v Wood* [2006] 3 NZLR 743 (CA) at [41].

[76] [2017] NZCA 45 at [11].

[77] At [12].

wanted in response to produce statements of other employees who had made similar complaints about the defendant, with the judge concluding that "the proposed cross-examination should be permitted on the basis that it was substantially helpful to the assessment of the witnesses' veracity." In our view, all of this evidence fell outside of the definition of veracity evidence, and was admissible (or not) subject only to ss 7 and 8 (and, in the particular case, s 18).

Evidence of a reputation to be untruthful

The current view of evidence of a person's reputation is that it has little probative value in most circumstances:[78]

> One's reputation *might* be a sound guide to one's past or future behaviour, but then again, reputation might equally well be a figment of malicious gossip, rumour, or ill-informed tittle-tattle. Today, reputation seems ludicrously weak material on which to base a criminal conviction.

The Law Commission's proposed Evidence Code nevertheless left open the possibility for a person's reputation for veracity to be offered by referring to such evidence in cl 39 and by providing that the hearsay and opinion rules did not apply to reputation evidence offered for that purpose.[79] However, when considering the relevance of a complainant's reputation in sexual cases, the Select Committee was convinced that "a person's reputation is irrelevant and should not be considered when assessing the veracity of their evidence".[80]

The Court of Appeal in *R v C*, cognisant of this legislative history, stated that the Act "does not allow for the admission of reputation for untruthfulness". [81] However, in *R v K*, the Court of Appeal discussed the significance of the removal from the s 37(3) list of "a reputation for being untruthful".[82] The Court considered it an inescapable conclusion that reputation evidence could be admissible because the sole criterion for the admission of veracity evidence is substantial helpfulness, s 37(3) is expressly non-exhaustive and the legislature chose not to prohibit (at least explicitly) evidence of a person's reputation for veracity.[83] In general, however, it will be "more profitable for a party to offer evidence of a person's specific conduct relevant to veracity rather than evidence of his or her general reputation."[84] In practice, the threshold of substantial helpfulness will seldom be met for reputation evidence.[85] Further, the

[78] Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 588. See also *R v K* [2009] NZCA 175 at [64] where Glazebrook J noted: "Even at common law, reputation evidence was rarely invoked … As a species of evidence, it has been described as 'typically bloodless, ritualistic and a bit dull' … as well as 'cumbersome, anomalous and unconvincing'" (references omitted).
[79] New Zealand Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55 – Volume 2, 1999) at [185]. The Law Commission recognised the limited probative value of reputation evidence but did not want to prevent its admission in cases where it may be substantially helpful (New Zealand Law Commission *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at [107] and [108]): "Because reputation evidence will rarely be of substantial helpfulness, no reference is made in the non-exhaustive list of factors provided to assist the court in [s 37(3)]."
[80] Evidence Bill 2006 (256-2) (Commentary) at 5. See also Helen Cull and Jonathan Eaton "Veracity and Propensity" in *Evidence Act 2006: Intensive* (NZLS, Wellington, 2007) 61 at 75.
[81] *R v C (CA391/07)* [2007] NZCA 439 at [21].
[82] *R v K (CA421/08)* [2009] NZCA 176 at [61] - [64].
[83] Ibid at [67].
[84] Ibid at [65].
[85] Ibid at [64]-[67]. See also *Gharbal v R* [2010] NZCA 45 at [19].

removal of the hearsay and opinion rule exemption will mean that reputation evidence will "have to pass the gauntlet" of those rules as well.

Bolstering the credibility of a witness

Prior to the Act it was not permissible to bolster the credibility of a witness except in some limited circumstances, and not by offering evidence of the witness's reputation for truthfulness.[86] The defendant in a criminal case was in a different position with regard to evidence as to their truthfulness and good character. Even though it may be of limited probative value, and offering it comes with attendant risks for some defendants, their ability to offer such evidence about themselves is a long-standing concession.[87]

The Act allows evidence about the veracity of any person to be offered, subject to the evidence being substantially helpful.[88] There is no requirement for there first to be a challenge to the person's veracity. The evidence may not meet the heightened relevance standard until there has been a challenge, but the rules were intended to be wide enough to allow witnesses, including complainants in sexual cases, to offer evidence about their own veracity.[89]

There was very little concern expressed about this approach when the Law Commission consulted with the profession about the draft Evidence Code in March 1998.[90] In fact, some defence counsel had already been discussing the issue, particularly in the context of sexual offences.[91] It is not clear the provisions are being regularly used with regard to complainants in sexual cases.[92] This may be because of the lack of clarity around the admissibility of reputation evidence following the amendment to ss 37 and 40 by the Select Committee.[93] However, in *R v J (CA 693/2017)* the Court of Appeal found that the prosecutor's questions in examination-in-chief allowed the complainant to make a statement that showed her in a good light, and amounted to evidence that unfairly bolstered her credibility.[94]

Challenging the evidence of a party's witness

Section 37(4) contains some limits on the ability for a party to challenge their own witness's veracity. It provides:

> A party who calls a witness –
> (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
> (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.

[86] *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [84].
[87] DL Mathieson *Cross on Evidence* (8th ed, LexisNexis, Wellington, 2005) at [13.35].
[88] In *Taiatini v R* [2014] NZSC 122, [2015] 1 NZLR 409 at [63], the majority of the Supreme Court held that the (intellectually impaired) complainant's mother's opinion that she "just tells the truth" was "not admissible as to the complainant's veracity as it was not substantially helpful … [being] too general and conclusory."
[89] Contra *Taiatini v R* [2013] NZCA 593 at [17].
[90] New Zealand Law Commission *Consultative Workshop on the proposed Evidence Code* (NZLS, Wellington, March 1998),
[91] "Why shouldn't a complainant be able to call character witnesses?" (Gary Turkington, quoted in Pamela Stirling "Trial and terror" *Listener* (Auckland, 1996) at 21).
[92] Research has revealed only one appellate decision on the matter: *R v K* [2009] NZCA 176.
[93] Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV37.03(4) and EV40.02(5).
[94] [2018] NZCA 343 at [58].

This subsection means that a party may contradict a witness they have called who is unfavourable to their case, by reference to other facts, or may put in issue their reliability or accuracy, but they may not challenge their veracity unless they have first been declared hostile by the judge.

The role of s 8

As with the other specific admissibility rules, s 8 remains important as the final aspect of the admissibility inquiry. In the context of veracity evidence, it is most likely that the focus under s 8 will be the extent to which the evidence will needlessly prolong the proceeding, given that the evidence, in meeting the substantial helpfulness test, already must have a "plus value" of probativeness:[95]

> Evidence about a person's veracity is, however, subject to ss 7 and 8 of the Evidence Act. If a person's veracity is inconsequential to the determination of the proceedings, evidence about that person's veracity will be inadmissible under s 7. That might be the case where, for example, that person's evidence is unchallenged and any attack on their veracity therefore gratuitous. Alternatively, if the probative value about a person's veracity is outweighed by the risk that the evidence will needlessly prolong the proceeding, it will be excluded under s 8. That might be the case where, for example, a person's veracity is consequential to the determination of a proceeding, but only collaterally or tangentially so.
>
> Otherwise, as Dr Downs submitted, a defendant could effectively insist on veracity-related convictions of a prosecution witness being adduced in evidence irrespective of an absence of challenge to that witness' evidence, thereby avoiding the application of ss 7 and 8 notwithstanding s 6(c), which affirms one purpose of the Act as the promotion of fairness to parties and witnesses.

It is s 8(1)(b), along with the heightened relevance test in s 37, which effectively operates to replace the common law collateral issues rule.[96] Section 8 is also of importance when determining the admissibility of evidence about a defendant's veracity. Two specific provisions in the Act deal with this evidence, which must also be "substantially helpful" in assessing the defendant's veracity: ss 38 and 39.

