Some Common Criminal Trial Directions in New South Wales

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CONTENTS PAGE

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I have endeavoured to state the law of New South Wales as at 12 November 2014.

INTRODUCTORY REMARKS

The topic of this paper is one of wide ambit. The paper does not set out to provide an exhaustive dissertation of the common trial directions that are referred to. Rather, the purpose of the paper is to provide a starting point to those who are new to trial advocacy, as well as providing a quick and convenient form of "refresher course" for more experienced advocates.

No consideration of trial directions in the state of New South Wales would be complete without reference the Criminal Trial Bench Book published by the NSW Judicial Commission. The Bench Book can be accessed for free online at the following URL:

http://www.judcom.nsw.gov.au/publications/benchbks/criminal

It is suggested that trial advocates should attend trial with an internet connection readily accessible at the Bar table in order to access both this and other online publications. This paper has drawn significantly (but not exclusively) on that publication for research purposes. Paragraphs in the Bench Book as cited in this paper are current as at 12 November 2014.

ACCUSED – FAILURE TO CALL OR GIVE EVIDENCE - THE *AZZOPARDI* DIRECTION

The ***Azzopardi direction*** takes its name from the decision of the High Court of Australia in *Azzopardi v The Queen* [2001] HCA 25, (2001) 205 CLR 50.

The essence of the direction is that the jury cannot draw an adverse inference against the accused in the event that the accused fails to give or call evidence at their trial, nor can it be used to cure any perceived deficiencies in the Crown case.

The suggested direction is set out in para [2-1010] of the Bench Book. It is to a significant degree derived from the joint judgment of Gaudron, Gummow, Kirby and Hayne JJ at [51], where their Honours stated:

> *"In the course of argument of the present matters it was suggested that if a judge said nothing to the jury about the fact that an accused had not given evidence, the jury may use the accused's silence in court to his or her detriment.*

Plainly that is so. It follows that if an accused does not give evidence at trial it will almost always be desirable for the judge to warn the jury that the accused's silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt. It by no means follows, however, that the judge should go on to comment on the way in which the jury might use the fact that the accused did not give evidence."

Further Reading:

Section 20 of the *Evidence Act 1995 (NSW).*
Azzopardi v The Queen [2001] HCA 25, 205 CLR 50.

ACCUSED - SILENCE WHEN QUESTIONED BY AN INVESTIGATING OFFICIAL IN THE ABSENCE OF A LEGAL REPRESENTATIVE

The ***Reeves direction*** at common law takes its name from the decision of the NSWCCA decision of *R v Reeves* (1992) 29 NSWLR 109. Section 89 of the *Evidence Act 1995 (NSW)* has now put the common law position on a statutory footing. Practitioners will commonly ask for a direction pursuant to section 89; however the direction is still occasionally referred to by its common law name.

The essence of the direction is that no unfavourable inference can be drawn against the accused for exercising his or her right to silence. The direction should be given at the time the evidence is led. It may be repeated in the summing up, though this is not essential.

The suggested direction is set out at para [4-110] of the Bench Book.

Further Reading:

Section 89 of the *Evidence Act 1995 (NSW)*
Sanchez v R [2009] NSWCCA 171; (2009) 196 A Crim R 472. – see especially at [58].
R v Reeves (1992) 29 NSWLR 109 – see especially at 115E.
Petty & Maiden v The Queen [1991] HCA 34; (2009) 173 CLR 95 – see especially at 99 and 101.
R v Anderson [2002] NSWCCA 141 at [30].
R v Coe [2002] NSWCCA 385 at [42]-[46].
R v Merlino [2004] NSWCCA 104 at [66]-[80].

ACCUSED – SILENCE WHEN QUESTIONED BY AN INVESTIGATING OFFICAL IN THE PRESENCE OF A LEGAL REPRESENTATIVE REGARDING A SERIOUS INDICTABLE OFFENCE

This issue is dealt with by section 89A of the *Evidence Act 1995 (NSW)* which was introduced by amending legislation, namely the *Evidence Amendment (Evidence of Silence) Act 2013 (NSW)*. No standard direction has been formulated in NSW at

the time of writing (November 2014). Should you strike this issue it is important to be aware that this legislation has significant similarities to certain provisions in UK law and guidance can be obtained from that source. The legislation appears to be based, to a significant extent, on the *Criminal Justice and Public Order Act 1994 (UK),* and in particular section 34.

The UK "Crown Bench Book" refers to the essential features of a trial direction in England and Wales concerning this issue. The judgment of Lord Rix in *R v Petkar & Farquhar* [2003] EWCA (Crim) 2688 at [51] is cited as summarising the essential components of any direction in the following terms:

> *"[51] In the light of the current model JSB direction, it might be said that, in addition to or else in amplification or clarification of the statutory conditions emphasised in Argent and the five essentials emphasised in Cowan and Condron, the following matters should be set before a jury in a well-crafted and careful direction:*
>
> > *(i) The facts which the accused failed to mention but which are relied on in his defence should be identified: see para 2 of the model direction and Chenia at paras 87/89, where Clarke LJ said that this requirement must be approached in a common-sense way.*
> > *(ii) The inferences (or conclusions, as they are called in the direction) which it is suggested might be drawn from failure to mention such facts should be identified, to the extent that they may go beyond the standard inference of late fabrication: see para 2 of the model direction.*
> > *(iii) The jury should be told that, if an inference is drawn, they should not convict "wholly or mainly on the strength of it": see para 2 of the model direction and Murray v. United Kingdom 22 EHRR 29 at 60, para 47. The first of those alternatives ("wholly") is a clear way of putting the need for the prosecution to be able to prove a case to answer, otherwise than by means of any inference drawn. The second alternative ("or mainly") buttresses that need.*
> > *(iv) The jury should be told that an inference should be drawn "only if you think it is a fair and proper conclusion": para 3 of the model direction. This is not stated in the statute, but is perhaps inherent in that part of it emphasised in Lord Bingham's sixth condition. In R v. McGarry [1999] 1 Cr App R 377 at 383G this court glossed that condition as requiring a jury "not arbitrarily to draw adverse inferences".*
> > *(v) An inference should be drawn "only if...the only sensible explanation for his failure" is that he had no answer or none that would stand up to scrutiny: para 3 of the model direction, reflecting Lord Taylor's fifth essential in Cowan. In other words the inference canvassed should only be drawn if there is no other sensible explanation for the failure. That is analogous to the essence of a direction on lies.*
> > *(vi) An inference should only be drawn if, apart from the defendant's failure to mention facts later relied on in his defence, the prosecution case is "so strong that it clearly calls for an answer by him": para 3 of the model direction. This is a striking way to put the need, reflected in Lord Taylor's*

third and fourth essentials in Cowan, for a case to answer. A note, note 16, to the JSB guideline explains that it reflects "a cautious approach".
(vii) The jury should be reminded of the evidence on the basis of which the jury are invited not to draw any conclusion from the defendant's silence: see para 4 of the model direction and R v. Gill [2001] 1 Cr App R 11 at paras 30/31. This goes with point (iv) above, because it is only after a jury has considered the defendant's explanation for his failure that they can conclude that there is no other sensible explanation for it.
(viii) A special direction should be given where the explanation for silence of which evidence has been given is that the defendant was advised by his solicitor to remain silent: see para 5 of the model direction.

