DEFENDED HEARINGS

A CHILDREN'S COURT PERSPECTIVE

SCOPE

I do not propose to go into great detail on matters of substantive law. Rather, this paper deals with many of the pragmatic issues which confront practitioners appearing in summary hearings. Some of these issues are particular to the Children's Court. Practitioners should turn their minds to at an early stage to these issues because some decisions taken early on in proceedings potentially have considerable ramifications which are irreversible.

The ideas set out in the paper are my own. However, I do not suggest that this represents the only way to conduct summary hearings. I suggest you adopt whatever ideas or suggestions you like and reject the ones you don't like.

I would like to thank Tim Gartelmann for his contribution to this paper but acknowledge that any errors contained within the paper remain the author's own.

PRE HEARING MATTERS

1. Pleading guilty or not guilty

This issue has particular application to children. As you would expect many children have never had any previous experience with the criminal justice system. For many it is their first time in court as either a defendant or a witness. Many children do not know what a lawyer is, or what they do, rather they just see you as part of the process.

You need to spend some time explaining to children that as their lawyer what they say to you is confidential and that it is your job to assist them in making decisions and to assist them in their understanding of the options available to them.

Before I try and obtain any instructions I will read the Facts Sheet to them verbatim. I will say something like “this is the police version of what happened”. I will write down the fact that the Facts Sheet has been read to the client.

When you come across children who have no experience with the criminal justice system, it is quite unhelpful to say them “are you pleading guilty or not guilty?” If I can see from their antecedents that they have not been to court before, I will explain to them what pleading guilty means and what pleading not guilty means. At first instance I will say to them pleading guilty means you did it and you accept what is written in the Facts Sheet. Pleading not guilty means you didn’t do it or you have a defence to the charge. Obviously this is only the starting point but it gives the client an understanding of what each concept means.

2. Instructions

It is important to have proper instructions at a very early stage. Whilst in practice you may be time poor, that is not an excuse for not obtaining appropriate instructions.

This begs the question, what instructions do I need? The stage at which you need very detailed instructions will vary depending upon the nature of the charge. Some practitioners take the view that in strictly indictable matters you do not take any instructions until the brief of evidence has been served and the client has been given advice regarding the strengths and weaknesses of the crown case. Whilst this might seem a cautious approach, your client does run the risk of losing some of his or her discount if the client ultimately decides to plead guilty.

If the matter will be disposed of summarily I try and take adequate instructions the first time I have a conference with the client. The reason is that your client may say to you something like, “I was at home with my mum” when the alleged offence occurred. Immediately you know that your client denies being present during the offence and you will need to conference the client’s mother as soon as possible.

Perhaps a more common scenario is when your client admits to being present at the scene but says it didn’t happen the way the crown says and I have three mates who

were present that saw everything. If you are only conferencing the client the day before the hearing and you receive these instructions then you are in a very difficult situation if you have not obtained a proof from the witnesses and issued a subpoena for their attendance at court. This is why it is important to obtain sufficient instructions at an early stage.

Once the brief of evidence has been served, you then need to obtain further instructions. You will need to obtain instructions regarding each statement which touches upon your client's case, including the complainant. You need these instructions because when you are cross examining witnesses you are required to comply with the rule in *Browne v Dunn* (1893) 6 R 67 ("*Browne v Dunn*").

Your obligations under this rule have been set out neatly by the Australian Law Reform Commission (ALRC 26, vol 1), as follows,

> "*The cross examiner must put to each of the opponent's witnesses so much of his own case as concerns that witness or on which that witness could give evidence. Any rule, however, should require no more than the opponent put the substance of the case to the witness. Otherwise, the requirement would be too onerous, time-consuming and costly*".

A legitimate question arises with respect to whether or not you are required to cross examine each witness on every minor inconsistency? The answer is no. I try and take a common sense approach. If you are going to be making a submission at the end of the hearing that relates to that piece of evidence then you are required to cross examine on it.

3. Serious Charges

There is a school of thought that you should not obtain any instructions the first time you see a client charged with a very serious offence, for example, murder. I do not accept this is a good practice.

