Defending Child Sexual Assault in the Local Court

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COMPETENCE OF THE CHILD WITNESS

Sections 12 and 13 of the Evidence Act 1995 (NSW) read as follows:

12 Competence and compellability

Except as otherwise provided by this Act:

(a) every person is competent to give evidence, and

(b) a person who is competent to give evidence about a fact is compellable to give that evidence.

13 Competence: lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

(a) the person does not have the capacity to understand a question about the fact, or

(b) the person does not have the capacity to give an answer that can be understood to a question about the fact,

and that incapacity cannot be overcome.

Note.

See sections 30 and 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.

(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:

(a) that it is important to tell the truth, and

(b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and

(c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.

(6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

(7) Evidence that has been given by a witness does not become inadmissible merely because, before the witness finishes giving evidence, he or she dies or ceases to be competent to give evidence.

(8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience.

Note that section 12 presumes all witnesses to be competent. The presumptive position therefore is that the child witness will be sworn or affirmed.

Swearing or Affirming the Child Witness

Section 13(3) requires that, in order to give sworn evidence, a witness must "…have the capacity to understand that, in giving evidence, he or she is under an obligation to tell the truth."

With respect to the meaning of the word "obligation" in subsection 13(3), The Court in *The Queen v GW* [2016] HCA 6 held that:

- a child may understand that they have been told to tell the truth, without understanding that at they are under an obligation to tell the truth.
- The fact that the child does not understand the nature of an oath or affirmation is not determinative of the issue, but is also not irrelevant in considering whether the child understands the obligation to tell the truth.

The relevant passages are found at [26] and [27] as set out below:

"[26] …."obligation" in s 13(3) is to be understood in its ordinary, grammatical meaning as the condition of being morally or legally bound – in this case, to give truthful evidence. A child may agree that he or she understands that he or she is to tell the truth without having any understanding of what it is to give evidence in a court proceeding, much less of the concept of being morally or legally bound to give truthful evidence. Contrary to the respondent's submission, R's affirmative answer to the question "[a]nd do you understand that today in giving evidence you have to only tell us the truth? You have to tell us things that really happened, you understand that?" is not to be understood as necessarily conveying that R had the capacity to understand that, in giving evidence, she was under such an obligation."

"[27] There are many ways to explore whether a child understands what it means to give evidence in a court and the concept of being morally or legally bound to be truthful in so doing. Here, it would seem the prosecutor questioned R about her understanding of swearing an oath on the Bible or making an affirmation. Her lack of understanding of either was not determinative but it was not irrelevant to the formation of the opinion that she did not possess the capacity to understand the obligation. The suggestion that it may not have been open to Burns J to be satisfied that R, a six-year-old child, lacked that capacity is unsustainable."

The Court has to be affirmatively satisfied on the balance of probabilities that the child witness does not understand that they are under an obligation to tell the truth before

proceeding to consider the capacity of the child to give unsworn evidence. Such is made plain by the judgment of the Court in *The Queen v GW* [2016] HCA 6 at [14]. The relevant passage is set out below:

> *"[14] The s 13(6) presumption applies to both competence to give evidence and competence to give sworn evidence. In either case, the presumption will be displaced where the court is satisfied on the balance of probabilities of the contrary. Where the presumption of competence to give sworn evidence is displaced, a person who is competent to give evidence about a fact may give unsworn evidence about the fact provided that the court has told the person the things set out in s 13(5)."*

As can be seen from the above, it is insufficient that the Court is "not satisfied" that the child does have the capacity to give sworn evidence.

Unsworn Evidence From the Child Witness

In the event that the child witness is unable to give sworn evidence, section 13 subsections (4) and (5) then fall to be considered. Those subsections read as follows:

> (4) *A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.*
> *(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person:*
> *(a) that it is important to tell the truth, and*
> *(b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and*
> *(c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue.*

Subsection (5) does NOT require that he child understand the difference between the truth and a lie. All that is required is that the child is told the information referred to in the subsection. Once that has been done the Court has no discretion to refuse to allow the witness to give evidence. These matters were made clear by the NSWCCA in *SH v R* [2012] NSWCCA 79; 83 NSWLR 258; 222 A Crim R 43 at [7]-[8] where Basten JA stated:

> *"[7] Section 13 was amended by the Evidence Amendment Act 2007 (NSW) ("the 2007 Amendment Act"), which commenced operation on 1 January 2009. In its old form, s 13(2) permitted a person to give unsworn evidence if the Court were satisfied that the person understood the difference between the truth and a lie: s 13(2)(a). That required an evaluative judgment. That requirement appears to have been deliberately removed because of the lack of clear differentiation between that test and the test of understanding an obligation to give truthful evidence, necessary to give sworn evidence."*

