CITATION: R. v. P.C.B., 2024 ONSC 1777
COURT FILE NO.: CR-22-00000048-0000
DATE: 2024Mar27

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HIS MAJESTY THE KING	)	H. Chiavetti and K. Andersen, for the Crown
– and –	)	
P.C.B. and M.B.O.	)	
Defendants	)	S. Ellacott, for the defendants
	)	**HEARD:** February 15, 2024 and March 20, 2024

THE PUBLICATION, BROADCAST OR TRANSMISSION OF ANY INFORMATION THAT COULD IDENTIFY THE COMPLAINANTS OR A WITNESS IN THIS PROCEEDING IS RESTRICTED PURSUANT TO SECTION 486.4 OF THE *CRIMINAL CODE OF CANADA*.

TRANMER J.

DECISION ON VOIR DIRE
(Crown Mid-Trial Application as to Admissibility of Observations made by S.O.)

Background

[1] A voir dire was held in the course of the trial on a Crown application to determine the admissibility of observations made by the witness S.O., an aunt/caregiver, of the behaviour of four of the children complainants, M., G., L., and H. The observations were made months after the arrest of the children's father and their subsequent removal from the home of their mother, and some months after they began to live with S.O. and her family.

Facts

[2] The father and mother are the accused in this case and are charged with physical and sexual abuse of six of their eight children.

[3] P.B. is the mother of K., B., G., M., and B.E.

[4] M.O. is the father of C., H., L., G., M., and B.E.

[5] M. was born April 20, 2014.

[6] G. was born April 30, 2012.

[7] L. and H. are twins born August 27, 2007.

[8] L. is not an alleged victim of either physical or sexual abuse.

[9] With respect to M., G., and H., the Indictment alleges as follows:

1. With respect to M., both of the accused are charged with touching her for a sexual purpose between January 1, 2018 and August 22, 2019. M.O. is charged with assaulting her on August 22, 2019.

2. With respect to G., the accused are charged with touching her for a sexual purpose between January 1, 2018 and August 22, 2019. They are charged with inviting her for a sexual purpose to touch a person between January 1, 2018 and August 22, 2019.

3. With respect to H., M.O. is charged with assaulting her between July 1, 2017 and July 31, 2017.

[10] M.O. was arrested August 22, 2019.

[11] The children were removed from the care of their mother, P.B., on October 29, 2019.

[12] Since that time, the children have lived with other family members and their families. In particular, M. and G. have lived with their aunt C.O. and her family, and began living with their aunt S.O. and her husband and their four children commencing on May 1, 2020. Her children are 22, 15, 13, and 11 years old. They continue to live with their aunt S.O. The evidence of S.O. is that while the children lived with their own family, she would see them a few times a year: Easter, Christmas, Thanksgiving, when she babysat, and at special church functions, such as a confirmation.

[13] L. and H. have lived with aunt H.E. and with S.O. and their families.

[14] M. and G. have already testified in this trial.

Brief Summaries of the Evidence Given by Three of the Child Complainants at Trial

[15] I summarize this evidence very briefly insofar as it is relevant to the voir dire. I have made no assessment of credibility or reliability or considered the challenges to the evidence arising from cross-examination or otherwise for the purposes of this voir dire.

M.'s Trial Evidence

[16] M. testified that her mother and father would hit her with a wooden spoon on her bum. Both of them did it. It occurred more than once. She also testified that once when she was riding her bicycle her father pushed her against the car in the driveway.

[17] M. gave no evidence about sexual misconduct involving herself or any of her siblings.

G.'s Trial Evidence

[18] G. testified about her sister being pushed by their father on the day of his arrest.

[19] She testified that her father made her put her mouth on his penis.

[20] She testified about being in the bathtub with her mother and father and a water bottle being squirted.

[21] She testified about her father and mother putting a fork into her vagina and bum. They were all naked in the bathtub.

[22] On one occasion, her father picked her up from school and put her to the ground and stepped on her with both of his feet.

[23] She described that her parents took pictures and videos of her touching various parts of her body. They used a spoon on her toes. She was naked. They had clothes on. They used the flashlight and a bendy chopstick in doing this.