My experience is the better practice is to obtain instructions in the usual way, that is, read the client the Facts Sheet. You will find that invariably they will interrupt you at

various stages saying things such as “bullshit” and “the lying dogs”. Whilst most of the time this is unhelpful, there are occasions where what is said the first time you see a client (usually in custody in the cells) becomes invaluable. For example if your client says to you immediately something like, “I only punched him because he yelled at me that he was going to kill me”. If on trial for murder and your client is being cross examined to the effect that he is making it up (recent invention) then the fact that he told his lawyer (who wrote it down) the first time he saw him or her potentially becomes admissible and very persuasive.

The better practice is to write down what your instructions are **but do not put any instructions on the bail application**. You can make a powerful bail application by simply attacking the strength of the crown case and submitting with respect to the matters set out in s32 of the *Bail Act* 1978 (NSW). You can protect your client’s interests without disclosing their instructions. You would not say, for example, my client says that he was provoked into doing what he did.

4. The Listing Advice

Remember that quite often in summary matters the best evidence is no evidence. A considerable advantage enjoyed by practitioners is that they have the brief many weeks in advance of the hearing whereas the prosecutor is only likely to have considered the brief the day before the hearing.

A corollary of that is the prosecutor is, practically speaking, bound by the listing advice completed by the practitioner. When the practitioner completes the listing advice the police, through their court process officer, note which witnesses are required and send an electronic notification to the officer in charge confirming which witnesses must attend court.

When deciding which witnesses are required to attend for cross examination it is important to remember the process by which a police statement is made. Generally speaking there are two ways in which witness statements are prepared. The first method is the statement which is taken at the scene of the incident.

As some of you may be aware the police now carry a stamp with a jurat on it which they use at the commencement of a statement in their police notebook so as to comply with the procedural requirements regarding the taking of statements. The ramifications of this is that a brief ten minute chat at the scene of the incident can be the only contact a witness has with police prior to the hearing.

This cuts both ways, on the one hand the witness may have been overstating the position because of a heightened sense of emotion at the time. On the other hand the witness may have been being completely reasonable and understated at the time of making the statement and, in fact, have a much better recollection of what occurred than what is contained in their statement.

I say this because it is often the case that the quality or otherwise of the witness statement has nothing to do with capacity of the witness but everything to do with the quality of the police officer who took the statement. If you do not ask the correct questions you will never get a good witness statement.

The second method of taking a statement from a witness is when they attend upon a police station. The police officer usually sits in front of a computer and asks the witness a series of questions and the witness gives a series of related answers. The police officer then puts this into a narrative form before the witness signs the statement.

It is this method of taking a statement where you get the bizarre inclusions in the statements such as the witnesses saying, *"the presence of the third person at the scene combined with the other two persons meant my will was overborne".* Obviously you need to take careful notice of the language used in the statement and form a view about whether the witness is being fed what the police officer views as the relevant information. Of course with this form of statement it tends to be more detailed and, depending upon how proximate to the incident it is taken, may more closely align with the theory of the crown case.

However, regardless of which method the police adopt with respect to taking a statement the point is don't take the risk. **If the witnesses' evidence does not hurt your theory of the case or is ambiguous, do not require them for cross**

examination. Far too often prosecutors are able to rescue otherwise hopeless cases by asking further questions of witnesses which should have been asked by the respective police officer at first instance.

5. Bail and Curfews

Children's court practitioners are aware that, rightly or wrongly, the vast majority of young persons have restrictive curfews governing their behaviour. More often than not the children break their curfews meaning they spend the night in custody before being released on more onerous bail conditions than they were originally placed on.

Practitioners need to be aware that many children are being defeated by the system. By this I mean that they get fed up with being on bail, they get embarrassed by police stopping them regularly on the street, and their parents and immediate family are well over the curfew checks at all hours of the night. The upshot of this is that many children are pleading guilty so they can get off bail but in circumstances which do not amount to a true admission of guilt.