> *"[8] This ambiguity is to be resolved in favour of the conclusion that there is no discretionary power to refuse to allow a child to give unsworn evidence, if the court is satisfied as to the capacity to understand a question and give a comprehensible answer, in accordance with sub-s (1). That conclusion follows from both the structure of the section and by reading sub-ss (4) and (5) together. Thus, sub-s (5) does not use equivocal language, but, subject to identified preconditions, states that a person who is not competent to give sworn evidence "is" competent to give unsworn evidence. That language, together with the absence of any attempt to specify criteria relevant to the exercise of a discretion, demonstrate that no discretionary power was intended."*
>
> *"[9] In its form prior to the 2007 Amendment Act, the Court was not merely obliged to tell the witness that it was "important to tell the truth" but the prospective witness was required to indicate "by responding appropriately when asked" that he or she would not tell lies. The practical consequence of that dual requirement was that trial judges gave the instruction as a question and required a response. Perhaps counter-intuitively, the present form of sub-s (5) requires judicial instruction but no response. Nevertheless, it is understandable that, as occurred in this case, a judge is likely to seek a response to ensure that the instruction has been noted and understood."*

There is no requirement that the child understand or acknowledge the information that has been conveyed to them pursuant to section 13(5). In this regard see *R v Muller* [2013] ACTCA 15; 7 ACTLR 296; 273 FLR 215 at [41

> *"[41 As Basten JA pointed out in that case at [8], this construction leads to the conclusion that there is no discretionary power to exclude a child's evidence, provided always that the requirements of s 13(1) have been satisfied. As his Honour suggested at [9], the absence of such power does not exclude the possibility of limited questioning of the proposed witness in order to determine whether he or she has understood the judge's directions pursuant to s 13(5). However any want of understanding will lead only to further explanation, and not to the conclusion that the witness is incompetent to give unsworn evidence. Section 13(5) requires only that the directions be given, and not that they be understood or even acknowledged."*

Note that subsection 13(8) permits the Court to inform itself "as it thinks fit" regarding the determination of a question arising under the section. In that regard the NSWCCA in *RJ v The Queen* [2010] NSWCCA 274; 208 A Crim R 174 at [23] referred to *Pease v R* [2009] NSWCCA 136 with approval. In that case the trial Judge watched the JIRT video and also asked the complainant some further questions in order to informed himself as to the capacity of the child to understand the obligation to tell the truth.

THE JIRT INTERVIEW

Section 306M of the Criminal Procedure Act 1986 (NSW) defines a "vulnerable person" to include a child.

Section 306P(1) of the Criminal Procedure Act 1986 (NSW) requires that the child be under the age of 16 years ***at the time of giving the evidence*** in order for the JIRT interview to be played as part of the evidence in chief.

Section 306S of the Criminal Procedure Act 1986 (NSW) permits the evidence of a vulnerable person to be given by way of the playing of the JIRT video.

Section 306V(1) allows the playing of the JIRT interview as evidence.

Section 306V(2) makes the JIRT interview inadmissible unless the prosecuting authority has given written notice in accordance with the regulations.

Regulation 17 of the *Criminal Procedure Regulation 2010 (NSW)* requires that the accused and their legal representative be notified of the police station or "other place nominated by the prosecuting authority" where the JIRT video may be viewed. Notice must be given at least 14 days before the evidence is lead.

Regulation 18 requires the defence to give written notice that they wish to view the JIRT video.

Regulation 19 requires that the prosecuting authority must provide access must provide access to the JIRT video within 7 days of receiving the defence notice.

ACCESSING THE JIRT DVD

Watch the DVD Before You Get to Court

It is of the utmost importance that both yourself and your client see the JIRT DVD prior to the tribunal of fact seeing it. There are a number of reasons why this is so including:

i. You do not want any "nasty surprises" on the floor of the court.
ii. You need to check the transcript for accuracy.
iii. You need to be in a position to inform the court in precise terms what, if any, parts of the transcript are in dispute.
iv. You need to watch for any tone, gestures or other non-verbal cues given to the child by the interviewing officer.
v. You need to watch the child witness carefully and assess matters such as intelligence, level of vocabulary and articulation, degree of self confidence, general demeanour etc.
vi. You need to get the feel or "vibe" of the child witness as an important guide to the level at which you "pitch" your cross-examination.
vii. You should make notes on your copy of the transcript of significant gestures, pauses and other matters of potential consequence that are not apparent from the transcript.
viii. You should inform the Magistrate by precise reference to numbered questions and answers of matters not captured by the transcript that you will be seeking to rely upon in either cross-examination or submissions. You should draw these matters to the attention of the bench prior to the JIRT interview being played such that the bench is forewarned and has the opportunity to pay particular attention when the relevant issue arrives during the playing of the DVD.