Veracity evidence offered about a defendant

The same matters considered under s 37 will assist when deciding whether the evidence is "substantially helpful". In order for the evidence to "help", however, the veracity of the defendant must be at issue. At common law, this meant that the defendant must have testified. The current position extends that approach to the situation where a defendant's pre-trial statement to the police is offered by the prosecution, which may well contain exculpatory claims by the defendant. Although the Law Commission has expressed doubt whether this alone should be sufficient to put the defendant's veracity at issue,[97] case law concerning the

[95] *Chown v R* [2011] NZCA 453 at [40] – [41].
[96] *R v Smith* [2007] NZCA 400 at [14].
[97] See New Zealand Law Commission *Disclosure to Court of Defendants' Previous Convictions, Similar Offending, and Bad Character* (NZLC R103, 2008) at [3.38] – [3.40].

operation of s 39 indicates that the admissibility of such a statement will justify consideration of the defendant's truthfulness.[98]

The Law Commission recommended that an amendment to s 38 should make it clear that the defendant only "opens the door" to the prosecution giving evidence of their veracity when he or she gives evidence in court.[99] Clause 14 of the Evidence Amendment Act 2016 introduced a new section 38(2)(a) which reads: "the defendant has, in court, given oral evidence about his or her veracity…". Section 38(1) remains unchanged, seemingly allowing the defendant to offer evidence of their own veracity whether or not they have testified.

However, in the 2013 review of the Act, the Commission cited with approval the previous view expressed: "The Law Commission considered that a proper reading of the Act required a strict approach – when the defendant does not give evidence from the witness box, the veracity of the defendant is not put in issue by the defendant and is not relevant." The amendment treats defendants differently from other people whose out-of-court statements are admitted, as admission involves an inquiry into their veracity.

If the defendant's veracity is at issue (that is, they are a witness), whether the prosecution or defence can offer veracity evidence about the defendant is governed by s 38.

A defendant may offer veracity evidence about themselves – this would mostly be in the form of what was previously referred to under the common law as "good character" evidence, that is, evidence to suggest that the defendant is an honest person. Such evidence must still be "substantially helpful". Evidence of a lack of any previous convictions, or a lack of dishonesty convictions, has not been viewed as reaching this threshold.[100] A mere denial of the offending does not qualify as evidence of veracity,[101] nor does evidence of setting up a false alibi,[102] or an allegation of a possible motive for the complainant to fabricate her account.[103] Section 38 does not prevent the prosecution from challenging the defendant about the defendant's version of events: "The veracity provisions were not intended to apply to the parties putting their cases to witnesses, but rather are directed at the introduction into the case of material that would at common law have been collateral."[104]

The risk a defendant takes when offering evidence of their veracity (and they are a witness) is that the prosecution may retaliate by offering evidence challenging their veracity. This is one of the triggers allowing the prosecution to do so in s 38(2). The other is when the defendant challenges the veracity of a prosecution witness "by reference to matters other than the facts in issue." Aside from those two situations, the prosecution is not permitted to offer evidence about a defendant. Even then, the judge must give permission by taking into account the matters in s 38(3), as well as s 8. Such evidence, which again must be "substantially helpful", can then only be used to assess the defendant's veracity, not for assisting the prosecution's

[98] In *R v Jamieson* (HC Timaru CRI-2008-076-000328, 12 February 2009) Cooper J held that as D1's statement to the police could not be used in the case against D2 (due to the operation of s 27), then D1's veracity was not at issue with regard to D2's defence. By implication, and if s 12A applied, D1's veracity could be at issue in the case, even if D1 did not testify.
[99] New Zealand Law Commission *The 2013 Review of the Evidence Act 2006* (NZLC R127, 2013) at [6.108].
[100] *R v Wi* [2009] NZSC 121, [2010] 2 NZLR 11.
[101] *B (CA526/2014) v R* [2015] NZCA 208 at [25].
[102] *McAllister v R* [2016] NZCA 61 at [14].
[103] *E v R* [2014] NZCA 510 at [12]. (Note however the comparison with an analysis of this evidence under s 35.)
[104] *Hannigan v R* at [59].

case as propensity evidence may do. In this way, such evidence is being offered for a limited use.[105]

The Law Commission has recommended no reform of s 38 which would change the policy behind the 2017 amendment, but has recommended clarifying it to make it clear that that the phrase "given oral evidence about" qualifies the phrase "challenged the veracity of a prosecution witness" (in s 38(2)(a)).[106]

Evidence of a co-defendant's veracity

Section 39 of the Act deals with the situation of a defendant challenging the veracity of a co-defendant. In such a case, notice must be given (s 39(2)) and the evidence will only be admitted if it is relevant to the defendant's defence and the judge gives permission.[107] Section 8 will also be relevant to the judge's decision in such cases.

Section 39 does not apply where a defendant wants to offer evidence *supporting* the co-defendant's veracity. The admissibility of that evidence is regulated by s 37 and s 8.

The propensity rules

Propensity evidence about any person

If a party wishes to offer propensity evidence about any person (including a witness) such evidence will be admissible, subject only to ss 7 and 8. The rules therefore allow "good character" evidence to be offered about a complainant in a sexual case, for example, although such evidence will usually not be relevant, or may have to satisfy s 44. This is a change from the common law when it was only the defendant who was permitted to do so.[108] "Bad character" evidence about a person other than the defendant will also only be relevant in rare cases. Most often, the type of evidence relevant to a challenge to a prosecution witness, for example, will be veracity evidence.

Cases in which the propensity of a prosecution witness (other than a complainant in a sexual case) has been at issue are those involving violent offences where the defendant is claiming he or she acted in self-defence.[109] In such cases, s 8 will still require consideration, as although a victim's prior convictions for violence may be logically relevant to a self-defence claim, it will depend on the circumstances of case as to whether the evidence is sufficiently probative. For example, there may need to be proof that the defendant knew about the previous offending in order to explain his or her pre-emptive strike. In the absence of sufficient probative value, disclosure of a victim's previous discreditable conduct risks prejudice to the proceeding.[110]

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[105] *Carter v R* [2016] NZCA 629 at [57].
[106] Recommendation 25 of *The Second Review of the Evidence Act 2006* (R142, 2019).
[107] See the above discussion of *R v Jamieson* HC Timaru CRI-2008-076-000328, 12 February 2009.
[108] See John Spencer *Evidence of Bad Character* (Hart Publishing, Oxford, 2006) at 1.2: "[Until the Criminal Justice Act 2003], the position at trial was that a defendant with a clean record could adduce his good character as evidence in the hope of persuading the court that he was less likely to have committed the offence charged, or more credible in his evidence, or both; but a defendant whose character was bad could not in general have this used in evidence against him at the trial."
[109] For example, *R v Herewini* HC Rotorua CRI-2006-063-3151, 15 August 2007; *R v Selby (No 10)* HC Auckland CRI-2007-092-20293, 18 December 2009; *R v Cable* [2011] NZCA 330.
[110] See *R v Herewini* HC Rotorua CRI-2006-063-3151, 15 August 2007 at [27] – [33].

