Sexual Assault Trial Directions

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1. SCOPE OF THE PAPER

The law of sexual assault has been the subject of significant legislative amendment in recent years. This paper deals with the law as it applies to proceedings commenced on or after 1 January 2009. In that regard, proceedings are considered to have commenced upon the arrest and charging of the accused – see TJ v R [2009] NSWCCA 257 at [21]-[22].

The paper deals with trial directions of a general character for offences of this nature. It does not deal with directions concerning elements of specific offences.

2. PRE-RECORDED EVIDENCE OF CHILD COMPLAINANT OR OTHER VULNERABLE PERSON

The Essential Content of the Warning

The jury must be warned:

(i) Not to draw any inference adverse to the accused; and
(ii) Not to give the evidence any greater or lesser weight because the evidence is being given in that way.

At What Stage Is the Warning Given?

The "Sexual Assault Handbook" published online by the New South Wales Judicial Commission website refers to the warning required under s.306X as being given as part of the opening remarks to the jury (see at [3-040]). It also suggests a "reminder warning" should be given during the course of the Crown Case (see at [3-060]).

The obiter remarks of Howie J in R v DGB [2002] NSWCCA 328, (2002) 133 A Crim R 227 at [23] state that the warning should be given at a time proximate to the evidence, either immediately before or immediately after the evidence. (A complainant in proceedings for a sexual offence is typically the first witness for the prosecution, which would comfortably justify a trial Judge confining the warning to being part of the opening remarks to the jury).

Whether or not it is advisable or necessary to repeat the warning in the summing up in order to ensure a fair trial will depend on the facts of the particular case – per obiter remarks of Howie J in R v DGB [2002] NSWCCA 328, (2002) 133 A Crim R 227 at [23].

The Statutory Provisions

Section 306X of the Criminal Procedure Act 1986 (NSW) requires that a jury be given a warning when evidence of a vulnerable person is given by way of the recording of a previous representation. The requirements of the warning are found within the terms of the section which is set out below:

> *306X Warning to jury*
>
> *If a vulnerable person gives evidence of a previous representation wholly or partly in the form of a recording made by an investigating official in accordance with this Division in any*

proceedings in which there is a jury, the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given in that way.

Section 306M of the Criminal Procedure Act 1986 (NSW) defines a "vulnerable person" as a child or a cognitively impaired person.

Section 306P(1) of the Criminal Procedure Act 1986 (NSW) states that the statutory provisions apply to children who are under the age of 16 at the time the evidence is given.

Section 306M(2) provides a non-exhaustive definition of a cognitively impaired person.

Section 306P(2) provides that the evidence of a cognitively impaired person is only to be given in this way "if the court is satisfied that the facts of the case may be better ascertained if the person's evidence is given in such a manner."

The legislative scheme concerning the giving of evidence in this way is found in Part 6 Division 1 of the Criminal Procedure Act 1986 (NSW), namely sections 306M through to section 306Z inclusive.

The Case Law

R v DGB [2002] NSWCCA 328, (2002) 133 A Crim R 227 concerned similar legislation (since repealed) concerning the evidence of children given in this way. The obiter remarks of Howie J (Meagher JA and Simpson J concurring) are of assistance:

> "[23] For my part, I believe it is highly preferable that a trial judge gives such information and warnings as are required in respect of a particular part of the evidence that is to be given in a trial before a jury either immediately before or immediately after the giving of that evidence rather than to wait to fulfil that obligation during the course of the summing up. Generally speaking, it would be expected that any information or warning that a jury is required to consider in their assessment of a particular piece of evidence would have considerably more impact upon the jury if given at a time proximate to the evidence. This does not mean that it would not be advisable, or even necessary in some cases, to convey that information or warning again during the course of the summing up. But whether such a course is necessary in order to ensure a fair trial and one according to law will depend upon all the circumstances of the particular case and the nature of the information or warning that must be given."

Further Reading

Criminal Procedure Act 1986 (NSW), sections 306M through to section 306Z inclusive.
R v DGB [2002] NSWCCA 328, (2002) 133 A Crim R 227
R v NZ [2005] NSWCCA 278, (2005) 63 NSWLR 628, especially Howie and Johnson JJ at [210] for the "preferred procedure".
Gately v The Queen [2007] HCA 55, (2007) 232 CLR 208

3. JURY REQUESTING REPLAY OF PRE-RECORDED EVIDENCE OF CHILD COMPLAINANT OR OTHER VULNERABLE PERSON

The Essential Content of the Warning

It may be necessary for the trial judge to warn the jury:

> That "because they are hearing the evidence of the complainant a second time and well after all the other evidence, they should guard against the risk of giving it disproportionate weight simply for that reason and should bear well in mind the other evidence in the case."

The above suggested direction is derived from R v NZ [2005] NSWCCA 278, (2005) 63 NSWLR 628, specifically Howie and Johnson JJ at [210].

No particular form of words is required to convey the above warning – see R v NZ [2005] NSWCCA 278, (2005) 63 NSWLR 628, especially Howie and Johnson JJ at [208].

At What Stage Is The Warning Given?

When the recording is replayed – see R v NZ [2005] NSWCCA 278, (2005) 63 NSWLR 628 at [110].

The Statutory Provisions

See above under the heading "Pre-Recorded Evidence of Child Complainant or Other Vulnerable Person".

Further Reading

Criminal Procedure Act 1986 (NSW), sections 306M through to section 306Z inclusive.
R v NZ [2005] NSWCCA 278, (2005) 63 NSWLR 628, especially Howie and Johnson JJ at [210] for the "preferred procedure".
Gately v The Queen [2007] HCA 55, (2007) 232 CLR 208 especially Hayne J at [96] and Heydon J at [108] and [111].