Division of Labour Whilst Watching the DVD and Checking the Transcript

It can be difficult to both watch the DVD and check the transcript at the same time. The ideal scenario for viewing the DVD in the author's humble opinion would include the following logical approach:

i. The advocate should view the DVD with a second person (NOT the client) checking the transcript for accuracy – this can be an instructing solicitor, secretary, admin person, PLT student, law student etc.
ii. Both the advocate and the transcript checker should have copies of the transcript.
iii. The advocate should have a copy of the transcript for the purposes of making the occasional note.
iv. The advocate should concentrate overwhelming on watching the DVD and in particular making the odd note as to gestures, demeanour, cues from the interviewing officer towards the child etc.
v. The transcript checker should concentrate overwhelmingly on the accuracy of the transcript. This is particularly so if the checker is not going to instruct at the hearing.
vi. The transcript checker should be "at the ready" whenever the advocate asks a question to the effect "What question number are we up to?"
vii. Once the DVD has been viewed the advocate should get a photocopy of the transcript as marked by the checker.
viii. If the checker is an instructing solicitor or instructing law clerk, the instructor will highly likely benefit from a marked copy of the advocates marked transcript.
ix. The advocate may well benefit from further marking up their transcript such that it becomes a "composite" marked up transcript, as may the instructor.
x. Someone should remember to retain an unmarked copy of the transcript (barristers are generally hopeless at this task).

CHALLENGING THE JIRT DVD

Challenging the JIRT DVD - Generally

Challenging the admissibility of matters referred to in the JIRT DVD is conceptually no different from challenging matters in an ERISP interview, or a typed statement. You should notify the prosecution in advance such that agreed matters can be edited out before being put before the Court. Similarly, the corresponding transcript will need to be edited.

Challenging the JIRT DVD – Leading Questions to Child Witnesses

Beware of JIRT officers seeking to lead otherwise reluctant child witnesses. Be sure to safeguard against the leading of the witness by watching the tape AND any body language, drawings, gestures, tone of voice, playing with pencils etc. by the interviewer, as well as thoroughly reviewing the transcript as served.

If you find evidence of leading questions being put to the complainant or witness you should object. The leading may be as to the identity of the alleged offender or as to the nature of the alleged offending behaviour. There are strong lines of authority to support such objections. The following cases will be of assistance:

Rex v Osborne [1905] 1 KB 551 is the foundational authority in English law. The judgment of the Court at 556:

> *"Questions of a suggestive nature or leading character will, indeed, have that effect, and will render it (i.e. the complaint evidence) inadmissible; but a question such as this, put by the mother or other person, "What is the matter?" or "Why are you crying?" will not do so. These are natural questions which, a person in charge will be likely to put; on the other hand, if she were asked, "Did So-and-so" (naming the prisoner) "assault you?" "Did he do this and that to you? Then the result would be different, and the statement ought to be rejected."*

The judgment of the Court at 561 further stated:

> *"It [admissibility] applies only when there is a complaint not elicited by questions of a leading and inducing or intimidating nature and…."*

Rex v Norcott [1917] 1 KB 347

This decision affirms the earlier decision of *Rex v Osborne* [1905] 1 KB 551. At 350 the Court stated:

> "*The Court in Rex v Osborne meant to guard against admission in evidence of statements which have been put in the mouth of the prosecutrix by questions of a leading or suggestive character. The Court is concerned to see that in the present case the statement made by the girl was spontaneous in the sense that it was her unassisted and unvarnished statement of what happened."*

R v Stewart (1920) 21 SR 33.

> This case involves NSW authority adopting the *Osborne* line of authority.

R v JAH [1990] NSWSC unrep. 12/10/90 Hunt J

> This NSWSC decision affirms the *Osborne* line of authority.

R v Nikolovski NSWCCA 5/12/90 unrep BC9002974

> This decision of the NSW CCA (Hunt, Enderby and Loveday JJ) also affirms the *Osborne* line of authority.

R v Warren (1994) 72 A Crim R 74

> This case presents an example of Hunt CJ at CL (at 83) offering particularly strident criticism of NSW police for the failure to adopt interview techniques which avoid the use of leading questions.

Defence practitioners should be particularly vigilant in this area of the law. It is not uncommon for the witness (typically the child complainant) to have been shown the video a number of times. This is particularly so where there is a delay in the matter commencing or in the complainant being called. It represents fertile ground for cross-examination as to the witness having their evidence tainted or having been in effect "coached".

EDITING THE JIRT DVD

As a result of the above common forms of challenge to the video, the prosecution may be left with either no recording or a significantly incomplete or disjointed edited recording. This does not prohibit the prosecution from seeking to call further evidence in chief from the witness.

It is worth considering whether such additional evidence should first be taken on the voir dire, as the accused may otherwise be taken by surprise, or irrelevant, inadmissible or unduly prejudicial evidence may be led.