A number of people have written very helpful papers on the topic that can be found on the Evidence page of www.CriminalCLE.net.au - see in particular the papers referred to immediately below under the heading "Further Reading". Also included in the reading list are two items available on JIRS as well as the Crown Court Bench Book (UK).

Further Reading:

Section 89A of the *Evidence Act 1995 (NSW)*
"The Right to Silence - How it Operates in England and Wales" Colin Wells (2013)
"Right To Silence" Troy Edwards (2013)
"The Attack On The Right To Silence, An English Method In The Antipodes - Should We Worry?" Daniel Smyth (2013)
"The Attack On The Right To Silence" Phillip Boulten SC (2013)
"NSW Right To Silence Reforms." Associate Professor David Hamer (2013)
"Address To NSW Labor Lawyers Re The Proposed Amendment To The Right To Silence." Samuel Pararajasingham (2012)
"The Modified Right To Silence: The Experience From England and Wales." Jake Harris (2012).
See also on JIRS - Special Bulletin 31 - August 2013
See also on JIRS - "How Will The New Cognate Legislation Affect The Conduct Of Trials in NSW?" The Honourable Justice Megan Latham, "Judicial Officers' Bulletin" August 2013 Volume 25, Number 7.
See also - Crown Court Bench Book (UK) - available at this link - http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf

ACCUSED – PARTIAL SILENCE - SELECTIVE ANSWERING OF QUESTIONS.

Section 89 (1)(a) of the *Evidence Act 1995 (NSW)* prohibits (subject to section 89A) the drawing of an inference against an accused for failing to answer *one or more questions* or (b) respond to a representation.

A direction should be sought in terms similar to that for a general exercising of the right to silence, but adapted to the facts of the particular case.

Further Reading:

Section 89 of the *Evidence Act 1995 (NSW)*
For NSW pre-Evidence Act common law decisions on this issue see *R v Towers* NSWCCA 7/6/93 unrep BC9303842 and *R v Tolmie* NSWCCA 2/8/93 unrep.

ACCUSED – RELIANCE ON AN ERISP INTERVIEW

Where the accused relies upon an ERISP interview or other out of court statement made by the accused, a trial Judge has a discretion to direct the jury that exculpatory statements in any such interview could have less weight than admissions (if any) at interview and less weight than sworn evidence.

Further Reading:

Mule v The Queen [2005] HCA 49; (2005) 221 ALR 85; (2005) ALJR 1573.

ADMISSIONS – GENERALLY

Section 165 of the *Evidence Act 1995 (NSW)* provides a non-exhaustive list of types of evidence that may be unreliable such as to warrant the giving of a warning and / or comment to a jury about that evidence.

Subsection 165(1)(a) refers to admissions. "Admissions" are defined in the *Evidence Act Dictionary*. The subsection applies to all admissions whether or not made to investigating officials - see *R v Fowler* [2003] NSWCCA 321, 151 A Crim R 166 at [183].

Admissions are often admitted in evidence when made to non-investigating third parties, when made to police outside the course of official questioning, or when it is held that there is a "reasonable excuse" pursuant to section 281 of the *Criminal Procedure Act 1986 (NSW).* IN such cases, defence counsel should consider seeking a warning pursuant to section 165.

Section 85 of the Evidence Act, 1995 (NSW) prohibits admissions being led as evidence unless the circumstances in which the admission "were such as to make it unlikely that the truth of the admission was adversely affected." This reduces the scope for a warning pursuant to section 165.

In *R v Fowler* [2003] NSWCCA 321, 151 A Crim R 166 at [187]-[188], the NSWCCA held that the nature of the warning would depend on the facts of the case, and that where the attack on the admission was to dispute the honesty of the witness, a warning would not normally be required as the court has no particular advantage over a lay jury.

Also, see below for a general discussion on s.165 under the heading "Unreliable Evidence - Generally"

Further Reading:

Evidence Act 1995 (NSW) s.165
R v Fowler [2003] NSWCCA 321, 151 A Crim R 166

ADMISSIONS - ORAL EVIDENCE OF UNSIGNED / UNRECORDED ADMISSIONS TO POLICE - THE *McKINNEY* DIRECTION.

A need for a warning concerning admissions to police will arise when admissions are made in a number of different circumstances. These include (as examples):

- where there is a reasonable excuse for not recording the admissions pursuant to section 281 of the *Criminal Procedure Act 1986 (NSW).*
- Where the admission is made otherwise than in the course of official questioning.

The ***McKinney direction*** takes its name from the decision of the High Court of Australia in *McKinney & Judge v The Queen* [1991] HCA 6, (1991) 171 CLR 468. It evolved as a judicial warning concerning alleged fabrication of confessions by police in the days before ERISP machines. It is a direction that still has some application where fabrication of the confession is alleged.

Section 165(1)(f) of the *Evidence Act* refers to *"oral evidence of questioning by an investigating official of a defendant that is questioning recorded in writing that has not been signed, or otherwise acknowledged in writing, by the defendant."*

A *McKinney* direction will sometimes need to be adapted to the circumstances of the case in a post ERISP world. However, the components of the common law warning include:

> (i) that police are trained / professional witnesses,
> (ii) that it can be difficult to decide whether such a witness is telling the truth.
> (iii) that it is comparatively more difficult for an accused person held in custody and without access to legal advice to have evidence available to support the challenge to the police evidence, than it is for police to fabricate such evidence.

It is the author's view that the part of the *McKinney* direction dealing with police as trained / professional witnesses and it being difficult to decide when such a witness is telling the truth, are matters that can be invoked whenever it is the case that the honesty or truthfulness of the evidence of a police officer is in issue at trial.

The suggested direction in the Bench Book can be found at [2-130].

Further Reading:

Section 165 of the *Evidence Act 1995 (NSW).*
McKinney & Judge v The Queen [1991] HCA 6, (1991) 171 CLR 468.

ALIBI

Section 150(8) of the Criminal Procedure Act 1986 (NSW) states that "evidence in support of an alibi means evidence tending to show that, by reason of the presence of the accused person at a particular place or in a particular area at a particular time, the accused person was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission."