Reputation evidence

As with evidence of a person's reputation for having a lack of veracity, the Select Committee was of the view that "a person's reputation should not affect current proceedings".[111] The reference to "reputation" was therefore removed from the definition of propensity and the provision stating that the hearsay and opinion rules did not apply to evidence of a person's reputation to have a particular propensity. However, it is argued that as s 44(2) is the only express prohibition in the Act,[112] and evidence of reputation still falls within the very wide definition of propensity, such evidence may still be admitted. That said, in cases where evidence of someone's "good" reputation is sought to be offered, it is rare for it to meet even the s 7 relevance test.[113]

Propensity evidence about a defendant offered by the defendant

Section 41 permits a defendant to offer "good" or "bad" character evidence about herself, either through evidence in chief or by calling another witness to attest to, for example, the defendant's laudable behaviour over time. Such evidence is subject to ss 7 and 8. The evidence must be logically relevant, and have sufficient probative value. In relation to propensity evidence offered by the defendant to demonstrate "good" propensity, it is unlikely to fall foul of s 8,[114] except to the extent that too much of this type of evidence may risk needless prolonging of the proceedings.[115]

The consequence of a defendant offering propensity evidence about herself, is that the prosecution will be permitted to respond by offering propensity evidence in rebuttal. This is viewed as fair in order to prevent a misleading picture of the defendant being presented to the fact finder.[116] So, for example, in the unlikely event that the defendant falsely claims he has no previous convictions, the prosecution would be permitted to offer evidence of those convictions (limited by s 8 in terms of type and number). However, given the wide definition of propensity, the prosecution will not be permitted to respond to every piece of propensity evidence offered by a defendant:[117]

> For example, if a defendant offers evidence about his or her regular attendance at cricket matches to show he or she was there on a particular occasion and therefore could not have been at the crime scene, the judge is unlikely to allow the prosecution to retaliate by offering totally unrelated propensity evidence consisting of the defendant's previous convictions.

[111] Evidence Bill 2006 (256-2) (Commentary) at 6.
[112] Bruce Robertson (ed) *Adams on Criminal Law – Evidence* (online looseleaf ed, Brookers) at EA40.02(3).
[113] For example *Gharbal v R* [2010] NZCA 45 and *R v Alletson* [2009] NZCA 205.
[114] *R v Wi* [2009] NZSC 121, [2010] 2 NZLR 11 at [20].
[115] Note here again the difference between s 8 and s 43 – in relation to the admissibility inquiry under s 41, the judge must consider the unfairly prejudicial effect on *the proceedings* (if rebuttal evidence is not offered), not the effect on the defendant: see further Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV41.02(4) – EV41.02(6).
[116] *R v O'Hagan* [2008] NZCA 498, [2009] 1 NZLR 490 at [28].
[117] New Zealand Law Commission *Evidence: Code and Commentary* (NZLC R55 – Volume 2, 1999) at [C197].

Notwithstanding the need for leave of the judge, s 41 remains a more straightforward route for the prosecution to offer propensity evidence about a defendant, on the basis of the distinction between ss 8 and s 43.[118]

There is no equivalent trigger in s 41(2) to that found in s 38(2) – the defendant does not expose himself to rebuttal evidence if he offers propensity evidence about a prosecution witness. This is most likely to happen in a sexual case when a defendant offers evidence about the complainant's previous sexual experience.[119] In such a case, if a defendant has relevant previous convictions, for example, the only route for admissibility is s 43.

Section 42 is the propensity rules' equivalent of s 39. It provides that a defendant may offer propensity evidence about a co-defendant when it is relevant to his or her defence, with the permission of the judge. Notice of the defendant's intent to offer such evidence must be given (s 42(2)).

As with evidence offered under s 41, such evidence is subject only to ss 7 and 8. The significance of s 8 in this context, when the judge is considering whether or not to give permission, has been the subject of discussion at Court of Appeal level.

In *R v Moffat* six defendants were charged with a jointly carried out murder.[120] Moffat argued that "the six defendants essentially constituted two groups, those who inflicted the fatal injuries and a less active group who did not",[121] and he was in the less active group. In support of his defence that it was others in the group who were responsible, Moffat wished to offer evidence of the previous convictions for violent offences by a number of the co-defendants. Leave to do so had been refused in the High Court, as the evidence was found to be irrelevant (s 7) and unfairly prejudicial (s 8).

A majority of the Court of Appeal disagreed with the decision to exclude the evidence of the co-defendants' convictions, however MacKenzie J made a compelling argument that the evidence was irrelevant to Moffat's defence:[122]

> The proposed propensity evidence … could only be relevant to the issue of whether [the co-defendants] participated actively in the attack on the victim. It could not, in my view, have any tendency to prove or disprove the appellant's involvement in these events.

With regard to the prejudicial effect in such cases, the Court held that provided that the propensity evidence was relevant, a co-defendant (like Moffat) should not be prevented due to s 8(1)(a) from offering the evidence merely because it produces "collateral damage" to another defendant.[123] However, the better approach is that s 8 requires consideration of *both* the interests of the defendant offering the evidence as well as the interests of the co-defendant

[118] Richard Mahoney "Evidence" [2010] NZL Rev 433 at 437. See for example *Poa v R* [2016] NZCA 222 at [104] – [108].
[119] Elisabeth McDonald and Yvette Tinsley "Evidence issues" in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" To Real Justice: Prosecuting Rape in New Zealand* (Victoria University Press, Wellington, 2011) at 355.
[120] *R v Moffat* [2009] NZCA 437, [2010] 1 NZLR 701.
[121] Ibid at [63].
[122] Ibid.
[123] Ibid at [42]. In the case of extreme prejudice, separate trials could be ordered.

who is the subject of the evidence – that is, the "unfairly prejudicial effect on the *proceedings*".[124]

Propensity evidence about a defendant offered by the prosecution

Section 43 governs the admission of propensity evidence about a defendant offered by the prosecution in situations where there has been no trigger under s 41 and the evidence is not "solely or mainly" relevant to veracity.

Cases dealing with the scope and operation of s 43 have made up the majority of appeals on evidence law issues under the Act. Discussion of this section appears in a separate paper.

Evidence about the sexual experience of a complainant in a sexual case

Section 44 of the Act, which is aimed at limiting the admission of evidence of the complainant's sexual experience with any person *other* than the defendant, is the New Zealand equivalent of what is referred to in some other jurisdictions as a "rape shield" provision. The relevant part of s 44 provides:[125]

> (1) In a sexual case, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with any person other than the defendant, except with the permission of the Judge.
>
> (2) In a sexual case, no evidence can be given and no question can be put to a witness that relates directly or indirectly to the reputation of the complainant in sexual matters.
>
> (3) In an application for permission under subsection (1), the Judge must not grant permission unless satisfied that the evidence or question is of such direct relevance to facts in issue in the proceeding, or the issue of the appropriate sentence, that it would be contrary to the interests of justice to exclude it.
>
> (4) The permission of the Judge is not required to rebut or contradict evidence given under subsection (1)…

Along with the other evidential rules, which apply specifically to sexual cases, rape shield provisions have attracted much academic analysis.[126] Complainants have also been asked to report the extent to which they have been questioned about their sexual history at trial.[127]

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[124] Scott Optican and Peter Sankoff *Evidence Act Revisited for Criminal Lawyers* (NZLS, Wellington, 2010) at 27.
[125] "Sexual case" is defined in s 4 of the Act as "a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for, -
(a) an offence against any of the provisions of sections 128 to 142A or section 144A of the Crimes Act 1961; or
(b) any other offence against the person of a sexual nature."
[126] Jennifer Temkin "Sexual History Evidence: the Ravishment of Section 2" [1993] Crim LR 3; Aileen McGolgan "Common Law and the Relevance of Sexual History Evidence" (1996) 16 Oxford Journal of Legal Studies 275; Elisabeth McDonald "The Relevance of Her Prior Sexual (Mis) Conduct to His Belief in Consent: Syllogistic Reasoning and Section 23A of the Evidence Act 1908" (1994) 10 (2) Women's Studies Journal 41; Sue Lees *Carnal Knowledge: Rape on Trial* (2nd ed, Women's Press Ltd, London, 2002); Regina A Schuller and Marc A Klippenstine "The Impact of Complainant Sexual History Evidence on Juror's Decisions: Considerations From a Psychological Perspective" (2004) 10 Psychology, Public Policy and Law 321; Jennifer Temkin "Sexual History Evidence: Beware the Backlash" [2003] Crim LR 217.
[127] Gender Bias and the Law Project *Heroines of Fortitude: The experiences of women in court as victims of sexual assault* (NSW Department for Women, 1996); Ivana Bacik, Catherine Maunsell and Susan Gogan *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre, Dublin, 1998).