4. SPECIFIC STATUTORY LIMITATIONS TO WARNINGS REGARDING THE EVIDENCE OF CHILDREN

In addition to matters raised elsewhere in this paper, practitioners should note the following provisions of the Evidence Act 1995 (NSW) concerning the evidence of children:

s.165(6) – prohibits a judge from warning or informing the jury that the reliability of the child's evidence may be affected by the age of the child, unless the warning is in accordance with s.165A(2).

Section 165A is set out below:

> **Warnings in relation to children's evidence**
>
> **165A Warnings in relation to children's evidence**

(1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:

(a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses,

(b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults,

(c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the age of the child,

(d) in the case of a criminal proceeding-give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.

(2) Subsection (1) does not prevent the judge, at the request of a party, from:

(a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable, and

(b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it,

if the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

(3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

5. USE OF PRE-RECORDED EVIDENCE IN RE-TRIALS AND SUBSEQUENT TRIALS

Is Any Information or Warning Required?

The relevant legislation makes no provision for any warnings or directions in relation to this type of evidence. Nor is there any case law directly on point at the time of writing (August 2010).

What Should Be The Essential Content of Any Information or Warning?

In the author's view it is a matter of concern that the legislation does not make any provision for relevant warnings. Evidence of a highly similar nature (e.g. pre-recorded evidence of a child complainant or other vulnerable person) attracts relevant warnings as does other evidence that is given via electronic means (e.g. use of CCTV).

There is a need to generate case law on this issue. It is suggested that trial advocates seek the following information and warnings, (and challenge the failure to give such warnings in the NSW Court of Criminal Appeal when a suitable case arises):

That these proceedings are a subsequent trial / retrial and therefore the trial judge should:

1. Inform the jury that it is standard procedure for the evidence to be given in this way, and

2. Warn that no adverse inference is to be drawn against the accused because the evidence is given in this way, and

3. Warn the jury that they should not give the evidence any greater or lesser weight because the evidence is being given in this way.

At What Stage Should Any Information or Warning Be Given?

In the author's view the information and warnings should be given as part of the trial judge's opening remarks, or "at a time proximate to the evidence" – per the obiter remarks of Howie J in R v DGB [2002] NSWCCA 328, (2002) 133 A Crim R 227 at [23] concerning pre-recorded evidence of children or other vulnerable persons. A more complete extract of this passage can be found under the heading "Pre Recorded Evidence of Child Complainant or Other Vulnerable Persons" earlier in this paper.

The Statutory Provisions

ss.306A – 306G inclusive of the Criminal Procedure Act 1986 (NSW) deal with the evidence of a complainant when a new trial has been ordered as the conviction was quashed on appeal. This legislation makes no provision for any warnings or directions whatsoever.

ss.306H – 306L inclusive of the Criminal Procedure Act 1986 (NSW) deal with the evidence of the complainant when a subsequent trial is held as a previous jury was discharged without verdict. This legislation makes no provision for any warnings or directions whatsoever.

The Case Law

There is no NSW case law directly on point on this form of evidence at the time of writing (August 2010).

It is suggested that initial guidance can be gleaned from the decision of R v NZ [2005] NSWCCA 278, (2005) 63 NSWLR 628, specifically Howie and Johnson JJ at [210] concerning the playing of an interview with a child witness, as this is conceptually similar to "replaying" video recorded evidence in a subsequent trial or re-trial.

Further Reading

Criminal Procedure Act 1986 (NSW) ss.306A – 306L inclusive.
R v DGB [2002] NSWCCA 328, (2002) 133 A Crim R 227
R v NZ [2005] NSWCCA 278, (2005) 63 NSWLR 628

6. USE OF CLOSED-CIRCUIT TELEVISION ("CCTV")

The Essential Content of the Information and Warnings

The trial judge must:

(i) Inform the jury that it is standard procedure for the evidence of in such cases to be given by such means, and
(ii) Warn the jury not to draw any inference adverse to the accused, and
(iii) Warn the jury not to give the evidence any greater or lesser weight because of the use of those facilities or that technology.

At What Stage Are the Information and Warnings Given?

The "Sexual Assault Handbook" published online by the New South Wales Judicial Commission website refers to the information and warnings being given as part of the opening remarks to the jury (see at [3-040]).

The Statutory Provisions

Section 294B(7) of the Criminal Procedure Act 1986 (NSW) sets out the essential requirements for the information and warnings for complainants giving evidence in proceedings for a prescribed sexual offence who are not vulnerable persons.

Section 306ZI of the Criminal Procedure Act 1986 (NSW) sets out the essential requirements for the information and warnings for vulnerable persons (whether or not they are complainants) giving evidence. The requirements for the information and warnings are found in the terms of the subsection.

The legislative scheme concerning the giving of evidence with respect to complainants who are not vulnerable persons in proceedings for a prescribed sexual offence is found in section 294B of the Criminal Procedure Act 1986 (NSW).

The legislative scheme concerning the giving of evidence by vulnerable persons by CCTV is found in Part 6 Division 4 of the Criminal Procedure Act 1986 (NSW), namely sections 306ZA through to section 306ZI inclusive.

The Case Law

There is no case law directly dealing with these statutory provisions at the time of writing (August 2010), however some guidance can be gleaned from the obiter remarks of Howie J in R v DGB [2002] NSWCCA 328, (2002) 133 A Crim R 227, a decision dealing with repealed legislation concerning children giving evidence in chief by way of a pre-recorded interview.