THE JIRT DVD AND TRANSCRIPT OF THE JIRT DVD – NOT GENERALLY EXHIBITS

The JIRT interview DVD and the transcript of that interview should not generally become exhibits in the proceedings. They should instead be "marked for identification". This "preferred procedure" evolved as a result of concerns held by the NSWCCA that in the event such material became exhibits they would be given undue weight by a jury. The foundational authority in this regard is *R v NZ* [2005] NSWCCA 278, 63 NSWLR 628, and in particular the joint judgment of Howie and Johnson JJ at [210] which states as follows::

> *'[210] We should by now have made clear our view that this Court should not lay down any rule of practice or procedure to be followed in every case where the evidence in chief of a witness has been given by the playing of a videotape. However, we can summarise our views as to the procedure to be followed generally:*
>
> > *(a) The videotape evidence of a Crown witness should not become an exhibit and, therefore, should not be sent with the exhibits to the jury on retirement;*
> >
> > *(b) Any transcript given to the jury under s 15A should be recovered from the jury after evidence of the witness has been completed;*
> >
> > *(c) It is for the discretion of the trial judge how a jury request to be reminded of the evidence in chief of the witness should be addressed;*

(d) It would be inappropriate for the judge to question the jury as to the purpose for which they wish to have the tape replayed.

(e) If the tape is to be replayed or the transcript of the tape provided to the jury, the judge should caution the jury about their approach to that evidence when the tape is being replayed to them or the transcript of the tape returned to them in terms to the effect that "because they are hearing the evidence in chief of the complainant repeated 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";

(f) The judge should consider whether the jury should be reminded of any other evidence, for example the cross-examination of the witness at the time that the tape is replayed or sent to the jury room, if that step is considered to be appropriate.

But other than expressing those views, we believe that the request by a jury for the replaying of the tape should be dealt with by the judge in the exercise of discretion bearing in mind the need for fairness and balance in addressing that request.

See also *Gately v The Queen* [2007] HCA 55, 232 CLR 208, 241 ALR 1, 82 ALJR 149, 179 A Crim R 77.

WARNINGS CONERNING THE JIRT DVD

The Essential Content of the Warning

The essential features of the judicial warning are:

(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.

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.*

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."

COMPLAINT EVIDENCE ELICITED THROUGH LEADING QUESTIONS

Complaint evidence led through leading questions is objectionable. This is so in light of the *Rex v Osborne* line of authority as referred to earlier in this paper. Note that all of these authorities are pre-JIRT.

The evidence is objectionable regardless of whether the leading question is asked by a police officer, or a citizen receiving compliant evidence.

This is so as aa result of the *Rex v Osborne* line of authority referred to earlier in this paper.

THE USE OF CLOSED CIRCUIT TELEVISION

Section 306ZB(1) of the *Criminal Procedure Act 1986 (NSW)* gives the child complainant the right to give evidence by way of CCTV.
This is so) providing that the complainant was under 16 years of age at the time the charge was laid and under 18 years of age at the time the evidence is to be given – see s.306ZB(2).

The child complainant may choose not to use CCTV facilities – see s.306ZB(3).

WARNINGS CONCERNING THE USE OF CLOSED CIRCUIT TELEVISION

Section 306ZI of the *Criminal Procedure Act 1986 (NSW)* provides for judicial warnings to be given to a jury concerning the use of CCTV to the effect that:

- The jury should be informed that it is standard procedure for the evidence of vulnerable persons to be given by that means;
- The jury should also be warned not to draw any inference adverse to the accused;,and also;
- Be warned not to give the evidence any greater or lesser weight because of the use of that technology

CROSS-EXAMINING THE CHILD COMPLAINANT

The Child's Reliance on Non-Verbal Cues

This author is not a psychologist, nor a child psychologist. I am, however, a very experienced criminal defence advocate. I have found over many years of experience of both life and law that young children appear to be far more reliant on non-verbal cues than adults. The younger the child, the greater the truth in this proposition in my view.

The Demeanour of the Advocate

So how is the above in any way relevant? If you want a child to form the impression that you are a nice person and worthy of their trust – well, you could spend all day telling them what a nice person you are – or a better approach is to look directly at the child and smile. Speak in an apparently friendly tone. A trusting child will often read your demeanour and smile back at you. The question of whether a young child likes or trusts you will more often than not be highly influenced by the child's interpretation of non-verbal cues.

Your chances of having an agreeable child in the course of cross-examination are increased if you present as an agreeable or "nice" person in the mind of a young child complainant.

"Warm Up" Questions

The prosecution will often start with a few "warm up questions." These will generally be something to the following effect:

- *What school do you go to?*
- *What is the name of your teacher?*
- *What are the names of some of your friends at school?*
- *What things do you like doing with your friends?*

The purpose of such questions is (obviously) to assist the child in feeling settled in the environment in which they are about to give evidence. They also seek to establish a rapport between the child witness and the questioner.