[24] She testified that on one occasion, her father pulled her off of the top bunk of a bunkbed.

[25] She also testified that if she had an accident, meaning wetting herself, they would pull down her pants and whack her with a wooden spoon.

[26] She testified that she did not talk to any of her siblings about these sexual things.

B.'s Trial Evidence

[27] B. was born July 21, 2008. He is an older brother of M. and G.

[28] He described the family household as violent.

[29] He described what happened on the day of his father's arrest. His father punched him from behind on the back of his head and also grabbed his sister and shoved her into the van. He also kicked his sister.

[30] He described his father spilling water on his sister.

[31] He stated that his father hurt all of them every day although not necessarily the same people.

[32] He described being grabbed by his shirt or his neck and put up against the wall.

[33] He described his father kicking M. almost every day.

[34] He saw his father punch her in her head.

[35] His brother C. would get hit with shovels and rakes.

[36] His father punched him a lot.

[37] His father threw a tape measure at him, leaving a bruise on his chest. C. was also hit in the head by a tape measure.

[38] He described his father pouring water on him and on his sister and throwing buckets at the other children.

[39] He testified that his father threatened to kill all of the children and said he did not care if he went to jail.

[40] He described that his father slammed the door on his sister H.'s head.

[41] He testified that his brother C., sister K., and he got hurt the most. They were the targets.

[42] He testified that the children stole food from the pantry.

[43] He testified that he had no knowledge about any sexual misconduct occurring to him or to his siblings.

[44] He testified that his mother was never physical with the children.

The Issue on the Voir Dire

[45] This evidentiary issue arose in the course of the examination in chief of Crown witness S.O. She is the sister of the accused M.O. He is six years younger than she is. Prior to the charges, she had an off and on relationship with him.

S.O.'s Observations of the Children While They Were Living with Their Parents – Not In Issue

[46] S.O. testified that the children M. and G. were "very well behaved", "always very quiet", "even when we were in a church setting". She testified that they were "very, very well behaved". She testified that they were "almost … hyper-aware, or hyper-sensitive." She noted that at meals the children would always eat more than her children did. "Other than that, things were … okay".

[47] As stated, M. and G. came to live with her family of six on May 1, 2020, after having lived with the families of two other aunts. L. and H. lived in her household from March to September 2020.

The Observations in Issue: S.O.'s Observations After the Children Came to Live in her Household

[48] S.O. testified that at first, she did not see anything unusual. She described it as a "'honeymoon' period".

[49] The observations that she describes in her testimony and that are in issue were made by her of M. commencing in the summer of 2020, and of G. commencing in the summer and fall of 2020.

Observations of M.

[50] S.O. described the observations that she made of M. as including the following: she did not sleep well, would go through people's things, had no established boundaries, would get up in the middle of the night to go find food and would take things that did not belong to her. S.O. said that M. was very aggressive, threw the cat down the stairs, pushed people downstairs, kicked the dog, and punched a child in the mouth. S.O. described observing M. to be hyperaware, obsessive about not being dirty, and hypervigilant, and said that sucked her thumb when she came into S.O.'s care. She said that she saw M. demonstrate sexualized behaviour: pulling her pants down in front of others, touching other children, and touching people's breasts. She also observed M. lock the cat in the laundry hamper. M. was verbally explosive with harsh and hurtful words, would go "from 0 to 60" in a moment, and collected things such as sticks, stones and glass, and hoarded these items in her school locker. She testified that at first M. could not get enough food. She testified that she observed M. straddling G., G. on top of M., M. masturbating herself roughly, and kissing her younger brother B.E. with her tongue. She said she relegated M. and G. to separate bedrooms as a result of observing the sexual behaviour.

Observations of G.

[51] S.O. observed that, similar to M., G. did not sleep well, would go through people's things, showed no established boundaries, would get up in the middle of the night to go find food, and would take things that did not belong to her. She also described that G. had trouble with her toileting, both urinating and defecating in her pants. She testified that G. had frequent "urinary tract infections", to the point she became resistant to medication. She testified that G. "was diagnosed with … neurogenic bladder dysfunction, that they said was caused from her prior trauma". She stated that G. would have frequent accidents, resulting in "really strong smells". She testified that G. required catheters "because her bladder was so irritated". She would catheterize G. every three hours, five times a day. She testified that G. required medications to help relieve bladder spasms. She described G. as also hoarding food. G. would self-harm by picking at herself, especially when asked to take phone calls from her parents. She testified that G. gravitates towards younger children. She testified that G. steals things in stores, especially food. She testified that G. still cannot get enough food.