Further Reading

Criminal Procedure Act 1986 (NSW) section 294B
Criminal Procedure Act 1986 (NSW) sections 306ZA to 306ZI inclusive.
R v DGB [2002] NSWCCA 328, (2002) 133 A Crim R 227

7. THE MURRAY DIRECTION

The Murray direction takes its name from the NSWCCA decision in R v Murray (1987) 11 NSWLR 12.

The Essential Pre-Conditions for the Warning

A charge where only one witness is giving direct evidence of the commission of the crime. This direction is not limited only to proceedings for prescribed sexual offences

The Essential Content of the Warning

The trial judge *may* warn the jury that the evidence of the witness must be scrutinised with great care before a guilty verdict is brought in.

R v Murray (1987) 11 NSWLR 12 is itself authority for the proposition that a Murray direction is not mandatory – see especially at 19D.

No particular form of words is required for a Murray direction – Kaifoto v R [2006] NSWCCA 186 at [72].

The Essential Limitations of the Warning

A judge is prohibited from warning a jury of the danger of convicting on the uncorroborated evidence of a complainant in proceedings for a prescribed sexual offence [see s.294AA(2) of the Criminal Procedure Act 1986 (NSW)below]. This does not mean that a Murray direction cannot be given – see discussion under the heading "An Unresolved Issue" below.

A judge is not required to give a warning that it is dangerous to act on uncorroborated evidence in proceedings for offences other than proceedings for prescribed sexual offences – see s.164(2) of the Evidence Act 1995 (NSW); or give a direction concerning the absence of corroboration – see s.164(3) of the Evidence Act 1995 (NSW).

At What Stage is The Warning Given?

During the course of the trial judge's summing up.

The Statutory Provisions

Section 294AA of the Criminal Procedure Act 1986 (NSW) commenced operation on 1 January 2007 and states:

> **294AA Warning to be given by Judge in relation to complainants' evidence**
>
> (1) A judge in any proceedings to which this Division applies must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.
>
> (2) Without limiting subsection (1), that subsection prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant.
>
> (3) Sections 164 and 165 of the *Evidence Act 1995* are subject to this section.

See also:

Evidence Act 1995 (NSW) s.164 per the discussion above under the heading "The Essential Limitations of the Warning"

The Case Law

In Regina v Murray (1987) 11 NSWLR 12 Lee J stated at 19E:

> "In all cases of serious crime it is customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable."

An Unresolved Issue?

The Second Reading Speech to the amending legislation that introduced s.294AA of the Criminal Procedure Act 1986 (NSW) states"

> "The direction in R v Murray provides that where there is only one witness asserting the commission of the offence, the evidence of the witness is to be scrutinised with great care. The typical sexual assault offence takes place in private without any other witnesses. The members of the task force agreed that the direction was unnecessary, as existing directions as to reasonable doubt were sufficient to protect the accused. Item [8] of the schedule therefore adds a new section 294AA which prohibits the judge from stating or suggesting to a jury that complainants in sexual offence proceedings are unreliable witnesses as a class, mirroring section 165A of the Evidence Act which relates to children. The new section also prohibits the judge from warning the jury of the danger of convicting on the uncorroborated evidence of any complainant." [NSW Legislative Assembly Hansard, 18 October 2006].

A broadly similar provision in Queensland Criminal Code [i.e. s.632 of the Criminal Code (Qld)] was considered by the High Court of Australia in Robinson v The Queen [1999] HCA 42 , (1999) 197 CLR 162, (1999) 165 ALR 226, (1999) 73 ALJR 1314 it was held (at [20]) that the relevant Queensland provision "...is not aimed at, and does not abrogate, the general requirement to give a warning whenever it is necessary to do so in order to avoid a risk of miscarriage of justice arising from the circumstances of the case, but is directed to the warnings required by the common law to be given in relation to certain categories of evidence...". Thus, the Queensland provision addresses a class of evidence (the uncorroborated evidence of one witness) that the common law presumed to be unreliable. Interpretation of that provision does not prohibit the giving a judicial warning where appropriate. Practitioners in NSW should therefore seek a direction, where appropriate, that complies with the terms of s.294AA.

Further Reading

Criminal Procedure Act 1986 (NSW) s.294AA
Regina v Murray (1987) 11 NSWLR 12
Kaifoto v R [2006] NSWCCA 186
Criminal Code (Qld) s.632
Robinson v The Queen [1999] HCA 42, (1999) 197 CLR 162, (1999) 165 ALR 226, (1999) 73 ALJR 1314
Hugh Donnelly: "Delay and the Credibility of Complainants in Sexual Assault Proceedings." Judicial Officers' Bulletin April 2007 – Volume 19 Number 3 (available on JIRS website).

8. THE SEPARATE CONSIDERATION WARNING

The NSW Criminal Trials Bench Book refers to this direction as "the KRM direction", taking its name from the decision in KRM v The Queen [2001] HCA 11, (2001) 206 CLR 221, (2001) 178 ALR 385, (2001) 75 ALJR 550. It is seldom referred to in these terms in trial courts, and is more frequently referred to as a "separate consideration" direction or warning.

The Pre-Condition for Giving The Direction

A trial involving more than one count on the indictment.

The Essential Content of the Direction

The trial judge must warn the jury:

(i) To consider each count separately; and

(ii) Consider each count only by reference to the evidence that applies to that individual count.

The Statutory Provisions

There are no specifically applicable statutory provisions in relation to this direction, which has its origins in the common law.

At What Stage is the Direction Given?

During the course of the trial judge's summing up.