A critique of the historical approach to questioning complainants about their sexual past has been succinctly stated by Paul Roberts and Adrian Zuckerman:[128]

> Over the years some strange notions of relevance became embedded in the common law. For example, it was assumed that evidence of prostitution diminishes the credibility of a rape complainant and increases the probability that the intercourse was consensual, when, on a dispassionate appraisal, one might expect prostitutes to be the last people to make false allegations of rape, since sending customers to gaol can hardly be good for business. Equally, a promiscuous person is not the most likely to concoct a false accusation of rape in order to protect her reputation, nor would one particularly expect a sexually experienced person (as opposed to a shrinking violet with no previous sexual history to exploit) to be overcome by shame or remorse into falsely accusing her partners of rape. All-too-frequently, it would appear, the real purpose of such cross-examination was to suggest that the complainant was herself too morally flawed to deserve the court's sympathy or to justify punishing the accused.

However, there are still concerns about the amount of evidence relating to a complainant's sexual experience that is admitted at trial, regardless of the type of provision in force.[129] Legislation in most common law jurisdictions does severely limit evidence of sexual experience with a person other than the defendant, if only offered to prove that the complainant consented, or that the defendant believed that she was consenting. It is difficult to see how evidence of the complainant's reputation in sexual matters provides, of itself, grounds for the defendant believing she consented to sexual relations.[130] Consent is, after all, given to a person, not a set of circumstances.[131] Section 44 is "intended to reduce the humiliation and embarrassment faced by complainants and to prevent the use of reasoning based in erroneous assumptions arising from a complainant's sexual history."[132]

In a number of recent cases, the defendant has sought to question the complainant about the fact that she had consensual sex with another person shortly after the alleged rape. Whether this is argued as relevant to consent or to whether the allegation is false, it has been held that the evidence is inadmissible under s 44(3):[133]

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[128] Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 443 – 444 (references omitted). See also T Brettel Dawson "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987) 2 Canadian Journal of Women and the Law 310 at 328: "Information made available to a jury concerning the primary witness's past sexual activity or non-conformity to sex-role norms increases the responsibility for the assault that is attributed to her at the same time that it decreases perceptions of the accused's guilt."

[129] See Mary Heath "The law and sexual offences against adults in Australia" (2005)(4) ACSSA 1 at 10 ff; Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 450: "This is a timely reminder that the attitudes and behaviour of the legal professionals who apply the rules are often as important in practice as the content of the rules themselves. Such attitudes and behaviour might be a more promising target for reformers keen to improve the lot of sexual assault complainants, rather than tinkering with technical evidentiary rules of admissibility which often appear unresponsive to reformer's best endeavours."

[130] *Guled v R* [2016] NZCA 238 at [23].

[131] However this argument is not always reflected in decisions about the admissibility of sexual history evidence, see for example *R v Bourke* CA207/06, 15 August 2006; commentary on the case in Elisabeth McDonald "Complainant's Reputation in Sexual Matters" [2007] NZLJ 251; and the later Court of Appeal case: *Keegan v R* [2010] NZCA 247 at [63].

[132] *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [53].

[133] *Hall v R* [2017] HZHC 1489 at [29]. See also *Singh v R* [2016] NZCA 552 at [20] and *Wallace v R* [2018] NZCA 2 at [14].

> People react to their sometimes bad experiences in different ways, and the idea that [the complainant] would be in such a bad state that having sex with her partner soon after would be unthinkable is not a reasonable inference.

Following an amendment at Select Committee stage,[134] s 44(2) now operates as a total bar against the admission of reputation evidence ("in sexual matters"). This should prevent arguments that the defendant thought the complainant was consenting on the basis of what he knew about her conduct with other men – that is, her reputation "in sexual matters". This provision is consistent with overseas jurisdictions.[135]

The scope of s 44(1): what is "sexual experience"?

As s 44(1) controls evidence of a complainant's "sexual experience" (with any person other than the defendant), litigation has focussed on the meaning of "sexual experience". Sometimes evidence of a previous complaint of sexual offending (by a person other than the defendant) may be categorised as "sexual experience". This may be when the evidence of prior sexual abuse is offered to explain the complainant's knowledge of sexual matters and behaviour.[136] However, in *Cavanagh v R*[137] the Court of Appeal considered the pre-Act case of *R v M*,[138] in which a distinction was drawn between evidence of sexual knowledge (by observation or media, for example, which did not require leave under the s 44 equivalent) and evidence of sexual experience with a person other than the defendant, which does require leave. The approach in *R v M* has also been applied in *M v R*, the Court of Appeal stating that "sexual knowledge lies beyond the reach of the section".[139]

Evidence about the complainant not having a sexual transmitted infection has also been held to fall outside the scope of s 44(1).[140] In *Tautu v R* the Court observed:[141] "Intensity of feeling is not synonymous with sexual activity", in the context of a decision not to allow the defendant leeway to determine, through the cross-examination of the complainant, whether a sexual relationship existed between the then 14 year old complainant and her boyfriend.

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[134] *Russell Fairbrother: Evidence Amendment Bill: Second Reading* (15 November 2006) 635 NZPD 6561; see also Mahoney and others Evidence Act 2006: Act and Analysis (3 ed, Thomson Reuters, 2014) at [EV44.02].
[135] See for example Liz Kelly, Jennifer Temkin and Sue Griffiths *Section 41: An Evaluation of New Legislation Limiting Sexual History as Evidence in Rape Trials* (Home Office Online Report 20/06, 2006) at 13.
[136] See *R v Morrice* [2008] NZCA 261 at [32].
[137] *Cavanagh v R* [2010] NZCA 36.
[138] *R v M* (2000) 18 CRNZ 368 (CA).
[139] *M v R* [2010] NZCA 620 at [23]. As a "central plank" of the Crown case in closing was that the complainant "could only have known about what she complained of if she had experienced it" without laying the foundation for this submission, the appeal was allowed (at [32] ff). In *C (CA634/2016) v R* [2017] NZCA 275 (application for leave to appeal dismissed: *C (SC75/2017) v R* [2017] NZSC141) however, the Court considered an argument under s 44 based on acquisition of sexual knowledge by the complainants, but held that the admission of facts given to the jury regarding the source of the complainants' knowledge (which included the phrase: "[Since the 1990s] children can derive sexual knowledge from a number of different sources, irrespective of whether they have been sexually abused or not") "meant that the complainants' sexual knowledge was irrelevant to the issues before them": at [26].
[140] *Harwood v R* [2010] NZCA 545 at [28].
[141] [2017] NZCA 219 at [21].

Although not the subject of any appellate consideration to date, evidence of a complainant's pregnancies or the number of children she has,[142] must (indirectly) be evidence of sexual experience and subject to s 44.