As a defence practitioner you should consider commencing cross-examination of the child with a few warm up questions of your own. I always start by saying the child's name telling the child that he / she has a "nice name" and saying that name repeatedly. Ask the child if they have a middle name – if they do; find out what that name is and tell them that they have a nice middle name and in fact that have two nice names. A child will be flattered and made to feel that you are a nice and kind person. They will more co-operative under cross-examination as a result. A good tactic is to then ask some "follow-up warm up" questions that pursue themes taken up by the prosecution. For example – if it was established by the prosecution warm up questions that the child has a pet dog – ask about the name of the dog and "what type" (breed / appearance) of dog it is. Ask at least a handful of these warm up questions before moving forward. It is important to make the child witness feel at ease as it helps your chances of a more fruitful cross-examination.

The Tone of Cross-Examination

In our everyday lives we use the tone of our voice to convey a particular meaning. We may wish to convey humour, sarcasm, surprise, disbelief, curiosity or any number of other states of mind.

You need to reflect upon the tone you will use with a particular child before you commence cross-examination. As noted previously, a prior viewing of the JIRT video is an indispensable part of the preparation for cross-examination and will likely greatly assist in this regard.

You should not simply rely upon the age of the child in considering this issue. Children of the same age can diverge significantly in terms of their intelligence, vocabulary, comprehension etc. If you know a child or have a child of your own who is of similar age to the complainant it is not safe to assume that the complainant and the child you are acquainted with are on a par with each other in terms of the matters referred to earlier in this paragraph.

If you do not know how to talk to kids, consider watching some children TV or online recordings prior to your cross-examination. This will be of at least some assistance.

Consider adopting a friendly tone not dissimilar to the adult stars of children's television and children's entertainment (think The Wiggles, Playschool, Romper Room, Sesame Street etc).

It is the author's experience that cross-examination of a young child in a friendly tone (obviously with leading questions, and a less that "friendly" ultimate goal) is far more

productive than conveying an openly hostile or disbelieving tone throughout cross-examination.

Use Simple Language

Lawyers are amongst the worst offenders in failing to use simple language. The need for simple language is particularly acute when dealing with children. To borrow from a real life "war story" from an adult jurisdiction – why would you start a question starting with words such as "It ill behoves you does it not…?" (I actually heard that from another advocate) when you could more simply start with the words "You shouldn't…?"

One Question One Concept

Avoid putting more than one concept into any one question. Adult witnesses are prone to become confused by double and tripe-barrelled questions. The situation is even more acute with child witness.

Consider this question:

> *"On that day did you walk down that street and see a red car that was going really fast?*

Compared to this series of questions:

> *"What is the name of the street you live in?"*
>
> *"Do you sometimes walk along Smith Street?"*
>
> *"What is at the end of Smith Street?"*
>
> *"Did you walk along Smith Street towards that shop on that day that we have been talking about?"*
>
> *"Did you see any cars that day when you got near that shop?"*
>
> *"Did you see a car that day that was red?"*
>
> *"When you saw the red car was it going really fast?"*

True it is that questioning a child requires some patience at times; however not only is patience a virtue – so is a more forensically successful cross-examination that "flows".

Avoid of Double Negatives

Young children will often get confused by double negatives. Even if they are not confused, the tribunal of fancy may develop a genuine concern that the child does not understand the question or questions, and thus gives reduced or no weight at all to the evidence that has been adduced from the witness. Avoid ending questions with phrases such as "…isn't it?" or "…wasn't it?"

Building Your Brown v Dunne Questions

NEVER EVER ask a young child a question that begins with "I put it you…" or "I suggest to you…." Even some adults will fail to grasp the nature or purpose of a Brown v Dunne question. Children are highly susceptible to this problem. You need to ask a series of lead in questions that make it plain to the child witness that you are putting your client's case, and that they are being given a chance to respond to that case. Consider the following example:

> *Q. I have spoken to Adam.*
>
> *Q. Adam has told me a lot of things.*
>
> *Q. I am going to say some things okay?*
>
> *Q. I am going to say some things that Adam told me about, okay?*
>
> *Q. When I say things I want you to tell me if what I am saying is right okay?*
>
> *Q. I'm saying that… (insert simple Brown v Dunne proposition # 1)…. Am I right about that one?*
>
> *Q. I'm saying that …(insert simple Brown v Dunne proposition # 2)... am I right about that one?*
>
> *Q. I'm saying that . …(insert simple Brown v Dunne proposition # 3)….. Am I right about that one?*

Tactics for Asking Your Brown v Dunne Questions

Leave these questions to the very end of cross-examination, save for your "warm down questions" (see below).