The direction, when given, will typically be immediately followed by a Markuleski direction.

The Case Law

KRM v The Queen [2001] HCA 11, (2001) 206 CLR 221, (2001) 178 ALR 385, (2001) 75 ALJR 550.

McHugh J:

> "[36] It has become the standard practice in cases where there are multiple counts, however, for the judge to direct the jury that they must consider each count separately and to consider it only by reference to the evidence that applies to it (a "separate consideration warning")."

Further Reading

KRM v The Queen [2001] HCA 11, (2001) 206 CLR 221, (2001) 178 ALR 385, (2001) 75 ALJR 550.

9. THE MARKULESKI DIRECTION

The Markuleski direction takes its name from the decision in R v Markuleski [2001] NSWCCA 290; (2001) 52 NSWLR 82, (2001) 125 A Crim R 186.

The Essential Pre-Condition for Giving the Direction

A trial involving more than one count on the indictment.

The direction is not mandatory and depends on the facts of the case – see Markuleski at [187] – [191].

The direction, when given, will typically be immediately preceded by the KRM direction

The Essential Content of the Direction

The trial judge should indicate to the jury that any doubt they may form with respect to the credibility of the complainant with respect to any one count ought to be considered by them when assessing the whether or not there was a reasonable doubt about the complainant's evidence with respect to other counts – see Markuleski at [191].

No precise words are required – see Markuleski at [188],

The precise terminology is a matter or the trial judge - see Markuleski at [191]

The direction is not mandatory – see R v G.A.R. [2003] NSWCCA 224 and in particular James J at [29](extract below under the sub-heading "The Case Law").

At What Stage is the Direction Given?

During the course of the trial judge's summing up.

The direction, when given, will typically be given immediately following the KRM direction

The Case Law

R v Markuleski [2001] NSWCCA 290; (2001) 52 NSWLR 82, (2001) 125 A Crim R 186.

Spigelman CJ

> "[186] ...it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. Some reference ought to be made to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count."
>
> "[187] Some form of direction assisting the jury in this respect should be given, to employ the terminology found in *Kilby* and *Davies* "as a general rule". Its absence is not necessarily fatal (as it was not in *Davies* itself). Furthermore, as the joint judgment in *Crofts* affirmed, the "general rule" does not apply "where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness" (at 451)."
>
> "[188] It is not necessary to specify any precise words for such a direction. That will depend on the circumstances of the case. It will often be appropriate to direct a jury that where they entertain a reasonable doubt concerning the truthfulness or reliability of a complainant's evidence in relation to one or more counts, that must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally."
>
> "[189] On other occasions it may be appropriate for a judge to indicate to the jury, whilst making it clear that it remains a matter for the jury, that it might think that there was nothing to distinguish the evidence of the complainant on one count from his or her evidence on another count."
>
> "[190] Or it may be appropriate to indicate that, if the jury has a reasonable doubt about the complainant's credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts."
>
> "[191] The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case. The crucial matter is to indicate to the jury that any doubt they may form with respect to one aspect of the complainant's evidence, ought be considered by them when assessing the overall credibility of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant's evidence with respect to other counts."

Wood CJ at CL concurred at [261]-[265], as did Simpson J at[334], and Carruthers AJA at [344]. Grove J did not consider the issue crucial, and stated at [280] that "it would suffice to commend the matter to the consideration of trial judges."

R v G.A.R. [2003] NSWCCA 224
James J at [29]:

> "[29] Far from being required in all cases, the direction required in **Markuleski** may be quite inappropriate where it is open to the jury to convict on one count and to acquit on another, as was the case in the present matter. Further, a **Markuleski** direction, given when it is not required, may give the jury the mistaken impression that the jury, having come to a view on one count, may not take their view on that count into consideration for the purpose of considering their findings on another count, having regard to whatever evidence may be common to the several counts...."

Further Reading

R v Markuleski [2001] NSWCCA 290; (2001) 52 NSWLR 82, (2001) 125 A Crim R 186
R v G.A.R. [2003] NSWCCA 224

10. WARNINGS CONCERNING ABSENCE OR DELAY IN COMPLAINT - GENERALLY

The Essential Pre-Conditions for the Information and Warnings

Evidence is given, or a question is asked in proceedings for a prescribed sexual offence, that tends to suggest either:

(a) Absence of complaint, or
(b) Delay in making complaint

The Essential Content of the Information and Warnings

The trial judge must:

1. Warn the jury the absence or delay does not necessarily indicate that the allegation is false, and
2. Inform the jury that there may be good reasons why a victim of sexual assault may hesitate in making, or refrain from making a complaint about the assault, and
3. Must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning (see under the heading "Warnings Concerning Absence or Delay in Complaint – Specific Issues - The Crofts Direction" below for further information regarding this last issue).

At What Stage is The Information and Warnings Given?

During the trial judge's summing up.

The Statutory Provisions

The requirements for the information and warnings as outlined above can be found in s.294 of the Criminal Procedure Act 1986 (NSW).

Note that the prohibition against warnings concerning the complainant's credibility unless there is sufficient evidence" as outlined in s.294(2)(c). Note that s.294(2)(c) only applies to "delay" in complaining and not absence of complaint.

The Case Law

R v Jackson [2004] VSCA 224 (concerning a similar Victorian provision)

Buchanan JA:

> "[17]....It was not necessary for counsel to use the word "delay" or a synonym for it or to ask the complainant why he had not complained earlier. Nor do I think that the fact that the questions were not designed to show delay prevented the operation of the section. The section operates when a question is asked which tends to suggest that there was delay in making complaint. The questions brought into the open the period of time between the applicant's conduct and complaint. Having regard to the length of the period, that was sufficient, in my view, to require the trial judge to direct the jury as he did."