Observations of L. and H.

[52] L. and H. lived in S.O.'s household from March to September 2020.

[53] S.O. described these children wetting their beds, having poor hygiene, being hungry, looking for food, and looking over their shoulders. She testified that L. watched inappropriate things on her tablet and would have panic attacks in the shower.

M. and G.'s Statements to Police

[54] M. and G. gave statements to the police in 2019 and 2020 alleging physical abuse by their parents, but made no allegations of sexual abuse.

[55] M. and G. disclosed the alleged sexual misconduct by their parents to S.O. at some point after the observations described above were made. The only date of disclosure specified in S.O.'s evidence is that M. disclosed to her in June 2021. From an earlier application, it is known that G. gave her third statement to the police in January 2021, at which time she first made allegations of sexual abuse. M. made a third statement to police in July 2021, in which she alleged sexual abuse. That statement was ruled inadmissible in a 715.1 application.

Positions of the Parties

Crown Submissions

[56] The Crown submissions followed those set out in her factum.

[57] When the issue first arose in these proceedings, the Crown stated that S.O. was called to give evidence about the observations that she made of the children "in the immediate aftermath of the children being removed from the home".

[58] She submitted that she was not relying on the testimony of S.O. as to what caused the behaviour of the children, referring to, for example, S.O.'s comment that the bladder dysfunction was caused by the prior trauma.

[59] She submitted that the evidence of S.O.'s observations of the children's behaviour is admissible from a lay witness in that such evidence is not being tendered by way of expert evidence. The Crown will not be calling any expert evidence with respect to S.O.'s observations.

[60] The Crown relies on the decision in *R. v. R.A.N.*, 2001 ABCA 68, 152 C.C.C. (3d) 464, which she says is directly on point with the present case. She notes in her submissions that *R.A.N.* deals with "observations of [a complainant's] behavioural changes" when in the presence of the accused. She argued that that case is similar to the present case insofar as G. would self-harm or pick at her skin, and this behaviour became much more prominent when she was asked to take phone calls with her parents. I note that this is the only observation S.O. linked to the parents.

[61] The Crown also relies on the decision in *R. v. R.O.*, 2015 ONCA 814, 333 C.C.C. (3d) 367, because the Court of Appeal cites *R.A.N.*

[62] The Crown submits that the issue on this voir dire is admissibility and does not involve weighing of the evidence.

[63] The Crown submits that this evidence of observations made by S.O. is admissible and can be used by the court to make common sense and human experience inferences when assessing the testimony of the complainants as to credibility and reliability. The Crown lumps together all of the observations that S.O. made of each of the children.

[64] The Crown also submits that the evidence is admissible as part of the narrative to provide the requisite context needed to assess the credibility and reliability of the witnesses.

Defence Submissions

[65] The defence strongly opposes the admissibility of this evidence.

[66] First, the hearsay component of some of S.O.'s testimony is obvious, as to the diagnoses, medical condition of G., the cause thereof, and the reasons for the medication prescribed.

[67] The defence submits that the various observations cannot be lumped together, but need to be viewed individually and separately in order to assess admissibility, and must be relevant and related to the charges before the court.

[68] The defence also strongly submits that the cases relied upon by the Crown are not directly on point but are clearly distinguishable, insofar as the observations in issue on this voir dire were made at least eight months after the children had been removed from the mother's care, at least ten months after the arrest of the father, and considerably after the time the abuse is alleged to have occurred on the evidence of G. The point is that the observations were not made while the children were in the presence of the accused. The point is that the behaviour of the children did not occur while they were in the presence of the accused and is not in any way linked to the accused, except for the observation of G. picking at her skin being linked to the phone calls.

[69] The defence submits that while the Crown is asking the court to draw inferences based on common sense and human experience, it does not articulate what those inferences are or should be. The defence submits that it is clear that the Crown is asking the court to rely on the evidence of the observations to bolster the credibility of the witnesses as to what they say occurred.