It will likely dawn on the child at this stage (if it hasn't already) that you are challenging them as to their truthfulness, reliability and credibility. A child who realises that you are not their friend is far less likely to be co-operative in any answers they care to give. It will highly likely to be at least uncomfortable and perhaps quite distressing for the child to be challenged in this way. An unduly lengthy attack in this regard runs the risk that the tribunal of fact will experience some sympathy for the child's position (and a corresponding lack of sympathy for your case).

Make the occasion for Brown v Dunne questions "short and sharp" (as possible) but nevertheless polite. Do not allow the child to experience a prolonged distress if you can possibly avoid it – you will not be doing your case any favours if you allow this to happen.

"Warm Down" Questions

A tribunal of fact that does not like the advocate may not like the argument advanced by that advocate. For this reason, you should try to avoid leaving a child in a state of

distress (or presumed distress) at the end of your Brown v Dunne questions. Consider asking some "warm down" questions prior to concluding your cross-examination. Provided you are brief the bench will give you leeway. If you have nothing else to work with go back to the subject matter found in the initial warm up questions of both prosecution and defence. Couch the questions in a manner that looks forward happily to the resumption of normal life for the child; for example….

- *"When you get home will you play with your dog / give your cat a big hug?"*
- *"Will you see your friend Sarah at school tomorrow?]Presuming the answer is "yes"]… That's nice isn't it?"*
- *"You really like swimming. Will you be going to swimming on the weekend? .....Do you think it will be nice and sunny?"*
- *"Okay I have no more question now. I have to go now. Thanks for talking to me today. Bye! Bye! (smile and wave goodbye to the witness)*

You should be looking at the camera and smiling at all times during the above series of "warm down" questions.

OTHER DIRECTIONS CONCERNING CHILD SEXUAL ASSAULT

This paper covers directions concerning JIRT DVD's and CCTV. For other directions see the paper by this author entitled *"Sexual Assault Trial Directions" (2010).* The paper can be found on the CriminalCPD.net.au website on the Offences page.

SENTENCING FOR CHILD SEXUAL ASSAULT

General Sentencing Principles in the Case Law

R v Dent NSWCCA 24 March 1991 - children are entitled to grow up free of defilement by sexual predators and free from risk of psychological upset, confusion and difficulties in later life caused by such conduct – per Lee J, Gleeson CJ and Loveday J concurring.

R v Fisher (1989) 40 A Crim R 442 – such offenders should be severely punished, especially those who stand in a position of trust. Significant custodial sentences should be imposed for reasons of both general and specific deterrence. Heavy custodial sentences are essential if the courts are to play their role in protecting young people from sexual attacks by adults.

R v Burchell (1987) 34 A Crim R 148 – general deterrence is of prime importance in making the community aware of the attitude of the courts to child sex offences.

R v Levi NSWCCA 15 May 1997 unrep. per Sperling J- prior good character is of relatively less importance when sentencing an offender for an offence of this nature.

Prior Good Character

Section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* creates a special rule to the effect that the prior good character or lack of prior convictions is not to be taken as mitigation if the court is satisfied that such matters were of assistance in the commission of a child sexual offence.

The subsection reads as follows:

> *(5A) Special rules for child sexual offences.*
>
> *In determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence.*
>
> *……*
> *(5B) Subsections (5A) and (5AA) have effect despite any Act or rule of law to the contrary.*
>
> *….*
>
> *(6) In this section:*
>
> *child sexual offence means:*
>
> *(a) an offence against section 61I, 61J, 61JA, 61K, 61M, 61N, 61O or 66F of the Crimes Act 1900 where the person against whom the offence was committed was then under the age of 16 years, or*
> *(b) an offence against section 66A, 66B, 66C, 66D, 66EA, 66EB, 91D, 91E, 91F, 91G or 91H of the Crimes Act 1900, or*
> *(c) an offence against section 80D or 80E of the Crimes Act 1900 where the person against whom the offence was committed was then under the age of 16 years, or*
> *(d) an offence against section 91J, 91K or 91L of the Crimes Act 1900 where the person who was being observed or filmed as referred to in those sections was then under the age of 16 years, or*
> *(e) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in any of the above paragraphs.*
>
> *prescribed traffic offence means an offence under any of the following provisions:*
>
> *(a) sections 9, 11B (1) and (3), 12 (1), 13 (2), 15 (4), 18B (2), 18D (2), 22 (2), 24D (1) and 29 (2) of the former Road Transport (Safety and Traffic Management) Act 1999,*
> *(a1) sections 110, 111 (1) and (3) and 112 (1) of the Road Transport Act 2013 and clauses 16 (1) (a), (b) or (c), 17 (1) and 18 (1) of Schedule 3 to that Act,*
> *(b) sections 51B (1) and 52A (1) (a) and (3) (a) of the Crimes Act 1900,*

> *(c) section 52A (2) and (4) of the Crimes Act 1900 in the circumstances of aggravation referred to in section 52A (7) (a), (c) or (d) of that Act.*