Further Reading

Criminal Procedure Act 1986 (NSW) s.294
R v Jackson [2004] VSCA 224
Hugh Donnelly: "Delay and the Credibility of Complainants in Sexual Assault Proceedings." Judicial Officers' Bulletin April 2007 – Volume 19 Number 3.

11. WARNINGS CONCERNING ABSENCE OR DELAY IN COMPLAINT – SPECIFIC ISSUES - THE CROFTS DIRECTION

The Essential Pre-Conditions of the Direction

The essential pre-conditions are:

1. A warning has been given pursuant to s.294(2)(a) and (b) of the Criminal Procedure Act 1986 (NSW) [see the topic immediately above – i.e. "Warnings Concerning Absence or Delay in Complaint – Generally"]; and

2. The judge considers that there is sufficient evidence to justify a warning that the delay is relevant to the victim's credibility – see s.294(2)(c) of the Criminal Procedure Act 1986 (NSW).

The Essential Content of the Direction

Warn the jury that the delay in complaint is relevant to the complainant's credibility.

At What Stage is The Warning Given?

During the trial judge's summing up.

The Statutory Provisions

Criminal Procedure Act 1986 (NSW) s.294

The Case Law

Crofts v The Queen [1996] HCA 22, (1996) 186 CLR 427, (1996) 88 A Crim R 232

Toohey, Gaudron, Gummow and Kirby JJ:

> "...the purpose of such legislation, properly understood, was to reform the balance of jury instruction not to remove the balance. The purpose was not to convert complainants in sexual misconduct cases into an especially trustworthy class of witnesses[47]. It was simply to correct what had previously been standard practice by which, based on supposed "human experience" and the "experience of courts", judges were required to instruct juries that complainants of sexual misconduct were specially suspect, those complained against specially vulnerable and delay in complaining invariably critical. In restoring the balance, the intention of the legislature was not to "sterilize" complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested that the judge should put such comments before the jury for their consideration[48]. The overriding duty of the trial judge remains to ensure that the accused secures a fair trial[49]. It would require much clearer language than appears ...[in the legislation].... to oblige a judge, in a case otherwise calling for comment, to refrain from drawing to the notice of the jury aspects of the facts of the case which, on ordinary human experience, would be material to the evaluation of those facts[50]."

Further Reading

Crofts v The Queen [1996] HCA 22, (1996) 186 CLR 427, (1996) 88 A Crim R 232
R v Davies (1985) 3 NSWLR 276, (1985) 17 A Crim R 297
Hugh Donnelly: "Delay and the Credibility of Complainants in Sexual Assault Proceedings." Judicial Officers' Bulletin April 2007 – Volume 19 Number 3.

12. DELAY – SPECIFIC ISSUES - INFORMING THE JURY CONCERNING DELAY CAUSING SIGNIFICANT FORENSIC DISADVANTAGE.

The Essential Pre-Conditions for Informing The Jury

1. The proceedings are criminal proceedings *in which there is a jury* – Evidence Act 1995 (NSW) s.165B(1)

2. *A party must apply* for the direction concerning significant forensic disadvantage because of the consequences of delay – Evidence Act 1995 (NSW) s.165B(2).

3. The court *must be satisfied* that the party *has suffered* a significant forensic disadvantage *because of the consequences* of delay – Evidence Act s.165B(2).

4. The court need not comply with the requirement to inform the jury if there are good reasons for not doing so – Evidence Act 19995 (NSW) s.165B(3).

Comment on the Essential Pre-Conditions

The section applies to all criminal proceedings, and not merely sexual assault proceedings.

Unlike the preceding common law, there is only a requirement to "inform" the jury of certain things, as oppose to "direct" or "warn".

The section only applies in a trial in which there is a jury. The section fails to capture Judge alone trials, or summary proceedings. In those cases, presumably the former common law as outlined in the line of authority stemming from Longman v R [1989] HCA 60, (1989) 168 CLR 427 applies.

What is "Delay"?

Delay includes delay between the alleged offence and it being reported – Evidence Act 1995 (NSW) s.165B (6)(a)

What Is "Significant Forensic Disadvantage"?

s.165B(7) states that factors that *may* be regarded as establishing significant forensic disadvantage include, but are not limited to:

(a) the fact that any potential witnesses have died or are not able to be located;

(b) the fact that any potential evidence has been lost or is otherwise unavailable.

s.165B(6)(b) states that significant forensic disadvantage is not to be regarded as having been established by the mere existence of a delay.

The Essential Content of the Information

See generally Evidence Act 1995 (NSW) s.165B(4)

The trial judge *may* inform the jury of:

(i) the nature of the significant forensic disadvantage, and

(ii) the need to take that disadvantage into account

No particular form of words is required.

The trial judge need not comply with the above requirements if satisfied that there is good reason for not doing so – see Evidence Act 1995 (NSW) s.165B(3).

The Essential Limitations of the Information

See generally Evidence Act 1995 (NSW) s.165B(4)

The trial judge must not suggest in any way that it would be dangerous or unsafe to convict solely because of the delay or the forensic disadvantage except in accordance with the section.

At What Stage is The Information Given?

At the time of writing (August 2010) there are no decided cases from the NSWCCA on this provision. However, using the Longman authorities as a guide, the only obviously appropriate time is at the time of the summing up.