The two leading cases on trial directions concerning alibi, and their relevant purple passages, are as follows:

R v Amyouni NSWCCA 18/2/88 unrep. BC8802201

Roden J at 5-6 (Street CJ, Slattery CJ at CL concurring):

> *"It seems to me that in every case where that situation is met, there are three possibilities, all three of which should be explained to the jury."*
>
> *"One is that they accept the alibi, in which event they would be obliged to acquit The second is that they reject the alibi, in which case they would not necessarily convict but must assess the evidence as a whole. The third possibility is that although they do not accept the alibi, the also do not reject it in the sense that they regard it as something which could reasonably be true. In that event also, in such a case, they must acquit."*

R v Kanaan (2005) 157 A Crim R 238; [2005] NSWCCA 385

This decision of the NSWCCA also discussed appropriate directions for alibi evidence.

Hunt AJA (Adams and Latham JJ concurring):

> *"[134] It was common ground that the Crown had to establish beyond reasonable doubt that the appellant was present at the crime scene. The appellant complains, however, that at no time did the judge ever in terms direct the jury that, in order to convict the appellant, they had to reject the evidence of alibi beyond reasonable doubt."*
>
> *"[135]…. An alibi asserts that, at the relevant time, the accused was not at X (the scene of the crime) but at Y (somewhere else, according to the alibi evidence). The issue which it raises is whether there is a reasonable possibility that the accused was at Y, rather than X, at that time. To prove beyond reasonable doubt that the accused was at X, the Crown must remove*

or eliminate that reasonable possibility: Regina v Youssef (1990) 50 A Crim R 1 at 2-3. An appropriate direction to the jury would be:

> *The Crown must establish beyond reasonable doubt that the accused was at X at the relevant time. The Crown cannot do so if there is any reasonable possibility that he was at Y at that time, as asserted by the alibi evidence. The Crown must therefore remove or eliminate any reasonable possibility that the accused was at Y at the relevant time, and also persuade you, on the evidence on which the Crown relies, that beyond reasonable doubt he was at X at that time."*

The suggested direction is set out in the Bench Book at para [6-000] and is intended to reflect what was stated in both *Amyouni* and *Kannan.*

Further Reading:

Criminal Procedure Act 1986 (NSW) section 150
R v Amyouni NSWCCA 18/2/88 unrep. BC8802201
R v Kanaan [2005] NSWCCA 285, (2005) 157 A Crim R 238.
"Identification, Alibi and The Electronic Snail Trail" (2009) Mark Dennis - see Defences page at www.CriminalCLE.net.au

ALTERNATIVE VERDICTS

Where an alternative count is in issue on the indictment, or available and is in issue as either a statutory or common law alternative, the jury must be directed that they must reach a unanimous verdict on the principal count before they can come to consider the alternative count. They must also be warned that they cannot bring back a verdict of guilty on an alternative count as a means of compromise in their consideration of the principal count.

The suggested direction is set out in the Bench Book at [2-120].

Further Reading:

Criminal Procedure Act 1986 (NSW) sections 23(3) and 162.
James v The Queen [2014] HCA 6; (2014) ALJR 427 – see especially at [14], [34], and [38].
*Stanton v The Qu*een [2003] HCA 29; (2003) 198 ALR 41; (2003) 77 ALJR 1151.
R v Pureau (1990) 19 NSWLR 372 – see especially at 375-377.
R v Cameron [1983] 2 NSWLR 66 – see especially at 77.

AUDIO VISUAL LINK – EVIDENCE VIA AVL

There is no statutory requirement for any direction or warning under NSW law for evidence taken in this way.

It is suggested that trial counsel ask for direction similar to those sought for evidence via CCTV in sexual assault trials - namely, that taking the evidence in

this way is a standard procedure (or perhaps "not an unusual procedure"), the evidence should not be given any greater or lesser weight, and no adverse inference be drawn against the accused because the evidence was taken in this way.

Note that evidence taken in this way in relation to Commonwealth terrorism offences attracts specific statutory provisions requiring the Judge to give trial directions to the effect that the evidence is to be given the same weight as if it were given in the courtroom - see section 15YX of the *Crimes Act 1914 (Cth).*

Further Reading

R v Ngo [2003] NSWCCA 82, (2003) 57 NSWLR 55
R v Wilkie [2005] NSWSC 794 - see especially Howie J at [72]-[73].
Bench Book [1-360]-[1-385] and in particular [1-382] re trial directions.

BLACK DIRECTION

The ***Black direction*** takes its name for the decision of the High Court of Australia in *Black v The Queen* [1993] HCA 71; (1993) 179 CLR 44.

The occasion for such a direction arises in the event that the jury indicates that they are unable to reach a unanimous verdict. The essence of the direction is to:

(i) ensure that the jury is not put under any pressure to reach a verdict;
(ii) encourage jurors to consider calmly, listen to, and weigh the opinions of their fellow jurors;
(iii) indicate that experience has shown that when given more time juries are often able to reach a unanimous verdict.

The relevant "purple passage" in *Black v The Queen* can be found at page 51 (para [15]) of the CLR report, wherein Mason CJ, Brennan, Dawson and McHugh JJ formulated a model direction in the following terms:

> *"With these comments in mind we consider that, should the occasion arise, a trial judge should give a direction along the following lines:*
>
> > *"Members of the jury,*
> > *I have been told that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors,*

you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.

Each of you has sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom and you are expected to judge the evidence fairly and impartially in that light.

You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong. That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

Experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they may be discharged. So, in the light of what I have already said, I ask you to retire again and see whether you can reach a verdict."

The suggested direction for Commonwealth offences (where majority verdicts are not permitted) is set out in the Bench Book at [8-060]. The suggested direction for State offences (where majority verdicts are permissible) is set out at [8-070].

Further Reading:

Section 56 of the *Jury Act 1977 (NSW).*
Black v The Queen [1993] HCA 71; (1993) 179 CLR 44.
Tangye (1997) 92 A Crim R 545 at 551.
Burrell v R (2009) 196 A Crim R 199 – see especially at [301]-[302].
See also under the heading "Majority Verdicts" below.

BRS DIRECTION - LIMITING THE USE OF THE EVIDENCE

The *BRS* direction takes its name from the High Court of Australia decision in *BRS v The Queen* [1997] HCA 47, (1997) 191 CLR 275.

The *Evidence Act 1995 (NSW*) s.136 permits evidence to be admitted and used for a limited purpose. Similarly, section 95 requires that evidence admitted as tendency or coincidence evidence not be used for any other purpose. It is in such a circumstance that the need for a direction arises. It is common to simply ask for a "direction limiting the use of the evidence that..." rather than referring to the direction as a "*BRS* direction".