In *R v Stoupe* [2015] NSWCCA 175 Johnson J (Hoeben CJ at CL, Beech-Jones JJ concurring) stated at [85]:

> *"Counsel for the Crown and the Respondent accepted in this Court that s.21A(5A) applied in the circumstances of this case where the Respondent was working as a childcare worker. It may be accepted that the Respondent's prior good character assisted him to hold the position of childcare worker, which he abused by the offences committed against the victim: R v Lord [2013] NSWDC 16 at [158], [160]. Although there may be circumstances where s.21A(5A) has no application (see, for example, AH v R [2015] NSWCCA 51), the present case falls squarely within the terms of that provision."*

In *AH v R* [2015] NSWCCA 51 the offender was the de facto partner of the victim's mother. The offender had no prior criminal record. The sentencing Judge at first instance held that the subsection applied. On appeal Hidden J (Beasley P and Fullerton J concurring) stated at [25]:

> *"Mr Hunt submitted that the applicant's good character played no part in his obtaining access to the victim. He was not exercising a role in the community which might have afforded him access to children, such as a teacher, sports coach or pastor. He also contrasted the present case with O'Brien v R [2013] NSWCCA 197, a case involving the sexual abuse of a girl by an offender who had befriended her family. Adamson J, with whom Latham J and I agreed, noted at [25] that he had been a responsible and helpful member of his community, and observed at [39] that he had "used his good character to gain access to the victim and to gain her trust."*

In *O'Brien v R* [2013] NSWCCA 197 the offender's prior good character was referred to in the following terms at [25]:

> *"The applicant was, at the time of sentencing, 25 years old. He has no prior criminal history. He comes from a good family. He left school in Year 10, has worked hard and makes valuable contributions to the community by his involvement in the Rural Fire Service. He is married with two children. He voluntarily helps elderly people in the area by chopping wood for their fires."*

In dealing with the question of the offender's prior good character Adamson J ((Latham and Hidden JJ concurring) stated at [39]:

> *"The applicant's conduct was deliberate, premeditated and exploited the trust reposed in him not only by the victim herself, but also by the victim's mother and grandparents. He used his good character to gain access to the victim and to gain her trust."*

Even if not caught by the provisions of section 21A(5A) of the *Crimes (Sentencing Procedure) Act 1999 (NSW),* the question of prior good character is caught by the

residual common law, which is best summarised in the decision of the High Court of Australia in *Ryan v The Queen* [2001] HCA 21; 206 CLR 267; 179 ALR 193; 75 ALJR 815. In summary the case is authority for the principle that prior good character will be of less weight when considered in sentencing for child sexual assault that is persistent over a period of time. The principle is perhaps best captured in the judgment of Callinan J at [174] where his Honour stated:

> *"[174] In exercising a sentencing discretion, less weight has been given to previous good character in circumstances in which the offence is not an isolated act. When the crime or crimes are part of a prolonged course of criminal activity, less weight will usually be given to the apparent good character and record of an accused. In Hermann, an appeal against a sentence imposed on a man of apparent good character, who had sexual intercourse with his step-daughter on a number of occasions over a period of three years, Lee J (with whom McInerney J agreed; Kirby ACJ dissenting) said:*
>
> *"So far as the question of good character is concerned, it has been pointed out in other cases that, where the event is not an isolated one, it is difficult for the court to give a great deal of consideration to an accused's 'previous good character', for the truth of the matter, as the evidence has disclosed, is that whilst appearing to have a good character and others believing so, he has over a lengthy period been committing a heinous crime on a helpless child. To give to an applicant's so-called 'previous good character' much weight in such circumstances is to give an appearance that the court is conceding to a parent or person in loco parentis or within the family unit some right to use a child for sexual pleasure at will. Of course, when the offence is an isolated one, the matter of the good character of the applicant as a factor in mitigation may be given a much greater degree of significance."*

Offence Occurring Within a Home

Subsection 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* states that is a matter of aggravation if:

> *"the offences was committed in the home of the victim or any other person."*

in *Jonson v R* [2016] NSWCCA 286 the NSWCCA convened as a five (5) judge bench in order to resolve this issue of the correct interpretation of this subsection. There had been quite some tension in the authorities in the preceding years as to whether the section had application when the offender had a lawful right to be on the premises and/or was an invited guest. The Court was unanimously of the view that there was no such restriction in the operation of the subsection. Bathurst CJ stated at [40]-[41]:

> *"[40]…There are two things to note. First, the section in its terms does not impose as a pre-condition for its operation that the offender be an intruder into the victim's home. Second, the aggravating factor is not limited to the home of the victim but extends to the home of any other person. On a literal construction, this could, hardly surprisingly, include the offender's home. It seems to me that, in those circumstances, the legislator did not intend that the operation of the section was*

limited to circumstances where the offender was an intruder either in the victim's home or some other home."