The Statutory Provisions

Section 165B of the Evidence Act 1995 (NSW) is set out below for the convenience of the reader:

> **165B Delay in prosecution**
>
> (1) This section applies in a criminal proceeding in which there is a jury.
>
> (2) If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.
>
> (3) The judge need not comply with subsection (2) if there are good reasons for not doing so.
>
> (4) It is not necessary that a particular form of words be used in informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account, but the judge must not in any way suggest to the jury that it would be dangerous or unsafe to convict the defendant solely because of the delay or the forensic disadvantage suffered because of the consequences of the delay.
>
> (5) The judge must not warn or inform the jury about any forensic disadvantage the defendant may have suffered because of delay except in accordance with this section, but this section does not affect any other power of the judge to give any warning to, or to inform, the jury.
>
> (6) For the purposes of this section:
> (a) delay includes delay between the alleged offence and its being reported, and
> (b) significant forensic disadvantage is not to be regarded as being established by the mere existence of a delay.
>
> (7) For the purposes of this section, the factors that may be regarded as establishing a "significant forensic disadvantage" include, but are not limited to, the following:
> (a) the fact that any potential witnesses have died or are not able to be located,
> (b) the fact that any potential evidence has been lost or is otherwise unavailable.

The Case Law

At the time of writing (August 2010), the NSWCCA had not yet considered a case involving the new statutory provision.

What Happened to the "Longman Direction"?

Section 165B of the Evidence Act (1995) commenced operation on 1 January 2009. This section significantly alters what was known as the "Longman direction" in the following respects:

1. The onus is now on a party to the proceedings to seek the direction (the trial judge has no obligation to inform the jury of relevant matters if the evidence would otherwise make it appropriate to do so in the absence of such an application).

2. Significant forensic disadvantage is no longer presumed, rather the court must be "satisfied" of its existence – s.165B(2).

3. The trial judge is now prohibited from warning or suggesting in any way the jury (except in accordance with the section) that it would be "dangerous to convict" or "unsafe to convict" as a result of the delay or significant forensic disadvantage – see s.165B(4). See also s.165A(1)(d) of the Evidence Act 1995 (NSW) concerning child complainants, and s.294AA(2) of the Criminal Procedure Act 1986 (NSW) concerning uncorroborated complainants – in these provisions warnings to the effect that it is "dangerous to convict" are also prohibited.

4. What is said by the trial judge no longer has the character of a "warning", rather the trial judge now merely "informs" the jury of certain matters, and the need to take them into account.

5. The emphasis is now on the significance of the forensic disadvantage and not on the significant period of time constituting the delay.

The above changes are very significant, and fundamentally alter the character of what was the "Longman direction". At the time of writing (August 2010) the NSWCCA had yet to consider a case involving the new legislative provision. It is the author's humble opinion that to refer to the issues and requirements dealt in s.165B of the Evidence Act as (possibly) giving rise to the need for a "Longman direction" is to invite error, as the essential features of the statutory scheme fundamentally alter, and in parts completely obliterate, many of the essential features of the former "Longman direction".

Whilst the former line of authority stemming from Longman may be of assistance to a limited degree in the subsequent interpretation of the new legislative provisions, it is well arguable that the "Longman direction" (at least as we once knew it) is now dead.

Practitioners are advised that with respect to proceedings commencing (i.e. charged – see TJ v R [2009] NSWCCA 257 at [21]-[22]) on or after 1 January 2009, you should "seek a direction pursuant to section 165B of the Evidence Act concerning delay causing significant forensic disadvantage." This at least draws the trial judge's attention to the correct provisions, and assists in avoiding error by wrongly deflecting attention to the Longman line of authority with its numerous (now) contradictory and prohibited features. Stick to the language of the new statutory provision. It is anticipated that the appellate courts will likely do the same as the case law develops.

Further Reading

As stated above, the line of authority stemming from Longman may be of limited assistance in interpreting some features of the new statutory provision. The Longman line of authority has had a very tortured and controversial history generating considerable case law across many state jurisdictions and in the High Court of Australia. Some (but not all) of the main cases in the line of authority are listed below for the information of practitioners who may seek some level of assistance in the interpretation of the new statutory provision. Practitioners reading the following cases should carefully bear in mind the sharp differences between the new statutory provision and the former Longman direction as discussed above under the heading "What Happened to the Longman Direction?"

Longman v The Queen [1989] HCA 60, (1989) 168 CLR 79
R v Johnston (1998) 45 NSWLR 312
Crampton v The Queen [2000] HCA 60, (2000) 206 CLR 161, (2000) 176 ALR 369, (2000) ALJR 133
Doggett v R [2001] HCA 46, (2001) 208 CLR 343, (2001) 182 ALR 1, (2001) 75 ALJR 1290

R v BWT [2002] NSWCCA 60, (2002) 54 NSWLR 241, (2002) 129 A Crim R 153

13. CONTEXT EVIDENCE

Essential Pre-Conditions for the Direction

Evidence of other acts has been admitted as context evidence only (and not as tendency or coincidence).

Note that the term "uncharged acts" now meets with judicial disapproval – see in particular Qualtieri v R [2006] NSWCCA 95, (2006) 171 A Crim R 463 at [122].

Note also that the term "relationship evidence" now meets with judicial disapproval – see in particular HML v R [2008] HCA 16, (2008) 245 ALR 204.

The Essential Content of the Direction

The trial judge must:

1. Inform the jury of the purpose for which the evidence was admitted, and
2. Warn the jury not to use the evidence for an impermissible purpose (i.e. tendency reasoning).

At What Stage is the Direction Given?

At the time the evidence is given, and again during the trial judge's summing up (see DJV v R [2008] NSWCCA 272 at [17]).