In *Jones v R* the Court of Appeal stated that sexual activity with another person just prior to the alleged offending is not "sexual experience", language which "indicates something that happened on a previous occasion".[143]

In *B (SC12/2013) v R* William Young J dissenting, was of the view that sexual "experience" should "be restricted to things that have happened, rather than encompass[ing] things that have not".[144] In *R v Singh* the Court of Appeal considered that text messages about sexual conduct that never took place was evidence of the complainant's "sexual disposition" properly dealt with under s 44.[145] In *Best v R*,[146] the Supreme Court left open "the issue of whether s 44 should be interpreted from the perspective of the complainant so that it would have applied even if M [another alleged offender] had maintained that there had been no sexual activity at all."[147] After a recent review of the case law, the Law Commission has stated "there seems to be a consensus that evidence about [the complainant's] virginity is captured by the terms 'sexual experience' in section s 44(1)".[148]

The Law Commission discussed the scope of s 44(1), and in particular the treatment of evidence about "sexual disposition", in its 2018 *Issues Paper*. Their preliminary view that "all evidence related to the complainant's propensity in sexual matters should be captured by section 44" as that would be consistent with the policy of the provision.[149] The Commission has asked for views on whether disposition evidence should never be admissible (as with reputation evidence in s 44(2)) or subject to the admissibility test in s 44(3). In their final report, the Law Commission concluded:

> [3.22] We consider sexual disposition evidence should be admissible under section 44, subject to satisfying the heightened relevance test in section 44(3). Those we consulted overwhelmingly preferred this option over the option of completely barring sexual disposition evidence. Like them, we consider there could be situations where sexual disposition evidence is of direct relevance to the proceedings. For example, the prosecution may wish to offer evidence of the complainant's sexual orientation to support the complainant's credibility. Alternatively, the defence may want to offer evidence of a complainant's sexual fantasies recorded in a diary or online (for example, on a dating app) to support a defence of consent or reasonable belief in consent. It follows that evidence of sexual disposition should not be completely barred.

The draft section that the Commission proposes to replace s 44(1) provides:

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[142] Subject to a woman's reliance on technological or social intervention (such a gestational surrogacy).
[143] [2018] NZCA 288 at [50]. In *Grooby v R* {2018] NZCA 344 on the night conduct (the defendant's sexual interaction with the complainant's father) was treated as falling outside the definition of propensity in s 40(1).
[144] *B (SC12/2013) v R* [2013] NZSC 151 [2014] 1 NZLR 162 at [119].See discussion of the scope of s 44(1) at page 25-26 Arnold J "Update on Evidence Part B" *Criminal Law Symposium*, NZLS.
[145] [2015] NZCA 435 at [25], relying on the majority decision in *B (SC12/2013) v R* [2013] NZSC 151 [2014] 1 NZLR 162 at [56], as well as other case law (see fn 6).
[146] [2016] NZSC 122.
[147] At fn 45.
[148] LC *2018 Issues Paper* at [3.25].
[149] LC *2018 Issues Paper* at [3.26].

44 Evidence of sexual experience or sexual disposition of complainants in sexual cases

(1) In a sexual case, unless a Judge gives permission, no evidence can be given and no question can be put to a witness that relates directly or indirectly to—

(a) the sexual experience of the complainant with the defendant (except to establish the mere fact that the complainant has sexual experience with the defendant):

(b) the sexual experience of the complainant with any person other than the defendant:

(c) the sexual disposition of the complainant.

Sexual experience with the defendant

The Law Commission originally proposed that the limitation on evidence of the complainant's sexual experience be extended to include the complainant's experience with the defendant. The Act did not adopt that suggestion. Evidence of the complainant's sexual experience with the defendant remains generally admissible is admissible subject to ss 7 and 8.[150] However the Commission has now recommended that s 44(1) should be extended to cover evidence of the complainant's sexual experience with the particular defendant.[151]

In *Jones v R* the Court of Appeal held that a number of pieces of evidence indicating that the complainant had a sexual interest in the defendant and his girlfriend fell outside s 44(1),[152] given the defence argument that he believed she was consenting to have sex with him as she was interested in a "threesome", therefore it was not evidence about sexual experience with someone other than the defendant. The Court concluded that even if s 44(1) was engaged, most of the evidence was admissible under the heightened relevance test in s 44(3), as being relevant to the issue of J's belief in consent.[153]

The Court cited in support the Supreme Court's decision in *Christian v R*,[154] in which the Court expressed the view that evidence about relationship expectations over time can have relevance to the issue of consent and belief in consent.[155]

Evidence relevant to veracity

Roberts and Zuckerman argue that evidence of a complainant's sexual history offered as being relevant to her credibility simply lacks sufficient probative value, "given that such evidence is likely to be distressing for complainants and may invite moral prejudice from the fact-finder."[156] Although any relevant link between prior sexual experience and credibility *per se* seems to be no longer accepted, evidence of sexual experience with a person other than the defendant that is thought to be relevant to a lack of credibility (or "veracity" to use the terminology of the Act)[157] is evidence of previous false complaints of sexual abuse.

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[150] See further Catherine Helm "Extending the 'rape shield' to evidence of sexual experience with the defendant" [2018] NZLJ 156.

[151] *The Second Review of the Evidence Act 2006* (R142, 2019) at [3.43].

[152] [2018] NZCA 288.

[153] At [48] and [54].

[154] [2017] NZSC 145, [2018] 1 NZLR 315.

[155] At [46]. For commentary on that decision see Andrea Ewing "Consent and 'Relationship Expectations'" [2017] Te Wharenga; New Zealand Criminal Law Review 357. See also Justice Matthew Downs "Evidence Act Update: Part B" in Criminal Law Symposium (NZLS CLE Ltd, Wellington, 2018) 16 at 25 - 26.

[156] Paul Roberts and Adrian Zuckerman *Criminal Evidence* (2nd ed, Oxford University Press, Oxford, 2010) at 448.

[157] Section 37(5) of the Evidence Act 2006.

Under s 23A of the Evidence Act 1908 (the predecessor to s 44) evidence of false complaints was viewed as being sufficiently relevant to credibility to meet the admissibility test – although the falsity was not always established. Section 40(4) of the Act provides that the admission of evidence of false complaints should be dealt with under s 37, not s 44[158] – because it is evidence which is "solely or mainly relevant to veracity." However, appellate case law, beginning with *R v C*, indicates that only when there is "clear" evidence of false complaints should the evidence be subject to s 37 (the veracity rule).[159]

It is possible to read the Court of Appeal's decision in *R v C* as providing a way of identifying when evidence of previous complaints are "solely or mainly relevant to veracity" – in other words, when it is a "clear" case of falsity. However, it seemingly cannot be the case that once the previous complaints are deemed not to be false they may nevertheless be offered as being relevant to the complainant's credibility pursuant to s 44.

I have previously expressed that the change to the definition of "veracity" in s 37(5) (removing the words "whether generally or in the proceeding") would have a flow-on effect in this context, clarifying the scope of s 40(4) for the purposes of s 44.[160] Challenges to the complainant's accuracy or reliability (that is, concerning the facts in issue) which rely on evidence of the complainant's sexual experience (including a previous false complaint, or absence of complaint) would be determined under s 44.[161] Challenges which amount to a proposition that a complainant is generally untrustworthy, based on numerous false complainants or other types of lies, would be subject to s 37.[162] However, this was not the approach taken by the Supreme Court in *Best v R*.[163]

In that case, the Court agreed with the Court of Appeal and the trial judge that the evidence of the complainant having made a previous complaint of rape, about someone other than the accused, was inadmissible if it was not determined to be false. The defence had been permitted to cross-examine the complainant about her knowledge of police investigatory procedures which follows a complaint. The scope of the questioning had been determined solely by reference to s 44, as the prior complaint was not a "clear" case of falsity – the police had elected not to prosecute on the evidence available.