A common practical example would be where the Crown leads context evidence. A trial Judge may be asked to direct the jury not to use the evidence as evidence of tendency - see for example the decisions of *R v Hagarty* [2004] NSWCCA 89, (2004) 145 A Crim R 138 at [23], and *Qualtieri v R* [2006] NSWCCA 95, (2006) 141 A Crim R 463 at [74]-[81].

Further Reading:

BRS v The Queen [1997] HCA 47, (1997) 191 CLR 275.
R v Hagarty [2004] NSWCCA 89, (2004) 145 A Crim R 138 - see especially at [23]
Qualtieri v R [2006] NSWCCA 95, (2006) 141 A Crim R 463 at especially at [74]-[81].

CHARACTER - PRIOR GOOD CHARACTER OF THE ACCUSED

Where prior good character is not contested by the Crown the jury should be directed that such evidence can be taken into account in two ways; firstly in a consideration as to whether the accused is the type of person to commit the offence charged, and secondly as to an assessment of the credibility of the evidence of the accused in denying the offence. Authority for these two aspects of the direction can be found in *R v Murphy* (1985) 4 NSWLR 42 at 54E

The Bench Book sets out suggested trial directions at para [2-370] through to [2-430] inclusive. Note that there are modified directions for when the Crown contests prior good character, and also where prior good character is raised by one co-accused and not by another.

Further Reading:

Evidence Act 1995 (NSW) ss.110-112
Braysich v The Queen [2011] HCA 1, (2011) 243 CLR 434
Melbourne v The Queen [1999] HCA 32, (1999) 198 CLR 1
R v Murphy (1985) 4 NSWLR 42 - see especially at 54E.

CIRCUMSTANTIAL EVIDENCE

Depending upon the nature of the circumstantial evidence, different directions may be given. Where an indispensable intermediate fact needs to be found in order to draw an inference of guilt, that indispensable intermediate fact needs to be found proven beyond a reasonable doubt before the jury can draw an inference of guilt from that indispensable intermediate fact (or "indispensable link in a chain of reasoning").

However, where there is a body of circumstantial evidence, none of which includes an indispensable intermediate fact, then the jury can nonetheless draw an inference of guilty notwithstanding that they are not satisfied beyond reasonable doubt as to an individual piece of circumstantial evidence, but are satisfied beyond reasonable doubt having considered all of the evidence. This form of reasoning has been referred to as "strands in a cable".

The term "indispensable link in a chain of reasoning" comes from the judgment of Dawson J in *Shepherd v The Queen* [1990] HCA 56, (1990) 170 CLR 573 at 579. Similarly, the term "strands in a cable" is attributed to *"Wigmore on Evidence Vol.9*" referred to with approval in the judgment of Dawson J in *Shepherd* also at 579.

Terms such as "indispensable intermediate fact", "links in a chain of reasoning" and "strands in a cable" after often bandied about at trial when a discussion concerning circumstantial evidence arises. It is of considerable assistance to understand what they mean and where they come from. In this regard, a working knowledge of the principles in *Shepherd*, and its correction of misconceptions and misinterpretations of the judgment in *Chamberlain v R (No.2)* [1984] HCA 7, (1984) 153 CLR 521 will be of considerable assistance.

An indispensable intermediate fact is more likely to arise where the incriminating facts relied upon to establish the inference are likely to be few in number (McHugh J in *Shepherd* at 593) . Conversely, where there are more "facts" asserted in order to draw the inference, the less likely it will be that any given "facts'" is an indispensable link in a chain of reasoning. To give a direction of the type regarding indispensable intermediate facts may be misleading or confusing in such a case.

A useful test as to whether a particular piece of evidence constituted an indispensable intermediate fact was formulated by Ipp JA in *R v Zaiter* [2004] NSWCCA 35 wherein his Honour considered that if one particular factual matter was withdrawn from the Crown case, and what was left was "an empty shell" then that evidence is such as to warrant a direction concerning an indispensable intermediate fact. There has been some criticism of such a direction on the grounds that it is ultimately a matter for the jury to determine whether a particular fact is an indispensable intermediate fact / link in the chain - see *Davidson v R* (2009) 75 NSWLR 150 at [8], [14], [18] and *Burrell v R*(2009) 196 A Crim R 199 at [95] and following.

The "indispensable intermediate fact" style of direction (sometimes referred to as a *Shepherd* direction") is set out in the Bench Book at para [2-530].

The more standard form of trial direction for circumstantial evidence is set out in the Bench Book at [2-520].

Further Reading:

Shepherd v The Queen [1990] HCA 56, (1990) 170 CLR 573
Zaiter v R [2004] NSWCCA 35 - see especially Ipp JA at [8]
Davidson v R [2009] NSWCCA 150, (2009) 75 NSWLR 150
Burrell v R [2009] NSWCCA 163, (2009) 196 A Crim R 199

DELAY CAUSING SIGNIFICANT FORENSIC DISADVANTAGE

Section 165B of the *Evidence Act 1995 (NSW)* requires that a trial judge inform a jury as to the nature of any significant forensic disadvantage, and the need to take that disadvantage into account [see in particular s.165B(4)].

An accused must apply for this direction to be given [s.165B(2)].

The court must be satisfied that significant forensic disadvantage has in fact been suffered [s.165B(2)].

The court may refuse to give such a direction if there are good reasons for not giving it [see s.165B(3)].

No particular form of words is required - s.165B(4).

Note that whilst this type of direction most typically arises in trials for matters of child sexual assault, it is not limited to offences of this nature and can be applied to any type of offence, providing the statutory pre-requisites are met.

Authorities on this section include the following:

Jarrett v R [2014] NSWCCCA 140

Basten JA stated at [53]-[54]

> *"[53} The effect of this provision is:*
>
> > *(a) to prohibit the judge from directing the jury "about any forensic disadvantage the defendant may have suffered because of delay" otherwise than in accordance with the section (subs (5));*

(b) there is a duty to warn, but only where the judge is satisfied that the defendant has "suffered a significant forensic disadvantage because of the consequences of delay" (subs (2));

(c) the obligation to warn is subject to a rider where there are "good reasons" for not taking that step (subs (3));

(d) the judge is prohibited from suggesting that it would be dangerous or unsafe to convict "solely because of" the delay or the disadvantage (subs (4));

(e) subject to the last prohibition, no particular form of words need be used (subs (4))."