The Statutory Provisions

s. 136 of the Evidence Act 1995 (NSW) permits the court to limit the use to be made of evidence.

s.95 of the Evidence Act 1995 (NSW) prohibits evidence admitted for another purpose being used to prove tendency or coincidence.

The Case Law

DJV v R [2008] NSWCCA 272

McClellan CJ at CL (Hidden and Fullerton JJ concurring):

> "[17] The difficulties faced by a court when considering the admissibility of evidence which demonstrates a tendency but where the Crown disavows the tender for that purpose have been discussed in relation to the *Evidence Act* on a number of occasions. I considered them in *Qualtieri* where I said at ([80] and [82]):
>
> > "80 To my mind it is essential in any trial where the Crown seeks to tender evidence which may suggest prior illegal acts by the accused, especially where the charges relate to alleged sexual acts, that a number of steps are followed. Although the circumstances of the particular trial may require some modification the relevant steps will generally be –

- Identification of the evidence which the Crown seeks to tender and the purpose of its tender.

- If the Crown asserts that the evidence is evidence of a tendency on the part of the accused the admissibility of that evidence must be assessed having regard to s 97 and s 101 of the *Evidence Act* (see *R v Fletcher* [2005] NSWCCA 338). Ireland J also provides an analysis of the relevant provisions of the *Evidence Act* in *R v AH* [(1997) 42 NSWLR 702] at 709.

- If the evidence is tendered merely to provide context to the charges which have been laid, it is first necessary to consider whether any issue has been raised in the trial which makes that evidence relevant (see *R v ATM* [2000] NSWCCA 475 at [72]). In relation to crimes of a sexual nature, particularly involving children, it may be anticipated that lack of complaint or surprise by the complainant may be an issue at the trial. If it is, it will nevertheless fall upon the trial judge to determine whether the proffered evidence should be admitted having regard to s 135 and s 137. Because the evidence will inevitably be prejudicial, great care must be exercised at this point in the trial.

- If admitted, the trial judge must carefully direct the jury both at the time at which the evidence is given and in the summing up of the confined use they may make of the evidence. They should be told in clear terms that the evidence has been admitted to provide background to the alleged relationship between the complainant and the accused so that the evidence of the complainant and his/her response to the alleged acts of the accused, can be understood and his/her evidence evaluated with a complete understanding of that alleged relationship. The jury must be told that they cannot use the evidence as tendency evidence."

"[18] I would make one change to this summary. In the third dot point it would have been more appropriate to refer to "whether there is an issue in the trial" allowing for the possibility of an issue not yet "raised" emerging at a later point in the trial process. I continued:

> "82 In the present case, the evidence of which complaint is now made was not the subject of objection at the trial. Perhaps it should have been. At the very least counsel and his Honour should have clearly identified the basis of the tender which, so it now seems, was confined to evidence establishing the nature of the relationship. That evidence of the relationship was relevant to the jury is made plain by defence counsel's criticism of the complainant's evidence in her address to the jury where counsel emphasised the lack of evidence of the complainant reporting the appellant's conduct to her mother or any other responsible adult. However, whether evidence of other sexual activity was necessary or relevant to explain this matter or merely the explanation that her lack of complaint was motivated by fear of the consequences need not be determined. I am not entirely comfortable with the proposition that in order to explain a lack of complaint, evidence of other sexual activity will necessarily be relevant or that its probative value going to the issue of lack of complaint, outweighs

> the obvious prejudicial value. These matters need not be resolved in this case although they may require attention in other matters when evidence of this character is sought to be tendered."

BRS v The Queen [1997] HCA 47, (1997) 191 CLR 275, (1997) 148 ALR 101, (1997) ALJR 1512.

Gaudron J (at CLR 301):

> "It is well settled that where evidence is admissible for one purpose but is inadmissible for another, the trial judge "should direct the jury that they must not use the evidence for the purpose for which it is inadmissible ... [if] the use of the evidence for that purpose would be adverse to the accused."[42] Certainly, a direction of that kind must be given whenever necessary to avoid a perceptible risk of injustice[43]."

Kirby J (at CLR 326-327):

> *"Differentiated directions on admitted evidence.* It is not uncommon for evidence to be admissible for particular purposes in a criminal trial but inadmissible for others. This is a problem "well known to the law"[108]. The problem which is then presented to a judge, conducting a trial with a jury, is not an easy one. Rather than exclude the evidence, the practical resolution of the problem is achieved by requiring the trial judge to instruct the jury concerning the purposes for which the evidence may, and may not, be used. If it were not so, serious risks of injustice could arise. This was recognised by this Court in *Donnini v The Queen*[109]and in *B v The Queen*[110]. "
>
> "The basis in legal policy for judicial directions to juries on the differential use of evidence admitted in a trial is the judge's obligation to assist the jury in the performance of their task. Without assistance, there could be a risk that a jury will act upon prejudice towards, or revulsion against, the accused[111]. They might fall into the trap of propensity* reasoning, i.e. concluding that because the accused did another act, he or she must be guilty of the acts charged[112]. They might divert their attention from considering whether the prosecution has proved the crimes charged, as distinct from different acts which are not before the jury for trial."
>
> "The judge should not invite the jury to act irrationally for such invitations will be ignored[113]. In a limited number of cases, propensity* reasoning will be permitted[114]. But otherwise, the judge must assist the jury in the limited use to which the evidence may be put since the jury, uninstructed, are not likely to be aware of such considerations and of the need for particular care[115]."