The Supreme Court began their analysis by considering "whether the treatment of the allegedly false complaint is governed by the propensity rules, those relating to veracity or by s 44 (or a combination of those provisions)."[164] In their view evidence of an "allegedly false prior

[158] See Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV40.05(2).
[159] *R v C* [2007] NZCA 439 (CA).
[160] See Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters, Wellington, 2018) at EV44.03.
[161] See eg *K (CA188/2011) v R* [2011] NZCA 146 at [12]; *Lindsay v R* [2011] NZCA 500, [2012] 1 NZLR 62 at [17]; *Cowx v R* [2013] NZCA 571 at [30].
[162] Which, it is argued, should have been the section relied on in *R v Taha* DC Hamilton CRI-2010-019-4982, 19 September 2012, as well as in *R v Morrice* [2008] NZCA 261, in which the Court of Appeal treated multiple (arguably false) complaints of sexual offending as sufficiently relevant under s 44(3), while holding that responses to a denial as to falsity would have to be considered under s 37(3). See further McDonald *Principles of Evidence in Criminal Cases* (Thomson Reuters, Wellington, 2012) at 209–210.
[163] [2016] NZSC 122, [2107] 1 NLZR 186.
[164] At [54].

complaint" would engage the veracity rules (so s 37, not s 44).[165] This approach of itself, which turns on the operation of s 40(4), and is contrary to the early case law under the Act, does not require a decision as to whether the prior complaint was in fact false. As it amounts to a challenge to the complainant's veracity, it would also trigger s 38. However, the Court went on to hold that s 40(4) "says nothing about the relationship between ss 37 and 44",[166] it only governs the dividing line between the veracity and the propensity rules. With respect, such an approach seems to overlook that s 44 is specifically referred to in the propensity rule (s 40(3)(b)). It was also the view of the Law Commission, and there is no legislative history indicating different Parliamentary intent, that s 40(4) also applied to veracity evidence about a complainant in a sexual case, specifically evidence of previous false complaints offered to challenge their credibility.[167]

The Supreme Court held that both s 37 and s 44 apply in such a situation, meaning that "even if the [prior] complaint was false … s 44 is engaged."[168] Part of the rationale for this approach is the risk of a "trial within a trial" which would be required in order to ascertain whether or not the prior complaint was false.[169] Better, the majority stated, to have the matter determined in the absence of the jury. Such a process is certainly consistent with the enactment of s 44A.[170] If evidence of an allegedly false complaint is sought to be offered under s 37, and s 44 is potentially engaged, then:[171]

> [T]here must be some evidential foundation that the prior complaint was in fact false before it can even be raised before the judge…
> [77] The judge will need to consider whether the evidence of the prior allegedly false complaint is substantially helpful under s 37 in the particular circumstances of the case… The more evidence that would need to be called on the unrelated prior allegation and the more uncertain the outcome of the deliberations on that evidence, the less likely the evidence is to be substantially helpful to assessing a person's veracity.
> [78] If the substantial helpfulness test under s 37 is met, there will need to be a separate assessment of whether it would be contrary to the interests of justice to exclude the evidence. Even if that test is met s 44 (if it applies) may well limit the way the evidence is led so that the concentration is on the falsehood of the complaint and not on the prior sexual experience.
> Applying this approach to the facts of the case, the Court concluded that if the complainant maintained that the prior complaint was true, then evidence of it would not be substantially helpful and therefore inadmissible under s 37.

The Court then stated:[172]

> As this is the case, we do not need to consider s 44 separately. However, given the outcome of the jury's deliberations as to falsity would be highly uncertain, to allow evidence of the complainant's prior sexual history would run counter to the policy behind s 44. If the complaint was not false there would be unnecessary trauma for the complainant in being questioned about the encounter with M. Further, if the complaint was true, the

[165] At [55] and fn 42.
[166] At [57].
[167] See Law Commission *Evidence Code and Commentary* (R55 Volume 2, NZLS, 1999) at [C194].
[168] *Best* at [59].
[169] At [60].
[170] *Tautu v R* [2017] NZCA 219 at [23].
[171] At [76] ff, references omitted.
[172] At [92]

> evidence is totally irrelevant, and, if adduced, there would be a risk of improper use by the jury.

Therefore, evidence of an allegedly false complaint, offered to challenge the complainant's veracity, that is not substantially helpful, will be inadmissible if the complaint is true (and there is no other purpose to support its admission).[173] In the alternative, proceeding on the basis that the prior complaint was false, evidence of it may be substantially helpful,[174] and the test in s 44(3) may also be met (where relevant).[175] The "bright line 'clean case' test posed by [the Court of Appeal] has thus been [set] aside in favour of a more multi-elemental balancing exercise."[176]

In *Arona v R* the appellants (convicted of sexually violating C, a previous workmate of A) argued that evidence of C's previous sex with two men while intoxicated should have been admitted to show that C is "prone to participate in group sex and blame intoxication afterwards".[177] The Court of Appeal applied the reasoning in *Best*, accepting that the evidence of C's friend M to the effect that C was embarrassed by her behaviour on the previous occasion and may have claimed to be more intoxicated that she was, "may have some bearing on [C's] veracity".[178] However the Court held that the evidence was not substantially helpful, nor was it clear that C had lied about her condition on the previous occasion. The Court agreed with the trial judge that the evidence did not meet the s 44(3) test, noting that the submissions made it plain that the appellants also wanted to show that C had a propensity to engage casually in group sex, which was "plainly illegitimate".[179]

I argued in 2011:[180]

> If it can be established that the previous complaints were false, this evidence must be viewed as "solely or mainly relevant to veracity" and the veracity rule in s 37 must apply. That is, the test is whether evidence of false complaints is "substantially helpful". This will need to be determined on a case-by-case basis, requiring an analysis of the context in

[173] *S (CA140/2016) v R* [2017] NZCA 110 at [10]. See also *T (CA71/2017) v R* [2017] NZCA 166 in which the Court of Appeal accepted the Crown's argument that as the previous complaint against C's maternal grandfather was true (or that there was no suggestion it was false), then s 44 (only) governed admissibility: at [11] and [19]. The Court held: "We have not been persuaded that the s 44 test has been met here. The relevant fact in issue is the complainant's claim that the sexual activity with the appellant is non-consensual. We do not consider the fact that she made allegations against her grandfather is of direct relevance to that. It may be, as the appellant wishes to contend, relevant to the complainant's credibility, but that does not have a direct relevance to the consent question": at [32].

[174] It was not in *Hohua v R* [2017] NZCA 89, where the Court noted "material differences" between the two incidents: at [21]; nor in *M (CA401/2016) v R* [2016] NZCA 562 at [27] ff. See also *R v Katipa* [2017] NZHC 2169 at at [3]. In pre-*Best* case the Court of Appeal reached the same conclusion on the basis that "the proposed challenge to veracity falls a long way short of justifying permission under s 44": see *C (CA1/2016) v R* [2016] NZCA 44 at [11]. Compare *Singh v R* [2015] NZCA 535 in which the Court held that evidence of C's previous (unsubstantiated) allegations "was highly material to the jury's assessment of her credibility and reliability as a witness": at [16]. See also *R v Morgan* [2016] NZHC 1498 at [14].
If such evidence was admissible then this would then presumably trigger s 38(2)(b), regarding admissibility of evidence of a defendant's veracity offered by the prosecution, although this point is not discussed in *Best*.

[175] See *M (CA401/2016) v R* [2016] NZCA 562 at [19].

[176] *Hohua v R* [2017] NZCA 89 at [14].

[177] [2018] NZCA 427 at [13].

[178] At [24].

[179] At [28].

[180] See further Chapter 8 in Elisabeth McDonald and Yvette Tinsley (eds) *From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand* (VUP, Wellington, 2011) at 332.