"[54] Consistently with this scheme, the judge must identify the significant forensic disadvantage and must inform the jury of the nature of that disadvantage; the direction will therefore need to be case specific. In directing the jury of the "need" to take that disadvantage into account, it will usually be expected that a direction would identify, so far as it is not obvious, how the disadvantage may affect the jury's consideration of the evidence. This aspect of any direction will not be straightforward: the usual consequence of delay is the loss of evidence or the loss of opportunity to test evidence; each involves a counterfactual assumption."

Later at [59]-[63] Basten AJ stated:

"[59] To assess the challenge to the trial judge's refusal to give the proposed form of direction, it is desirable to identify how the question should be approached. However, the operation of s.165B should not become encrusted with judicial exegesis of the kind surrounding the "Longman direction", which led to its enactment. Suffice it to say, there are a number of broad considerations which bear upon its application in the present case."

"[60] First, the proper focus of the section is on the disadvantage to the accused; it does not reflect any degree of prejudgment of the reliability of a complainant's evidence with respect to a sexual offence, ..."

"[61] Secondly, the concept of delay is relative and judgmental. Where both complainant and law enforcement authorities have

acted with all reasonable expedition, it is not usually apt to describe any lapse of time as involving "delay". Delay is suggestive of hesitation or indecision of the complainant or inefficiency on the part of authorities. That is not to say it involves blameworthy conduct: quite significant lapses of time may be reasonable in the context of a child who is the victim of sexual assault. Whether that which is not unreasonable constitutes "delay" for the purposes of s.165B will depend upon particular circumstances."

"[62] Thirdly, although various factors may contribute to a delay, where a significant element is misconduct on the part of the accused, any resultant forensic disadvantage may not be characterised as a consequence of delay or, in the alternative, may provide a good reason for a judge not to give a direction, pursuant to the permissible exception in s.165B(3)..."

"[63] Fourthly, if the accused is put on notice of the complaint, any failure to make inquiry or investigation thereafter will not normally constitute a consequence of the delay, but a consequence of the accused's own inaction..."

KSC v R [2012] NSWCCA 179

In this case the appellant asserted that the direction given fell short of a "warning." Note that s.165B(4) uses the word "inform" and not "warn". The appeal was dismissed.

W v R [2014] NSWCCA 110

This matter concerned a judge alone trial, specifically a special hearing under s.21 of the *Mental Health (Forensic Provisions) Act 1990 (NSW),* as the accused was unfit to plead. The appellant contended that as it was a Judge alone trial, and as s.165B only applied to trial by jury [see s.165B(1)], the Judge was required to revert to the common law position and give himself a *Longman* direction by virtue of section 9 of the *Evidence Act.* The submission was rejected (see at [126]-[129]), and it was held that a *Longman* direction is explicitly prohibited by virtue of s.165B(4).

Further Reading:

Evidence Act 1995 (NSW) section 165B
Jarrett v R [2014] NSWCCCA 140
KSC v R [2012] NSWCCA 179
W v R [2014] NSWCCA 110

EXPERT WITNESSES

The essence of the direction is to:

> (i) Inform the jury that experts are permitted to express opinions that are within their area of expertise, but is likely to be outside the knowledge and experience of the average lay person.
> (ii) Inform the jury that such an opinion is very much dependent on the reliability and accuracy of material which the expert used to reach his or her opinion.
> (iii) Inform the jury that they are not bound to act upon the opinion of the expert witness.

The suggested direction is set out in the Bench Book at [2-1110].

FLIGHT

Flight is a form of evidence demonstrating a consciousness of guilt. Be careful in dealing with this issue. You client may well have fled the scene for reasons that are not apparent on the face of the brief. You will need to get careful instructions. Your client may have had some particular reason for flight - for example - they knew they had an outstanding warrant, knew they were in breach of bail, knew that they were wanted for questioning in relation to some other unrelated matter etc. In such circumstances application should be made to exclude the evidence pursuant to *Evidence Act* s.137.

There is no suggested direction set out in the Bench Book. The Bench Book states that the direction concerning lies as consciousness of guilt found at para [2-965] should be adapted to the issue of flight.

Further Reading:

Steer v R [2008] NSWCCA 295, (2008) 191 A Crim R 435
Quinlan v R [2006] NSWCCA 284, (2006) 164 A Crim R 106
R v Cook [2004] NSWCCA 52
R v Adam [1999] NSWCCA 189, (1999) 106 A Crim R 510

LIES

There are two different types of trial direction concerning lies. The first is lies as consciousness of guilt (an *Edwards* direction - taking its name from the High Court of Australia decision in *Edwards v The Queen* ([1993] HCA 63, (1993) 178 CLR 193. The second type of direction is lies going to the credit of the accused only and not to consciousness of guilt. This is sometimes (but certainly not always) referred to as a *Zoneff* direction; taking its name from the decision of the High Court of Australia in *Zoneff v The Queen* [2000] HCA 28, (2000) 200 CLR 234.

The relevant "purple passage" from *Edwards v The Queen* can be found in the joint judgment of Deane, Dawson and Gaudron JJ at CLR at 210-211:

> *"A lie can constitute an admission against interest only if it is concerned with some circumstance or event connected with the offence (i.e. it relates to a material issue) and if it was told by the accused in circumstances in which the explanation for the lie is that he knew that the truth would implicate him in the offence. Thus, in any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest ((31) See M v. R, unreported, Court of Criminal Appeal of South Australia, 18 August 1993, at pp.4-5.). And the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it ((32) See, e.g., Credland v. Knowler (1951) 35 Cr App R 48; Tripodi v. The Queen [1961] HCA 22; (1961) 104 CLR 1, at p.10; Buck (1982) 8 A Crim R 208, at p.214; Reg. v. Preval (1984) 3 NSWLR 647, at pp.650-651; Reg. v. Evans (1985) 38 SASR, at pp.348-349; People v. Showers (1968) 440 P 2d 939, at p.942.) and that it was told because the accused knew that the truth of the matter about which he lied would implicate him in the offence, or, as was said in Reg. v. Lucas (Ruth), because of "a realisation of guilt and a fear of the truth".*
>
> *"Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt ((33) See, e.g., Lonergan v. The Queen (1963) Tas S R 158, at p.160; Broadhurst v. The Queen (1964) AC, at p.457.). A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. The jury should be told that, if they accept that a reason of that kind is the explanation for the lie, they cannot regard it as an admission. It should be recognized that there is a risk that, if the jury are invited to consider a lie told by an accused, they will reason that he lied simply because he is guilty unless they are appropriately instructed with respect to these matters. And in many cases where there appears to be a departure from the truth it may not be possible to say that a deliberate lie has been told. The accused may be confused. He may not recollect something which, upon his memory being jolted in cross-examination, he subsequently does recollect."*

The relevant "purple passage in *Zoneff v The Queen* can be found in the judgment of Gleeson CJ, Gaudron, Gummow and Callinan JJ at [14]-[17}:

> *"[14] In this Court the appellant puts his case in the alternative: that the trial judge should not have embarked in his summing up upon the topic of possible lies at all; or, if his Honour was entitled or bound to give directions on the topic,*

he should have given them in accordance with the judgment of this Court in Edwards v The Queen."