*The above decision dealt with a trial conducted prior to the introduction of the Evidence Act 1995 (NSW). The word "propensity", in the judgment of Kirby J as extracted above, should therefore be read as "tendency" in the post Evidence Act context. This case has been included to assist in a better conceptual understanding of evidence admitted for a limited purpose – see now Evidence Act s.136.

Further Reading

Evidence Act ss. 95, 97, 98, 101, 136
JDK v R [2009] NSWCCA 76
DJV v R [2008] NSWCCA 272

HML v R [2008] HCA 16, (2008) 245 ALR 204
Qualtieri v R [2006] NSWCCA 95, (2006) 171 A Crim R 463
BRS v The Queen [1997] HCA 47, (1997) 191 CLR 275, (1997) 148 ALR 101, (1997) ALJR 1512.
Judicial Officers' Bulletin; December 2008 Vol. 20 Number 11 (available on JIRS) for a summary of DJV v R [2008] NSWCCA 272, (discussed under the name Name Withheld [2008] NSWCCA 272 due to a pending re-trial at the time of publication).

14. TENDENCY AND COINCIDENCE

What is Tendency Evidence?

Tendency evidence is evidence of the character, reputation or conduct of a person or a tendency that the person has or had to act in a particular way or have a particular state of mind – see Evidence Act 1995 (NSW) s.97.

What is Coincidence Evidence?

Coincidence evidence is evidence of two or more events admitted to prove that a person did a particular act or had a particular state of mind o the basis that having regard to the similarities in the events or circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally – see Evidence Act 1995 (NSW) s.98.

When is Tendency or Coincidence Evidence Admissible?

In order for tendency or coincidence evidence to be admissible the following requirements must be met:

1. There must be reasonable notice in writing

   See s.97(1)(a) of the Evidence Act for tendency evidence
   See s.98(1)(a) of the Evidence Act for coincidence evidence

2. The evidence must have significant probative value

   See s.97(1)(b) of the Evidence Act for tendency evidence
   See s.98(1)(b) of the Evidence Act for coincidence evidence

3. The probative value of the evidence must substantially outweigh any prejudicial effect- see s.101 of the Evidence Act. Note that there are exceptions for prosecution evidence led to explain or contradict tendency or coincidence evidence led by the defence.

4. Note there are exceptions in the legislation for tendency or coincidence evidence led to explain or contradict the opposing party's tendency or coincidence evidence.

The standard of proof for tendency evidence to be admitted in sexual assault cases is proof beyond a reasonable doubt – DJV v R [2008] NSWCCA 272 at [30]

Note that notices must comply with the any regulations – see s.99 of the Evidence Act.

Note that the Regulation 5 of the Evidence Regulation 2005 (NSW) specifies the requirements for written notices.

Note that s.100 of the Evidence Act permits the court to dispense with notice requirements.

What Is The Essential Content of Directions Concerning Tendency in A Sexual Assault Matter?

There is no single definitive statement or summary in the case law, texts, or commentaries in relation to this issue. The author suggests the following essential features:

The jury must be directed that:

1. If they are satisfied beyond reasonable doubt of the other acts (tendency evidence), they can use that as evidence of guilt of the accused in respect of the count or counts to which the tendency evidence relates. If they are not so satisfied, then the evidence cannot be used in that way.

2. They must not use the other acts (tendency evidence) in substitution for proof beyond reasonable doubt of the count or counts charged [see Evidence Act s.95, R v Lumsden [2003] NSWCCA 83 at [54], R v Lewis [2003] NSWCCA 180 at [19], [45]). That is, they should not reason that simply because the accused is guilty of the acts constituting the tendency evidence, the accused is therefore guilty of the count or counts charged.

3. It may be helpful to identify what evidence is admissible in relation to each individual count.

4. In cases involving context and tendency evidence, the judge should identify with precision the purpose (or purposes) for which each part of the evidence has been led.

At What Stage Are the Directions Given?

At the time the evidence is given, and again during the trial judge's summing up (see DJV v R [2008] NSWCCA 272 at [17]).

The Statutory Provisions

See Evidence Act 1995 (NSW) ss.95 – 101 inclusive

The Case Law

There is a significant body of case law on these issues. It is suggested that practitioners read the cases listed under the heading "Further Reading" as minimum starting point to gaining an understanding of this area of the law.

Further Reading

DJV v R [2008] NSWCCA 272
Qualtieri v R [2006] NSWCCA 95, (2006) 171 A Crim R 463
R v Fletcher [2005] NSWCCA 338, (2005) 165 A Crim R 308
R v Lumsden [2003] NSWCCA 83
R v Lewis [2003] NSWCCA 180
R v AH (1997) 42 NSWLR 702
R v ATM [2000] NSWCCA 475
R v AN [2000] NSWCCA 372, (2000) 117 A Crim R 176

I warmly welcome any feedback designed to result in improvements to this paper, as it may be updated and republished in the future. My various contact details are on the front cover.

Should you wish to ask any questions about the content of this paper, please do not hesitate to contact me. I am best caught on my mobile number - **0408 277 374**. Please respect the "no fly zone" on my phone between 9.30am – 10.00am on a court day, as I am just about to go into court too ☺. I can also answer questions forwarded by email to my chambers address:

dark.menace@forbeschambers.com.au

I will almost always respond within 24 hours.

You will notice that this paper has a number of hyperlinks to the relevant legislation and case law. If you would like an electronic copy in order to access these hyperlinks, please drop me a short note via email and I will send an electronic copy of this paper back to you ASAP.

I have endeavoured to state the law of New South Wales as at 23 August 2010.

Mark Dennis
FORBES CHAMBERS