> which the complaint was made, when it was made and to whom. If evidence of false complaints is admitted under s 37 after application by the defence (that is, evidence challenging the veracity of a prosecution witness) this is a trigger that should allow the prosecution to offer evidence as to the defendant's veracity pursuant to s 38. It is consistent with the scheme of the Act that the distinction between propensity evidence and veracity evidence is maintained.

What if the evidence sought to be offered is evidence of the complainant's reputation to be untruthful about sexual matters? Evidence as to the "reputation of the complainant in sexual matters" is barred under s 44(2). Evidence as to the complainant's reputation for being truthful may not meet the test in s 37 either,[181] but it is not barred. Presumably s 44(2) was not aimed at this type of reputation evidence, but this example strengthens the case for further clarification of the interplay between ss 37 and 44.[182]

In its 2018 *Issues Paper* the Law Commission sought views on: whether the admissibility "of a false complaint of sexual offending should be treated differently from an allegedly false complaint"; and, whether the approach in *Best* is supported and/or could be simplified or clarified by amending the Act.[183] It has no recommended no change to the Act on the basis that no problems with the application of *Best* were identified.[184]

Evidence relevant to credibility

Historically one of the key concerns about admission of this type of evidence was that an impermissible link would be drawn between a complainant's sexual experience and her credibility.[185] For example in *W (CA537/2012) v R* the Court of Appeal stated that the jury should not be invited to "draw the inference that [the complainant] is promiscuous and so unworthy of belief, which is the very risk that s 44 is intended to control".[186]

In *Pegler v R* however,[187] the Court of Appeal held that a video still of the male complainant kissing another man, as part of a consensual three-way encounter which included his girlfriend, could be admitted. The Court said this evidence was irrelevant to Pegler's belief that the complainant was consenting to oral sex in the park while he was asleep, but was admissible to assist the jury to assess the credibility of the complainant when giving evidence that he told Pegler that sex with him "was not his vibe" and that he had a girlfriend. The notable risk, that once the evidence was admitted the jury could use if for an impermissible purpose, was viewed as being manageable by jury directions.[188]

A similar approach was taken in *R v Singh* in which the accused (aged 32) alleged that the 14 year old complainant had initiated the sexual encounter, saying to him: "It's not like it's my first time."[189] The defence wanted to offer evidence that she had previously had sex with her

[181] See *R v R* [2010] NZCA 98.
[182] There was discussion of the admissibility of a complainant's propensity "to exaggerate or lie about her sexual experience" in *J (CA89/2016) v R* [2016] NZCA 528 at [38] with no mention of s 44(2).
[183] LC *2018 Issues Paper* at [3.51] ff.
[184] *The Second Review of the Evidence Act 2006* (R 142, 2019) at [3.66].
[185] Elisabeth McDonald (2014) 45 VUWLR 487.
[186] [2012] NZCA 567 at [11]. See also *Hartley v R* [2014] NZCA 162 at [77].
[187] [2015] NZCA 260.
[188] See the critique of this aspect in Scott Optican "Evidence" [2016] NZL Review 473 at 512ff.
[189] [2016] NZCA 199 at [9].

teenage boyfriend. The Court of Appeal accepted that "of itself the fact that the complainant is sexually active does not mean she is more likely to have consented to sex with the defendant. Indeed, it is that sort of reasoning that s 44 rightly prohibits".[190] What made a difference in this case was that having been sexually active in the past made it more likely the complainant would have made that statement at the time of the sexual encounter.[191] The Court ruled the complainant could be asked in cross-examination if she said such a thing, *and* whether she was in a sexual relationship with her boyfriend at the time of the alleged offending.[192]

In *Marsters v R*, the Court of Appeal upheld the judge's decision, and the reasons, not to admit evidence of the 12 year old complainant's alleged previous sexual abuse by another young man (B) around the same time as the alleged offending by the defendant.[193] The Court stated that the application of the rule in s 44 is somewhat different in cases concerning children, so that "evidence of previous complaints in cases involving children may be admitted if it is of material assistance to assess the complainant's credibility, particularly in cases where the evidence of other complaints made by the child has striking similarity to the allegation against the defendant" (at [19]). The Court agreed that the statements the complainant made about being sexually violated by B in the context of being questioned by a doctor, was inadmissible (there was no suggestion the allegation was false), however statements she made about M could be offered. The Court also considered the need to avoid jury speculation:

> [25] It will be for the trial judge to determine, after hearing from counsel, how the admissible evidence about M's statements to the medical practitioners in May 2016 may be put before the jury in a manner that avoids any reference to the reasons why M was being medically examined in May 2016, her allegations against B and the consequential sexually transmitted infections.

If evidence of a complainant's sexual experience may be used to challenge their credibility (whether they are children or not), then arguably it may also be used to bolster their credibility. The prosecution could therefore seek to offer evidence, of virginity for example, to support the complainant's version of events. As stated in *Taiatini v R*, s 44 "is for the protection of complainants",[194] therefore evidence of sexual experience offered to bolster the complainant's credibility is not in conflict with the purpose of the rule. However, evidence relevant to credibility has not been admitted in other appellate cases.

In *Hartley v R* one of the issues was the age of the complainant at the time he was allegedly first sexually assaulted.[195] Both in evidence in chief and more emphatically in cross-examination, when challenged about gaps in his memory, the complainant responded that he knew he was only 13 or 14 because it was his first sexual experience and as it was with a 40 year old man he testified: "I'm never going to forget it and I wish I could".[196] The Court of Appeal held the evidence should not have been led by the Crown, in breach of s 44, [197] going on to say:[198]

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[190] [2016] NZCA 199 at [18].
[191] [2016] NZCA 199 at [19].
[192] [2016] NZCA 199 at [32].
[193] [2019] NZCA 140.
[194] [2014] NZSC 122, [2015] 1 NZLR 409 at [60].
[195] [2014] NZCA 162.
[196] [2014] NZCA 162 at [71].
[197] [2014] NZCA 162 at [72].
[198] At [77].

> In a case such as this where the evidence goes only to veracity, the standard requires that the proposed evidence should possess such relevance and quality as to have a major impact on the complainant's credit.

Similarly in *Bruce v R*,[199] the Court held that the complainant should not have been permitted to say: "I've never had sex after drinking alcohol ever in my life and before I've never kissed in that way. So that's got nothing to do with alcohol. That's just the way I am".[200] The Court concluded it was "plainly inadmissible" under s 44(1) and evidence of "a lack of sexual experience is not probative of whether the complainant consented on this particular occasion".[201] There was no discussion as to whether the evidence was relevant to the complainant's credibility.

In *K (CA 640/2016) v R*,[202] the appellant argued that the evidence of the complainant's virginity, and the evidence that her delay in complaining was for cultural reasons connected to that loss of virginity, should not have been admitted into evidence. The Court of Appeal disagreed:[203]

> [17] This Court has consistently held that evidence of a complainant's virginity relates directly to his or her prior sexual experience and is therefore captured by the prohibition in s 44(1) of the Evidence Act. It is therefore inadmissible unless it is of such direct relevance to issues in dispute in the proceeding that it would be contrary to the interests of justice for the jury not to hear it. In *R v Tainui*, it was said that evidence would meet that test if it forms a crucial part of a narrative of the alleged offending.
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> [18] The evidence the jury heard which we have set out above did not, we think, engage s 44(1). Whilst it is arguably implicit in these passages that the complainant was a virgin prior to the offending, her evidence does not positively assert that fact, but simply assumes it. Nevertheless, even if s 44(1) were engaged, the evidence undoubtedly met the s 44(3) threshold for admissibility.
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> [19] The complainant's fear of disclosure of sex prior to marriage was a critical part of her explanation as to her reaction to the offending and why she took no steps to complain about the offending while it was ongoing. The evidence is therefore both part of the narrative and of such direct relevance to issues in dispute that it would be contrary to the interests of justice to exclude it.
>
> [20] In any event, on the Crown case, the offending began when the complainant was between 10 and 12, when it could be assumed that she was a virgin. Therefore we do not think that prejudice could have been caused to Mr K by the admission of this evidence.