"[15] The meaning of the phrase "consciousness of guilt", the risk that its use by the trial judge may itself suggest guilt, which circumstances call for the giving of an Edwards-type direction, and the difficulty in distinguishing between lies going to credibility and those indicating guilt have been matters of some controversy. The Court of Appeal in Victoria in a series of cases, R v Morgan[4], R v Renzella[5], R v Laz[6], R v Erdei[7], R v Cervelli[8] and R v Konstandopoulos[9] has sought to grapple with the problems. But as Hayne JA in Morgan[10] suggests, rigid prescriptive rules as to when and in what precise terms an Edwards-type direction should be given cannot be comprehensively stated."

"[16] There may be cases in which the risk of misunderstanding on the part of a jury as to the use to which they may put lies might be such that a judge should give an Edwards-type direction notwithstanding that the prosecutor has not put that a lie has been told out of consciousness of guilt. As a general rule, however, an Edwards-type direction should only be given if the prosecution contends that a lie is evidence of guilt, in the sense that it was told because, in the language of Deane, Dawson and Gaudron JJ in Edwards[11], "the accused knew that the truth ... would implicate him in [the commission of] the offence" and if, in fact, the lie in question is capable of bearing that character. (The words in italics are ours and, for the sake of clarity, should be included in the statement of principle.)"

" [17] Moreover, if there is a risk of confusion or doubt as to the way in which the prosecution puts its case, the trial judge should inquire of the prosecution whether it contends that lies may constitute evidence of consciousness of guilt and, if so, he or she should require identification of the lie or lies in issue and the basis on which they are said to be capable of implicating the accused in the commission of the offence charged[12]."

The issue of lies as consciousness of guilt as opposed to lies going to credit only has been the subject of some controversy in the case law. Further reading of the case law is strongly recommended (see some further cases below). It is of the utmost importance for the defence to liaise with the Crown to ascertain whether the Crown is relying upon lies as consciousness of guilt. The issue should *always* be sorted out *prior to* final addresses. You do not want to experience the prejudice of having the Crown go to the jury with lies as consciousness of guilt only to have the trial Judge disallow it. Due to the difficulties in the distinction between an *Edwards* lie, and a lie going only to credit, many Crown Prosecutors are in practice reluctant to press for an *Edwards* direction.

The suggested directions as to lies are set out in the Bench Book at [2-965] re consciousness of guilt and [2-970] re lies going to credit only.

Further Reading:

Edwards v The Queen ([1993] HCA 63, (1993) 178 CLR 193
Zoneff v The Queen [2000] HCA 28, (2000) 200 CLR 234.
R v Ray [2007] NSWCCA 227, (2003) 57 NSWLRT 616 at [98]
Healey v R [2008] NSWCCA 229 at [43]
R v GJH [2001] NSWCCA 128(2001) 122 A Crim R 361
R v Lane [2011] NSWCCA 157
R v ST (1997) 92 A Crim R 390

IDENTIFICATION EVIDENCE

See the paper by this author entitled *"Identification, Alibi and The Electronic Snail Trail"* on the Evidence page of www.CriminalCLE.net.au especially at pages 45-52 inclusive.

MAJORITY VERDICTS

This direction does not arise unless the pre-conditions outlined in section 55F of the *Jury Act 1977 (NSW)* have been satisfied. The trial Judge must positively find those pre-conditions prior to embarking upon a majority verdict direction - see *Hanna v R* [2008] NSWCCA 173, (2008) NSWLR 390.

The law as to the requirements for compliance with section 55F has been the subject of a number of decisions. Trial advocates should familiarise themselves with this body of case law. The commentary / notes to the Bench Book are of assistance in this regard.

The suggested direction is set out in the Bench Book at para [8-090].

Further Reading:

Jury Act 1977 (NSW) section 55F and related case law (this topic is probably worth a CLE paper all of its own).

MURRAY DIRECTION

The *Murray* direction takes its name from the NSWCCA decision of *R v Murray* (1987) 11 NSWLR 12. It applies where only one witness gives direct evidence of the commission of an offence. The giving of a Murray direction is discretionary and not mandatory (*Murray* itself is authority for this proposition - see at 19D).

The essential content of the direction is that the trial Judge may give a warning that the evidence of the witness must be scrutinised with great care before a guilty verdict is brought in. No particular form of words is required in giving the warning - see *Kaifoto v R* [2006] NSWCCA 186 at [72].

A *Murray* direction will most commonly arise during a sexual assault trial, however it is important to note that the direction is not limited to matters of sexual assault.

A suggested direction is set out in the Bench Book at [3-160]

Further Reading:

R v Murray (1987) 11 NSWLR 12.
Kaifoto v R [2006] NSWCCA 186

SELF-DEFENCE GENERALLY (EXCLUDING MURDER / MANSLAUGHTER TRIALS).

The *Crimes Act 1900 (NSW)* ss.418-423 inclusive deals with the issue of self-defence.

The leading authority on this issue in NSW is *R v Katarzynski* [2002] NSWSC 613 - see especially at [22]-[23]. I this judgment Howie J stated:

> *"[22] The question now posed for the jury, where there is evidence raising self-defence, is not the same as it was at common law after* ***Zecevic v DPP*** *and as it was considered in* ***Conlon****. The questions to be asked by the jury under s 418 are: (i) is there is a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself; and, (2) if there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them."*
>
> *"[23] The first issue is determined from a completely subjective point of view considering all the personal characteristics of the accused at the time he or she carried out the conduct. The second issue is determined by an entirely objective assessment of the proportionality of the accused's response to the situation the accused subjectively believed he or she faced. The Crown will negative self-defence if it proves beyond reasonable doubt either (i) that the accused did not genuinely believe that it was necessary to act as he or she did in his or her own defence or (ii) that what the accused did was not a reasonable response to the danger, as he or she perceived it to be."*

The standard trial direction is set out in the bench Book at para [6-460] and is substantially derived from the decision in *Katarzynski.*

Further Reading:

Crimes Act 1900 (NSW) ss.418-423 inclusive
R v Katarzynski [2002] NSWSC 613

SEPARATE CONSIDERATION DIRECTION (KRM DIRECTION)

This direction arises when there is more than one count on the indictment. The essence of the direction is that each count should be considered separately and only by reference to the evidence which is admissible with respect to that count.