With this in mind practitioners have a role to play in ensuring that children's matters are dealt with expeditiously. For example, rather than adjourning a matter because two corroborative police statements are outstanding, take the hearing date and, if any additional material is served, rely on prohibition from receiving evidence which is not served in accordance with the provisions of the *Criminal Procedure Act* (1986) (see sections 183 and following). For charges of supply or possess prohibited drugs get proper instructions on whether an analysis certificate is required and explain to the child that it is likely to delay obtaining a hearing date by approximately three to six months.

Most children's courts are listing hearings at least three months in advance. This is three months from when the parties are ready to take a hearing date. The reality of the situation is that from the date of charge to the date of the hearing it is likely to be at least five months. If the hearing is likely to take longer than one day it will be closer to 12 months.

6. Information Gathering

I accept that matters may come into your practice at the last minute with little or no scope for further inquiries to be made, however, for matters which you have carriage of from the beginning it is important to consider what further information may be required.

The most common way to obtain further information is through issuing a subpoena. If you have instructions that the incident is said to have occurred in an area which is covered by closed circuit television cameras it may be important to issue a subpoena urgently because the footage contained on the cameras will only be held for a finite period.

In relation to the police, if the case requires it, consider issuing a subpoena for the criminal records of the complainant or other witnesses. Make the subpoena returnable well in advance of the hearing for two reasons. Firstly, if the documents are not produced on the first occasion you have time to stand the matter over to another day prior to the hearing. Secondly, as a result of the material produced under subpoena you may need to issue a further subpoena.

As a matter of abundant caution I always subpoena witnesses which the defendant has indicated will give evidence in his or her favour. This protects your position in that if the witness does not attend court you are on much firmer ground when making an application for an adjournment.

Your client is also a good source of further information. For example, quite often it is helpful to have a series of photographs of the house where the incident occurred or the particular room in question, this assists in giving the evidence context in assisting the Magistrate determine whether what is alleged is likely, or even possible. For circumstantial cases where your client may be stopped by police relatively proximate to where the offence occurred (for example a break and enter), it can be invaluable to have a Google map demonstrating how far he was from the house at the time he was stopped. These inquiries are very cost effective but assist the Magistrate greatly in understanding the case.

Expert evidence is rarely called in summary proceedings, however, if the charge is sufficiently serious and the evidence is particularly cogent consider calling expert evidence (usually this will mean making an application to Legal Aid for further funding). If the practitioner is sufficiently across the subject matter it may be possible to use the prosecutions own expert to elicit the required evidence. For example, an appropriate concession from the treating emergency doctor regarding the likely cause of injury may be sufficient.

7. Representations

Again there are some pragmatic considerations when deciding whether to write representations to the police for either the withdrawal of the charge or to plead guilty to a lesser charge.

The first consideration is delay. The court will adjourn the matter for six weeks to enable to the representations to be written and considered. The matter will then be adjourned on another one or two occasions because there is no response to the representations. Finally, maybe ten weeks later, you will have a response. If your representations were successful this may necessitate an adjournment for a further six weeks to facilitate the preparation of the Juvenile Justice Report. If your representations were unsuccessful the court will then make brief orders and then set the matter for hearing.

If your client is on bail, the prospect for an additional ten weeks of bail compliance is unlikely to be an attractive one.

The second consideration is that by writing representations you give the crown an opportunity to fix their case. If you write to the police and detail all of the problems with their case, quite often they will think, thank you for the free legal advice, and then fix all of the problems that you raised. Some charges and some evidence are not capable of being fixed, so the danger of rectification is low, but my experience is that these cases are few and far between.

For what it is worth I rarely write representations and if I do it never contains a detailed analysis of the evidence.

8. The Indictment

It is amazing how many times I have seen the police lay the incorrect charge or lay a charge which is impossible to prove. As a matter of practice you should request a copy of the indictment, which for summary matters is a copy of the Court Attendance Notice ("CAN"), from the prosecution the first time the matter is mentioned. It should be provided in addition to the Facts Sheet and criminal record.

Read the indictment carefully. Try and determine what are the elements of the offence and what are merely particulars? If the police have laid the incorrect charge, strategically what do you do? The short answer is, it depends.