"[41] That construction promotes the purpose of the section, namely, that a home is a place which should be safe and secure for persons who reside, or are otherwise present, at such a place. Thus, it would extend to persons (for example, children) visiting a relative's home or, for that matter, persons in a domestic relationship at the home of the offender."

Sentencing for Historical Child Sex Offences

In *Regina v MJR* [2002] NSWCCA 129; 54 NSWLR 368; 130 A Crim R 481 the NSWCCA convened as a five (5) judge bench to consider the question of the appropriate approach to sentencing for historical child sexual offences. Specifically, the Court considered the question of whether an offender should be sentenced in accordance with the prevailing pattern of sentences at the time of the offending, or at the time that the offender stood for sentence. The Court (Spigelman CJ, Newman AJ, Grove and Sully JJ agreeing, Mason P dissenting) held that it was appropriate to sentence on the basis of the prevailing pattern of sentences at the time of the offending.

In *Regina v Moon* [2000] NSWCCA 534; 117 A Crim R 497 the NSWCCA considered the question of how to approach the sentencing exercise for historic sexual offences where there was a paucity of statistical information or comparable cases available for consideration in assisting to determine the prevailing pattern of sentences at the time of the offending. It concluded that the Court would be guided by the maximum penalty and an assessment of the objective seriousness of the offence. Howie J held at [70]-[71]:

> *"[70] The nature of the criminal conduct proscribed by an offence and the maximum penalty applicable to the offence are crucially important factors in the synthesis which leads to the determination of the sentence to be imposed upon the particular offender for the particular crime committed. Even after taking into account the subjective features of the offender and all the other matters relevant to sentencing, such as individual and general deterrence, the sentence imposed should reflect the objective seriousness of the offence: Dodd (1991) 57 A Crim R 549, and be proportional to the criminality involved in the offence committed: Veen v The Queen (1979) 143 CLR 458. Whether the sentence to be imposed meets these criteria will be determined principally by a consideration of the nature of the criminal conduct as viewed against the maximum penalty prescribed for the offence."*
>
> *"[71] When sentencing an offender for offences committed many years earlier and where no sentencing range current at the time of offending can be established, the court will by approaching the sentencing task in this way effectively sentence the offender in accordance with the policy of the legislature current at the time of offending and consistently with the approach adopted by sentencing courts at that time."*

Practitioners may have to take account of differing statutory sentencing regimes. The *Crimes (Sentencing Procedure) Act 1999 (NSW)* commenced operation on 1 April 2001. This statutory regime allows for parole and non-parole periods, special

circumstances etc. that would be well familiar to practitioners. Its immediate predecessor was the *Sentencing Act 1989 (NSW);* which was conceptually quite similar (allowing for some differences in terminology). This legislative regime was in place from 25 September 1989 to 31 March 2001. Prior to that, the relevant legislation was found in the *Probation and Parole Act 1983 (NSW).* This statutory regime allowed for "remissions" to be earnt or credited to prisoners resulting in a reduction of their non-parole period. The current "statutory proportions" as between parole and non-parole periods. Similarly with the legislation prior to that – namely the *Parole of Prisoners Act 1966 (NSW).* Such remissions no longer exist. For a discussion of the differences between sentencing regimes see *R v Maclay* (1990) 19 NSWLR 112 at 115-122. The reality is that the modern system of sentencing is less flexible in terms of fixing parole and non-parole periods as relative proportions of the overall head sentence – for a useful discussion of this issue see *R v Moffit* (1990) 20 NSWLR 114. *"NSW Sentencing Act 1989"* by Makta (BOSCAR, 1991) is an early research publication with respect to differences in the statutory schemes and suggest that the newer regime has resulted in an increase in non-parole periods in higher courts.

In *AJB v R* [2007] NSWCCA 51; 169 A Crim R 32 Howie J held at [37] that special circumstances could be found on the basis that a different statutory regime existed at the time of the offending (1982) in that matter; specifically there was no statutory constraint as to the proportions as between non-parole and parole periods.

Practitioners may also have to deal with an increase in maximum penalty as between the time of the offending and the time the offender stands for sentence. In this regard, section 19 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* makes it clear that the lower maximum penalty is to be applied.

I hope that the above has been of some help. If you are a criminal defence lawyer in need of further assistance with matters referred to in this paper I am happy to help. I am best caught on my mobile – 0408 277 374. Please respect the "no fly zone" on my phone in the morning before the commencement of the court day – I am stressing about my case too!! Other than that you are fine to call at any time including out of hours. Alternatively, you may wish to email me – I will almost always reply within 24 hours. My email address remains:

dark.menace@forbeschambers.com.au

I have endeavoured to state the law of New South Wales as at 17 March 2017.

Mark Dennis
Forbes Chambers