[70] The defence points to para. 7 of the Crown factum, where it states the following:

> The Crown does not assert that the guardians are able to testify to a causative link between the behaviour, for example, that the sexualized behaviours of the children are *proof* of the offence on their own, merely that they observed these behaviours. It is then available for this Honourable Court to draw inferences from this evidence that the behavioural changes are confirmatory of the children's accounts.

The defence points out that these observations were made after the children had been removed from the family home with the involvement of the police and the Children's Aid Society. At the relevant time, they were in the latest of a number of homes that they had been put in within a year. They have been housed with people whom they had not previously seen very often. The children have been split up as a family unit. This distinguishes the cases relied on by the Crown.

[71] It is to be noted that, in its factum, the Crown refers to the evidence in *R.A.N.* as "behavioural changes" in the complainant when in the presence of the accused. That is not the present fact scenario.

[72] The defence notes that in the cases relied upon by the Crown, the evidence of the observations of the behaviour of the complainant was called to rebut the defence argument.

[73] The defence also notes that during the course of their testimony at trial, M. and G. were not asked about the behaviours S.O. testified to.

[74] The defence notes that the Court of Appeal noted in *R.O.*, at para. 40, that "[t]he Crown did not argue that the complainant's behaviour confirmed the abuse." In contrast, in the present case, the Crown will be asking this court to draw inferences from the observations confirming the abuse.

[75] The defence strongly questions whether the observations in issue in this case can give rise to such inferences as sought by the Crown on the basis of common sense and human experience.

[76] The defence suggests that many of the observations sought to be tendered as admissible could be indicative of poor parenting, and therefore evidence of bad character. The character of the accused has not been put into issue.

[77] With respect to the Crown position that the evidence is admissible as part of the narrative, the defence has referred to Justice David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015), at pp. 46-47. In reference to the Crown factum, at para. 19, the defence points out that none of the purposes identified by the Crown for evidence of narrative are relevant to this case.

[78] The defence points out that at para. 20 of the Crown factum, the Crown specifies that it intends to ask the court to use the observations in issue to assess witness credibility. The defence strongly asserts that the observations have no relevance in that regard as matters of common sense and human experience.

Reply

[79] The Crown reply submissions include reference to para. 75 of *R. v. Kruk*, 2024 SCC 7, which provides as follows:

> Trial judges are uniquely tasked with assessing the testimony they hear and interpreting the range of possible inferences arising from

> the evidence. They must be able to rely not only on their judicial experience as fact-finders, but also on their common sense and the generalized expectations it generates about human behaviour. Trial judges will naturally rely on "ungrounded" assumptions about human behaviour in their testimonial assessments and thereby draw on factors that lie outside the immediate record. The Judicial function entitles them to do so without requiring extrinsic evidence to support each and every one of their conclusions.

Analysis

The Hearsay Opinion/Expert Evidence

[80] The following evidence of S.O. is expert evidence that was told to S.O. by a medical professional and as such is clearly inadmissible hearsay:

1. G. had frequent urinary tract infections – so many that she became resistant to medication and they ended up having to use compounded medications;

2. G. was diagnosed with neurogenic bladder dysfunction that they said was caused by her prior trauma;

3. G. needed catheters to empty her bladder because her bladder was so irritated; and

4. G. was on medications to help with bladder spasms.

The *R.A.N.* and *R.O.* Cases are Substantively Distinguishable

[81] *R.A.N.* addressed observed behavioural changes in the complainant during the timeframe when the alleged abuse was occurring and whenever the appellant was around. The behavioural changes stopped when the accused moved away and had no contact with the complainant: at para. 2.

[82] In that case, there was a temporal nexus between the abuse occurring, the accused being present, and the behavioural changes.

[83] The Crown also referred me to three cases cited at para. 20 of *R.A.N.*

[84] These cases also dealt with a close temporal nexus between the observed behavioural changes and the abuse.