On some occasions you can properly proceed by way of a hand up brief and submissions, however, on other occasions you will still need to call evidence in the usual manner but make a submission that the crown has not made out the charge as particularised.

Before deciding which approach to take, anticipate what application the crown is likely to make and how you would meet that application. Ask yourself these questions. Has my client suffered any prejudice? If so, what is the prejudice? Can the prejudice be cured by an adjournment and, if so, is that really what my client wants?

9. Brief Organisation

As sure as night follows day if the matter has proceeded by way of summary jurisdiction you will have been served with many different versions of the brief of evidence. Sometimes you get served with the same material twice and even three times, whilst on other occasions your brief is missing important items.

The police prepare the brief. You should not allow them to dictate what order you organise the matters in the brief. Throw away duplicate copies of statements.

Some practitioners organise the brief chronologically. That is, the police were first contact by witness X. Constable Y then attended the scene and took a statement from the complainant. The scene of crime officer then attended and dusted for fingerprints...and so on. Another method of organising the brief is to divide it into categories. For example civilian statements, police statements and other evidence (photos, annexures etc). The statements should be filed alphabetically.

Of course if a witness makes more than one statement I put the witnesses statement in chronologically order for ease of cross examination.

Whichever method you adopt it must make sense to you and you need to be able to find the relevant evidence at short notice. Whenever I receive a brief the first matter I attend to is arranging the brief in an order that makes sense to me.

THE HEARING

10. Evidence in Chief

Shortly before the hearing I take the client through their evidence which I will have written down in the form of a proof. During this “test run” I will lead the evidence the way I would lead it in the court room.

Your client will undoubtedly be extremely nervous about giving evidence, therefore, I always begin any examination in chief with some preliminary matters which the client will be relatively comfortable giving evidence about. For example, John how old were you at the time of the incident? Who were you living with at the time? If the client is either: attending school; attending TAFE; or working, I always like to lead that evidence early so that the bench forms a positive view of my client.

I will then lead evidence by way of subject matter. For example, John I am now going to ask you some questions regarding when you were at home. With each new subject matter I ask another introductory question so that the witness and the bench understands that we are moving on to a new topic.

Remember that by the time your client gives evidence the crown case will be closed and there may be additional matters that you need to ask of your client which were raised in the crown case but perhaps not disclosed in the statements.

Prior to having called your client make sure you have thought about what is the crucial issue and how are you going to lead admissible evidence? If your case is self defence the most important question is “why did you hit him” or “when you punched him what were you trying to do?” Of course you must have at the forefront of your mind your ethical responsibilities not to suggest any answer to any witness which includes your client.

However, you will have asked your client this question in conference and have a reasonable expectation of the response you will receive.

Leading Questions

Section 37 of the *Evidence Act* 1995 (NSW) governs the permissibility of leading questions. It is important to be familiar with the section because there are many exceptions to the general rule that “*a leading question must not be put to a witness in examination in chief*”.

Significantly section 37(d) provides, in effect, that you can ask a leading question provided the question relates to a matter that is not in dispute. In practice there are a number of matters that will not be in dispute. For example, it will not usually be in dispute that your client was arrested at the time of the offence. It will not be in dispute that you client has been charged with a particular offence.

If, as will happen from time to time, you cannot get the evidence out which you were trying to elicit, try working backwards. For example, John do you remember being arrested on 14 September? Who were you with immediately prior to arrest? When was it that you first met Jim on this day? How do you know Jim? In the ten minutes prior to your arrest where had you been? Etc, etc.

11. Cross Examination

For each witness I have a list of topics which I need to put to that witness to comply with my obligations under *Browne v Dunn.*

There are a number of different ways in which to cross examine a witness and the more you do it the more you will find yourself developing a certain style. Not every style works for every practitioner.

It is very important that before you begin your cross examination you have thought about what you are trying to achieve. Only cross examine a witness if, forensically, it is going to better your theory of the case. For example you would not necessarily cross examine a witness regarding a prior inconsistent statement when the evidence they give in examination in chief is far more favourable than the version contained in their statement. Alternatively, where your objective is to try and diminish the reliability of a witness every inconsistency may be important.