The Bench Book refers to this direction as the *KRM* direction, taking its name from the High Court of Australia decision in *KRM v The Queen* [2001] HCA 1, (2001) 206 CLR 221. It is the author's experience that the direction is more commonly referred to as a "separate consideration direction" or (even more simply) "a direction to consider each count separately."

A simple purple passage can be found in the judgment of McHugh J at [36]:

> "[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.

SEXUAL ASSAULT TRIAL DIRECTIONS

A paper by this author on this topic can be found online on the "Offences page" of www.CriminalCLE.net.au.

TENDENCY AND COINCIDENCE EVIDENCE

Tendency Evidence

The admissibility of tendency evidence is governed by Part 3.6 of the *Evidence Act 1995 (NSW).* The requirements for admission are three-fold, namely:

> (i) notice - *Evidence Act* s.97(1)(a)
> (ii) significant probative value - *Evidence Act* s.97(1)(b); and
> (iii) the probative value substantially outweighs any prejudicial effect - *Evidence Act* s.101(2).

Note that the court may dispense with notice requirements - *Evidence Act* s.100.

Note that the evidence is admitted for a limited purpose and cannot be used to prove a particular matter if it was not admitted for that purpose - *Evidence Act* s.95.

At common law, the test for admissibility of this type of evidence was that there was "no rational view" of the evidence other than that the matters sought to be

established had been proven - see *Pfennig v The Queen* (1995) 182 CLR 461. The "no rational view" test was later interpreted as meaning proof beyond reasonable doubt. The old common law test was rejected in the interpretation of the provisions of the Evidence Act - see *R v Ellis* [2003] NSWCCA 319, (2003) 144 A Crim R 1, (2003) 58 NSWLR 700.

Note, however that the NSWCCA has held that notwithstanding the decision in *Ellis*, the standard of proof for matters of child sexual assault is proof beyond a reasonable doubt - see *DJV v R* [2008] NSWCCA 272, (2008) 200 A Crim R 206, *Doyle v R* [2014] NSWCCA 4.

Note that there is currently an inconsistency between NSW and Victorian authority concerning how the probative value of such evidence is to be assessed for the purposes of considering its admissibility - compare *R v XY* [2013] NSWCCA 121 and *R v Shamouil* [2006] NSWCCA 112, (2006) 66 NSWLR 228 against *R v Dupas* [2012] VSCA 328. The difference in approach between the jurisdictions turns on whether or not it is permissible to assess the credibility and reliability of the evidence in determining its probative value. The approach under NSW authority is that the court cannot. The approach under Victorian authority is that the court can. At some stage this issue will fall to be resolved by the High Court of Australia - until then NSW authority will of course apply in this state. Given the NSW approach at the moment (at least with respect to non-child sexual assault matters) it seems somewhat futile to cross-examine on the voir dire, and instead "proceed on the papers" when challenging the admissibility of such evidence.

The suggested direction for a non-child sexual assault case can be found in the Bench Book at para [4-227].

The suggested direction for tendency evidence in a child sexual assault case can be found at para [4-232].

Note that directions should be given both at the time the evidence is admitted and also during the summing up - *Qualtieri v R* [2006] NSWCCA 95, (2006) 171 A Crim R 463 at [80].

Coincidence Evidence

The admissibility of coincidence evidence is also governed by Part 3.6 of the *Evidence Act 1995 (NSW).*

As with tendency evidence, there are three requirements for admissibility:

(i) notice - s.98(1)(a)
(ii) significant probative value - s.98(1)(b)
(iii) probative value substantially outweighs any prejudicial effect - Evidence Act s.101

Note that the court can dispense with the requirements for notice - s.100.

Note that different directions are to be given depending on whether the coincidence evidence represents an indispensable "link in the chain" in a circumstantial evidence case - e.g. to establish the identity of the offender.

The suggested directions in the Bench Book is set out at [4-237] and [4-240].

Note that directions should be given both at the time the evidence is admitted and also during the summing up - *Qualtieri v R* [2006] NSWCCA 95, (2006) 171 A Crim R 463 at [80].

Further Reading:

The following papers can be accessed via the Evidence page of www.CriminalCLE.net.au:

"Tendency and Coincidence Evidence" Craig Smith - July 2013 (link to PD site)

Powerpoint presentation accompanying "Tendency and Coincidence Evidence" Craig Smith - July 2013 (link to PD site)

"Tendency and Coincidence Evidence in Criminal Cases" Ian Barker QC - November 2011

"Tendency and Coincidence Evidence" Judge Dina Yehia SC - November 2011 (link to PD site)

"Arguing the Admissibility of Tendency Evidence - An Interactive Case Scenario" Chris Maxwell QC - March 2011

"Tendency and Coincidence Evidence" John Stratton SC - September 2008 (link to PD website)

TRANSCRIPTS

Section 55C of *the Jury Act 1977 (NSW)* provides that upon request the jury may be given a copy of the whole or part of the trial transcript.

This can include addresses and the summing up: *R v Sukkar* [2005] NSWCCA 54 at [84]. See generally *R v Fowler* [2000] NSWCCA 142 at [91]; *R v Bartle* [2003] NSWCCA 329 at [687].

The jury is also often given transcript of ERISP interviews, telephone intercepts, listening device recordings etc. They are told that if they perceive a discrepancy between what they hear and what they read in the transcript it is the actual recording that constitutes the evidence, and the transcript is simply there to assist their understanding of the evidence.

it is of importance ot check the trial transcript for errors as the trial proceeds such that you are ready ot point out such errors in the event that the jury asks for the transcript. This task should be performed thoroughly, including for non-contentious evidence (which is sometimes the subject of a request from the jury

notwithstanding the parties take the view that it is not of any particular significance). It is also of importance that the transcript bundle is checked such that no part of the transcript of proceedings conducted in the absence of the jury is sent to the jury room.

UNRELIABLE EVIDENCE - "EVIDENCE OF A KIND THAT MAY BE UNRELIABLE"- GENERALLY

Section 165 of the *Evidence Act 1995 (NSW*) provides a non-exhaustive list of evidence of a kind that may be unreliable. Note, therefore that the fact that a kind of evidence that is not found in the listed examples within the section may nonetheless attract a warning under the section. Note also that the fact that a type of evidence is within one of the enumerated categories is not, of itself sufficient to warrant a warning - the trial Judge must be satisfied that the particular evidence in the case is of a kind that may be unreliable - see *Derbas v The Queen* [2007] NSWCCA 188 and in particular McClellan CJ at CL at [28]., see also *GAR v The Queen (No.3)* [2010] NSWCCA 165 at [85].