[85] In *R. v. V. (G.R.)* (1996), 76 B.C.A.C. 72 (B.C. C.A.), the behavioural changes occurred during the period of the alleged abuse: paras 6, 10. The court pointed out, at para. 15, that in contrast to the Ontario Court of Appeal decision in *R. v. Fair*, which I cite below, "In the case at bar the evidence was much more specific and was time - connected to the alleged assaults". The court noted, at para. 16, that that case was distinguishable from the other authorities cited and that

the evidence was admissible "as part of the family dynamics in which the alleged offences occurred".

[86] In *R. v. Munroe* (1994), 51 B.C.A.C. 174 (B.C. C.A.), the evidence in question was of the mother's observations that the complainant's personality changed for the worse after the night in question. The court held that the complainant's story was strengthened by the serious reaction she suffered following the alleged incident, as observed by her mother. In that case, the observations were made apparently immediately after the incident and the complainant's nightmares were of a continuing nature thereafter. The observational evidence was directly linked to the alleged incident.

[87] In *R. v. Falkenberg* (1995), 95 C.C.C. (3d) 307 (Alta. C.A.), the evidence was of a friend and a relative as to the appearance and behaviour of the complainant after the event. She was observed to be curled up, unresponsive, not communicating, in a world of her own. The court stated that the witnesses meant to describe that the complainant's apparent state of mind had been "similar to that of people who have <u>just had</u> very bad news or a severe fright" (emphasis added): at p. 309. Clearly, the observations were contemporaneous with the alleged sexual assault.

[88] In *R.O.*, it appears that behaviours were observed while the abuse was ongoing and the complainant lived with the accused. The Crown called the evidence to respond to the defence position arguing that the complainant's problems were consistent with the timing of the abuse. Significantly, and in contrast to the present case, "[t]he Crown did not argue that the complainant's behaviour confirmed the abuse. There was very little evidence led on this point. The Crown questioned the complainant about her bad behaviour, including skipping school and drinking, as well as the timeline of the alleged abuse": at para. 40. The Crown put to the accused that the complainant's problems at school increased as the sexual abuse escalated.

[89] In contrast to *R.O.*, in the present case, the Crown is urging that this court rely on S.O.'s observations to draw inferences supporting the child complainants' allegations of abuse. I observe that there is, to this point, no evidence or allegations of sexual abuse in regard to M. As such, it appears the Crown seeks to have the court draw inferences inconsistent with the evidence.

[90] Those cases dealt with observations of behavioural changes in the complainant during the timeframe of the abuse, in the presence of the accused, or shortly after the alleged event, and in the one case were of a continuing nature.

[91] That is not the situation in the present case.

[92] The abuse alleged by G. occurred months earlier than S.O.'s observations.

[93] The children in the present case were not questioned at trial about S.O.'s observations of their behaviours.

[94] The Ontario Court of Appeal has addressed the situation most similar to the present case in *R. v. Fair* (1993), 16 O.R. (3d) 1 (C.A.), cited in *R.A.N.*, at para. 21. In my view, the decision in *Fair* is binding and determinative of the issue on this voir dire. In that case, the complainant testified as to a series of sexual assaults by the accused in 1985, 1986, and 1987,

commencing when she was nine years of age. At the time, she was living with her mother and the accused.

[95] The observations of the complainant's emotional state and the timing of those observations are set out at pp. 6-7 of the decision:

> The evidence of the complainant's emotional state during the period of the alleged assaults came mainly from the testimony of the complainant's aunt and the complainant's mother. The aunt testified to four specific instances in which she recalled the complainant's emotional state had been abnormal.
>
> > (a) During a visit around Christmas 1986 to the appellant's home, in which the complainant and her mother were living, the complainant appeared very nervous, withdrawn and timid, and would follow her around and "cling" to her.
> >
> > (b) In May 1988 while the complainant visited her aunt in London, Ontario she, her aunt, and her aunt's fiancee drove to a video store to rent a movie. The complainant got out of the car in a daze, walked to the end of the strip mall, and sat down on the curb and started to rock and cry. She was speaking in a very low tone of voice and became more and more upset to the point of becoming hysterical. This lasted for about 45 minutes.
> >
> > (c) In November of 1989, the complainant called her aunt from Hamilton to see if she could come to London for a visit. She appeared upset over the phone and wished to take the bus leaving in 20 minutes. The aunt picked the complainant up at the bus station, and the complainant seemed very quiet, distraught and withdrawn.
> >
> > (d) Approximately a week and a half after the last visit, the aunt received a call from the complainant from the London bus station. When the aunt picked her up from the station, the complainant was standing in the middle of the sidewalk with her head down and crying. She was very despondent and would not talk for hours. During the visits to London, the complainant would work all through the night cleaning and would rarely get to sleep before 4:00 or 5:00 in the morning. She would sleep late into the day, get up despondent and depressed, and the same cycle would begin again.