In *Ward v R* Lang J, hearing an appeal from a conviction at a Judge-alone trial, accepted without comment that questions in cross-examination about the complainant's initial identification of a fictional boyfriend called Stan as the offender were permissible (without reference to ss 37 or 44).[204]

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[199] [2015] NZCA 332.
[200] [2015] NZCA 332 at [32].
[201] [2015] NZCA 332 at [39].
[202] [2017] NZCA 336.
[203] Citations omitted.
[204] [2018] NZHC 775 at [29] - [33].

In *Arona v R* the Court of Appeal held that evidence of the complainant saying to the co-defendant, in an audio recording played at the trial, that she was not a one-night stand kind of girl, was inadmissible (the Crown did not lead it to show that a one-night stand was out of character for her, and so to bolster her credibility) and should have been excised from the recording.[205]

Evidence relevant to accuracy

One basis for arguing for the admissibility of previous sexual experience is by suggesting that the incident at issue is, or could be, the result of unconscious transference (or attribution) by the complainant.[206] In other words, not through malice or mendacity, the complainant has confused the sexual assault allegedly committed by the complainant with a sexual assault committed at another time but in similar circumstances by another person. This argument has been successfully used under the Act, for young children primarily,[207] but also for teenagers.[208] Such evidence, it is argued, falls outside s 37 as it is not evidence about the complainant's veracity.

However, in other jurisdictions the transference theory is not well supported, except in quite narrow circumstances. Indeed, the kind of transference argued in such cases (that is, in the context of the admissibility of sexual history evidence) is not the same as accepted in the psychological literature:[209]

> The defence argues that while the victim's memory of an encounter with the accused at a particular time and place is accurate, the victim has mistakenly incorporated into that memory as recollection of the nature of the sexual contacts with the third party. … [O]n these facts it would be more appropriate to refer to a "source monitoring error". In this fact pattern, to lay the foundation for the expert testimony about a source monitoring error, the defence might attempt to introduce evidence of the complainant's sexual encounters with third parties.

In such a situation, however, it is not clear that such evidence would meet either admissibility standard, pursuant to ss 44 *or* 37, especially when it is not likely that either transference or source monitoring error has occurred:[210]

> [O]ne of the conditions for transference proper is the witness's weak memory of a detail of the event he or she is now attempting to recall. The same condition is relevant in assessing the probability that a source monitoring error has occurred. Absent special facts, there is no reason to believe that the complainant's memory of the nature of his or her contact with the accused is likely to be weak. It is true that witnesses often experience difficulty remembering the details of traumatic events. However, in this situation, the defence theory is that the accused's encounter with the complainant was innocent and licit. There is nothing about that type of encounter which would make it especially hard for the complainant to remember the character of the encounter. According to the defence's

[205] [2018] NZCA 427 at [38].
[206] See *C (CA1/2016) v R* [2016] NZCA 44 at [8].
[207] See for example *R v KC and GC* HC Auckland CRI 2008-016-001131, 2 June 2010.
[208] *TPN v R* [2010] NZCA 291.
[209] Francis A Gilligan, Edward Imwinkelried and Elizabeth F Loftus "The Theory of 'Unconscious Transference': The Latest Threat to the Shield Laws Protecting the Privacy of Victims of Sex Offences" (1996) 38 BCL Rev 107 at 128 (references omitted).
[210] Ibid, at 139 (references omitted).

> theory, the encounter with the accused should not have been "mentally shocking" … [unlike] being raped or assaulted by a third party. …When the two events in memory are dissimilar, the conditions are less than ideal for a monitoring error.

In my view the transference theory should not be grounds for admitting evidence of a complainant's sexual experience with another person, in the absence of evidence that such transference or source error monitoring actually occurred.

There is a different concern about the admissibility of evidence of previous sexual abuse. Where there is scant evidence that there was in fact "transference", or the incidents did not occur in sufficiently similar circumstances (as was the case in *TPN v R*,[211] although the evidence was admitted), allowing cross-examination of the complainant will be unnecessarily distressing. It is hard for complainants to have to answer questions about previous *consensual* sexual encounters,[212] it must therefore be both difficult and upsetting for a complainant to have to recount painful details of previous *non-consensual* sexual conduct.

Although it is recognised that the rationale for sections like s 44 is to prevent both "tarring" the complainant in the eyes of the jury (at least with regard to adult complainants),[213] and controlling the extent to which they have to "re-live" earlier events of sexual abuse,[214] there is limited reference to fairness to the complainant in s 44 admissibility decisions. More particularly, the effect on the complainant of cross-examination about previous sexual abuse is rarely mentioned – yet the need to consider this type of fairness when applying the Act is made clear in s 6(c). An unnecessarily distressed witness is also unlikely to give their best evidence.

In *R v Tunbridge* the Court of Appeal upheld the ruling in the District Court that the complainant could be asked about sexual offending by another man (Bevin) which she disclosed at the same time as the allegations about the defendant.[215] The abuse allegedly occurred when the complainant was 10 and 11 years old. The relevance of the evidence about the actions of Bevin (most of which he pleaded guilty to) was not to support a claim of transference in the traditional sense but rather to posit another explanation for the complainant's on-going nightmares, which she gave as a reason for eventual disclosure at age 15.[216] In this case, no expert evidence was required as the jury could "bring to bear their collective knowledge and experience of dreams or nightmares in assessing this issue."[217]

In *R v Andrews* the Court of Appeal distinguished *Tunbridge* and held, even though the evidence of alleged previous sexual abuse of the complainant (who was very young at the time) would be given by the babysitter who observed it, the material differences between that event

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[211] *TPN v R* [2010] NZCA 291 as compared to *Nguyen v R* [2011] NZCA 8 in which the Court of Appeal stated at [15]: "[W]e agree that the risk of 'conscious transference' is no more than speculative."

[212] See, for example, Jenny McEwan *Evidence and the Adversarial Trial Process: the Modern Law* (2nd ed, Hart Publishing, Oxford, 1998) at 125.

[213] *R v Clode* [2007] NZCA 447 at [23]; *R v Sutherland* [2010] NZCA 154 at [19].

[214] *R v C (CA 228/10)* [2010] NZCA 147 at [14]; *T (CA71/2017) v R* [2017] NZCA 166 at [28].

[215] [2015] NZCA 456 at [10].

[216] [2015] NZCA 456 at [18].

[217] [2015] NZCA 456 at [19]. See however *D (CA368/2017) v R* [2017] NZCA 464 at [25] (distinguishing *Turnbridge*) with the Court of Appeal noting that: "Professor Garry's [a psychologist] report, while interesting on the issue of transference generally, was entirely equivocal as to whether transference was likely on the facts of this case".

and the allegations against the defendant, as well as equivocal expert evidence meant that the evidence did not pass the test in s 44(3).[218]

The Court of Appeal reviewed the previous authorities and stated:

> [26] … [T]here are a number of relevant factors at play when transference is raised in support of an application under s 44 of the Evidence Act. These include the factual circumstances within which the offending took place, and whether there is an evidential basis for transference — an evidential basis which will most often, but not necessarily always, need to include expert evidence.

[218] [2018] NZCA 421 at [29] ff (application for leave to appeal pre-trial declined: *Andrews v R* [2018] NZCA 128.