Note that a warning pursuant to section 165 may be given even in respect of evidence that favours an accused person - *R v Rose* [2002] NSWCCA 455, (2002) 55 NWLR 701 - see Wood CJ at CL and Howie J at [283]-[297].

Note that there is no obligation to give the warning unless a patty requests it - s.165(2). See also *Evans v The Queen* [2007] HCA 59, (2007) 82 ALJR 250 and in particular Heydon J at [232].

The required content for such a warning is set out in s.165(2). No particular form of words is required for the warning - s.165(4).

The Judge need not give the warning if there are "good reasons for not doing so" - s.165(3). Such reasons may include that the evidence is not in dispute, that in the circumstances of the case the Judge finds it unlikely to be unreliable, etc.

Note the restrictions concerning the evidence of children found at s.165(6).

If seeking a warning under this section you should expect to be called upon to assist the trial Judge as to the following matters:

(i) The "kind" of evidence that the warning relates to.
(iii) A precise identification of that evidence.
(iii) The features of that evidence that make it "of a kind that may be unreliable."
(iv) The essential matters you want included in the warning.

It is a common practice for trial judges to call upon counsel for assistance of the type referred to above. That counsel has such obligations is specifically referred to in the context of this section in *Evans v The Queen* [2007] HCA 59, (2007) 82 ALJR 250 and in particular Heydon J at [232].

The purpose of a warning pursuant to s.165 is "...to provide the jurors with knowledge of matters not within their general experience and understanding." - see *Kanann v R* [2006] NSWCCA 109 at [182].

Further Reading:

Evidence Act 1995 (NSW) section 165
Derbas v The Queen [2007] NSWCCA 188 and in particular McClellan CJ at CL at [28].
GAR v The Queen (No.3) [2010] NSWCCA 165 - especially at [85].
R v Rose [2002] NSWCCA 455, (2002) 55 NWLR 701 - see Wood CJ at CL and Howie J at [283]-[297].
Evans v The Queen [2007] HCA 59, (2007) 82 ALJR 250 and in particular Heydon J at [232].
Kanann v R [2006] NSWCCA 109 - especially at [182].

UNRELIABLE EVIDENCE - PERSONS WHO MIGHT REASONABLY BE SUPPOSED TO BE CRIMINALLY CONCERNED

Section 165(1)(d) of the Evidence Act 1995 (NSW) refers to evidence "by a witness who might reasonably be supposed to have been criminally concerned in the events that give rise o the proceedings." as being a type of evidence that may be unreliable.

Note that the test is "might reasonably be supposed" to be criminally concerned, not "WAS" criminally concerned.

Reasons for such a witness to be unreliable will often include the tendency to minimise their own involvement and to exaggerate the involvement of others, the discount for assistance to authorities, the prospect of a Crown appeal if the witness does not give the evidence in accordance with their undertaking to do so.

See *Grey v The Queen* [2001] HCA 65, regarding the obligation of the Crown to disclose any assistance / reduction in penalty as a result of assistance.

See *R v Sullivan* [2003] NSWCCA 100 re the obligation on the Crown to lead evidence of the fact of assistance and the discount obtained as a result.

See *R v Stewart* [2001] NSWCCA 260 , (2001) 52 NSWLR 301 regarding the need to inform the jury of the mechanism available by way of Crown appeal in the event that a person who has received a discount for assistance then fails to provide that assistance.

For a consideration of the issue of one co-accused giving evidence against another co-accused see *Webb & Hay v The Queen* [1994] HCA 30, (1994) 181 CLR 41, *Rv Diez-Orozco and Lawrence* [2003] NSWSC 1050, *R v Johnston* [2004] NSWCCA 58 at [149] and *R v Jacobs & Mehajer* [2004] NSWCCA 462, (2004) 151 A Crim R 452 at [265]-[287].

The suggested direction is set out in the Bench Book at para [4-385].

Further Reading:

Evidence At 1995 (NSW) s.165
Grey v The Queen [2001] HCA 65
R v Sullivan [2003] NSWCCA 100
Webb & Hay v The Queen [1994] HCA 30, (1994) 181 CLR 41
Rv Diez-Orozco and Lawrence [2003] NSWSC 1050
R v Johnston [2004] NSWCCA 58 at [149]
R v Jacobs & Mehajer [2004] NSWCCA 462, (2004) 151 A Crim R 452 at [265]-[287].

UNRELIABLE EVIDENCE - PRISON INFORMERS

Section 165 (1)(e) of the *Evidence Act 1995 (NSW)* designates that such evidence is of "a type which may be unreliable."

Subsection (2) of section 165 requires the trial Judge to:

(a) warn the jury that the evidence may be unreliable, and

(b) inform the jury of matters that may cause it to be unreliable, and

(c) warn the jury for the need for caution in determining whether to accept the evidence and the weight to be given to it.

Subsection (3) relieves the trial Judge of the obligation to give such a warning "if there are good reasons for not doing so."

No particular form of words is required - s.165(4).

The suggested Bench Book direction is setout out at para [3-760].

The term "prison informer" is not defined in the Evidence Act. Smart J offers a definition in *R v Ton* [2002] NSWCCA 337, (2002) 132 A Crim R 340 - see especially at [34].

In *Robinson v R* [2006] NSWCCA 88, (2006) 162 A Crim R 88, The NSWCCA held that the requirements for a warning about such a matter at common law are no longer applicable in light of the statutory provision - see especially Spigelman CJ at [9] (Simpson and Johnson JJ concurring). However such pre-Evidence Act case law may be of assistance in determining why the evidence may be unreliable - see Spigelman CJ at [7].

For common law cases on this issue see *Pollitt v The Queen* [1992] HCA 35, (1992) 174 CLR 558 and *R v Clough* (1992) 28 NSWLR 396.

Further Reading:

Evidence Act 1995 (NSW) s.165
Robinson v R [2006] NSWCCA 192, (2006) 162 A Crim R 88.
R v Ton [2002] NSWCCA 337, (2002) 132 A Crim R 340 - see especially at [34].
Pollitt v The Queen [1992] HCA 35, (1992) 174 CLR 558.
R v Clough (1992) 28 NSWLR 396.

I hope the above has been of some assistance. Should you have any questions in relation to the content of this paper please do not hesitate to get in touch with me. I am best caught on my mobile - **0408 277 374**. Please respect the "no fly zone" on my phone between 9am and 10am on a court day - I am about to go into court too! Other than that you are fine to contact me any time including out of normal business hours. Alternatively, you can contact me via email:

dark.menace@forbeschambers.com.au.

I will typically respond within 24 hours.

I have endeavoured to state the law of New South Wales as at 12 November 2014.

Mark Dennis
Forbes Chambers