> The complainant's mother also testified as to the complainant's emotional state during the relevant period. She testified that the complainant, who used to be very outgoing, became withdrawn and introverted and had no self-esteem. She also testified that after she and the complainant moved out of the appellant's home, she noticed that the complainant's sleeping habits had changed, and that she had problems sleeping so that she would sometimes sit awake until 3:00 or 4:00 in the morning.
>
> The complainant's father gave evidence as to the emotional state of the complainant both before and after the disclosure to Szaba of the assaults. He testified that, during the complainant's stay in Saskatchewan in 1988 "she seemed to be showing signs of not dealing with things well. She was despondent; she was depressed. Emotionally she seemed as if she was having a good deal of difficulty but couldn't come to terms with it". He also testified that after the complainant had disclosed the assaults to the social worker in December of 1990 the complainant became a totally different person, was depressed and was having difficulty dealing with the situation to the point of not being able to complete her last three weeks of grade nine and dropping out of school the next year.

[96] It is only the first observation made by the aunt and the first observations described by the mother that are contemporaneous with the abuse.

[97] On this point, the court stated the following, at pp. 21-23:

> My first observation about the four episodes of apparent emotional upset is that there is nothing in the episodes to connect them with the sexual assaults.
>
> . . .
>
> The trial judge ruled that the complainant's emotional state was relevant because it showed the effect on the complainant of the sexual assault. The complainant did not so testify nor did anyone else. There is no nexus between the sexual assaults and the mood changes described in the evidence. How many of these mood changes are natural in the childhood of any young person and how many are attributable to a child trapped in a relationship between her mother and a man she simply did not like, is left to the conjecture of the jury. I think they deserved more help. I think that it was incumbent upon the Crown to lead an expert witness who would be in a position to relate the emotional trauma, if such it was, to the sexual assaults alleged. Left the way it was, it was of no probative value and was highly prejudicial to the appellant.

> Once again, there was no direction from the trial judge as to what use the jury could make of this evidence despite the closing argument of the Crown in which he declaimed at length the emotional condition of the complainant as seen through the eyes of her family. He relied strongly on the evidence of the aunt.
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> . . .
>
> On appeal, Crown counsel submitted that evidence of physical injury and hysteria have always been admissible in rape cases, and that emotional upset is in the same category. I think this ignores the fact that the hysteria in the cases he referred to was always contemporaneous with the rape or other sexual assault. It was introduced as corroborative of the truth of the complainant's claim that she was raped or sexually assaulted. For example, in the case under appeal, the fact of the bruising to the complainant's eye was admissible because the complainant related it to the slap of the appellant which overcame her resistance to the sexual assault. Absent such a nexus, the mere fact that a child had an unexplained bruise would not be admissible.
>
> In *R. v. B. (G.)* (1990), 56 C.C.C. (3d) 200 [77 C.R. (3d) 347] (S.C.C.), Wilson J. stated that evidence of an expert as to the psychological and physical conditions which frequently arise as the result of sexual abuse is admissible to provide assistance to the trier of fact as to whether an assault has occurred (p. 220 [C.C.C., p. 369 C.R.]). In my opinion such evidence is not only admissible, but in a case like the one under appeal, it is mandatory if the Crown intends to rely upon lay descriptions of the complainant's emotional condition as direct evidence that she was subject to a sexual assault. Without such evidence, there is nothing to connect the emotional condition described to the offence charged as opposed to some other unhappiness experienced by the complainant. There is nothing to demonstrate that these four unrelated episodes and the ex post facto recollections of the parents of the child as to her general lassitude and sleeplessness are even manifestations of a child with serious emotional problems. Certainly, nobody at the time thought enough of the symptoms to consider helping her. The complainant instituted her own therapy through a counsellor at school in Saskatchewan.

[98] I have also considered *R. v. S.(C.N.)*, 1990 CarswellBC 838 (B.C. C.A.), *R. v. Z.L.*, 2000 BCCA 169, 144 C.C.C. (3d) 444, aff'd 2001 SCC 16, and *R. v. A.R.D.*, 2017 ABCA 237, 55 Alta. L.R. (6th) 213, aff'd 2018 SCC 6.

[99] On this authority, S.O.'s evidence as to the behaviours of M., G., L., and H. as a source for the court to assess and confirm the credibility and reliability of the evidence of G. – and

perhaps L. and H., depending on their testimony – as to the allegations of sexual abuse is inadmissible in the absence of admissible expert evidence.

[100] In reaching this decision, I have considered the principles set out in *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, and *R. v. Kiss*, 2018 ONCA 184, as to delayed disclosure and how victims do and do not react to sexual abuse, and in *R. v. D.P.*, 2017 ONCA 263, as to piecemeal disclosure.

Narrative

[101] With respect to the Crown submission that the evidence is admissible as part of the narrative, the decision in *Fair*, at pp. 16, 20-21, is also instructive:

> It must be a part of the narrative in the sense that it advances the story from offence to prosecution or explains why so little was done to terminate the abuse or bring the perpetrator to justice. Specifically, it appears to me to be part of the narrative of a complainant's testimony when she recounts the assaults, how they came to be terminated, and how the matter came to the attention of the police.
>
> …
>
> To qualify as narrative, the witness must recount relevant and essential facts which describe and explain his or her experience as a victim of the crime alleged so that the trier of fact will be in a position to understand what happened and how the matter came to the attention of the proper authorities. … The fact that the statements were made is admissible to assist the jury as to the sequence of events from the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness. However, the jury must be instructed that they are not to look to the content of the statements as proof that a crime has been committed.

[102] S.O.'s observations of the children's behaviour do not meet this criteria. Nor do they meet the purposes of narrative evidence as set out in the factum of the Crown, at para. 19.

[103] Furthermore, the following cases are instructive. In *R. v. Edwards*, 2009 CarswellOnt 5246 (S.C.), the court writes the following at paras. 22-24:

> Narrative has been described by Paciaocco and Stuesser in *The Law of Evidence*: 5th Edition … page 45, as "harmless background material" that, while frequently not meeting the admissibility prerequisites of relevance and materiality, is often tolerated "because it improves comprehension by presenting a total picture and makes it easier for the witness to recount the evidence".

> At times, however, narrative can contain highly prejudicial information. As Paciaocco and Stuesser point out, where narrative constitutes prejudicial information, it should only be allowed "where significant testimony can not be recounted meaningfully and fairly without its disclosure."
>
> Narrative, in my view, is really akin to connective tissue. It binds together other elements of significant and admissible testimony and makes that evidence more comprehensible. I do not agree that narrative, on its own, could ever really be described as a "live issue" in a case.

In that case, narrative evidence related to prior disreputable conduct was not necessary to recount "the evidence relating directly to the charged incidents … meaningfully and fairly": at para. 25. In *R. v. Proulx*, 2022 ONSC 1495, the court writes the following at para. 92: "Narrative evidence is evidence which helps the judge or jury to understand how the charges came to be before the court".

[104] In my view, the evidence at issue does not seem to fit into any of the permitted uses of narrative evidence. The observation evidence of S.O. is not admissible on this basis either.

Conclusion

[105] For these reasons, the evidence of the observations of the children testified to by S.O. are not admissible for the purposes sought by the Crown.

Tranmer J.

Released: March 27, 2024

CITATION: R. v. P.C.B., 2024 ONSC 1777
COURT FILE NO.: CR-22-00000048-0000
DATE: 2024Mar27

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SUPERIOR COURT OF JUSTICE

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– and –

P.C.B. and M.B.O.

DECISION ON VOIR DIRE

(Crown Mid-Trial Application as to Admissibility of Observations made by S.O.)

Tranmer J.

Released: March 27, 2024