If you are relatively new at cross examination it is possible to take a formulaic approach to cross examination to make sure you don't miss anything. For novices the following approach may be helpful:

(i) When the witness is giving evidence in chief you will be writing down his or her answers. When the witness says something which is not consistent with his or her statement, highlight it. If there are significant discrepancies between the evidence in chief and the statement the first matter I attend to in cross examination is to confirm what was said during examination in chief was the truth. If it departs significantly from the statement get the witness to expand on it and provide more details.

(ii) I then cross examine the witness about any prior inconsistent statements remembering my obligations under section 43 of the *Evidence Act*. I will then look to my highlighted notes to jog my memory regarding which matters were inconsistent.

Remember that the inconsistencies are not just found between the statement provided to police and the examination in chief. Quite often

there are further inconsistencies in a version of events provided to police and recorded in a notebook. The witness may have given a version of events to the nurse at the hospital. The witness may have made a “000” telephone call. There may be complaint evidence. These are all legitimate areas to cross examine any prior inconsistent statements.

Remember also that quite often you are looking for inconsistencies in the crown case as a whole.

In relation to police witnesses the informant is usually responsible for creating the Facts Sheet and perhaps also responsible for the COPS entry. This can often be the first time they write something down in relation to the incident. This is also a legitimate basis for cross examination. When you are running a hearing on the basis that the stop and search was unlawful, the police will inevitably come along and try and justify the stop and search on the basis that your client “had his hands in his pockets”, was “looking suspicious” and “avoiding police”. This evidence from the police becomes less cogent when you take the officer to the Facts Sheet and confirm that none of the observations he just provided were contained in the Facts Sheet.

(iii) The final matter I attend to in cross examination is to confirm that I have covered all of my *Browne v Dunn* questions for each witness. When you are first starting out summary hearings it may be easy to say before completing your cross examination something like, “Mr Smith I am going to suggest to you a series of events, you can agree or disagree with each proposition, do you understand?” You can then continue to put the relevant parts of your theory of the case to the relevant witnesses.

As you become more experienced you will learn to ask the *Browne v Dunn* questions as you approach each subject matter rather than asking them all at the end. This is the preferred manner of advocacy. However, even if you are confident enough to take this approach you

would still have a checklist of relevant questions to confirm that you have discharged your obligations.

Inevitably at some point in your career you will forget to put a particular matter to a witness. What are the ramifications of this mistake? It is not necessarily fatal to your case. See section 46 of the *Evidence Act* and *R v Birks* (1990) 19 NSWLR 677. At the very least you need to be aware that you still have options available to you including making an application to re-call the relevant witness.

12. Re Examination

Read section 39 of the *Evidence Act* to understand that there are strict limits on re-examination. My experience is that police prosecutors frequently over step the line with re examination and you need be alive to this issue and be ready to object when they invariably try and fix their case.

It is rare that I will re-examine any of my witnesses because it only tends to make things worse. There are cases when my client will have been cross examined on a particular topic area but not given an opportunity to provide a legitimate explanation for his conduct. In those circumstances I will use re-examination to clarify the issue.

13. Closing Submissions

It is trite to say that prior to any evidence being called you should have a fair idea of what your closing address to the Magistrate is going to be. You are going to have a lot more traction before a Magistrate if you can set out clearly, in short form, the following matters:

(i) What are the issues in the case?;

(ii) What is the relevant evidence?; and

(iii) What does the Magistrate need to find and to what standard?

Before any evidence is called I have a sheet of paper with “Closing Submissions” written on it and the name of all witnesses. As the hearing progresses I fill in the sheet of paper as the evidence is called and use this as the basis of my closing submissions.

There are a number of ways to impeach the evidence of a witness to the same end, that is, to support a submission that the witnesses’ evidence is not reliable, for example:

(i) his or her powers of observation were effected either because of the distance involved or any physical barrier in the way;

(ii) the passing of time has affected the witnesses memory;

(iii) the witness had a motive to be untruthful; or,

(iv) any prior inconsistent statements of the witness.

Part of fulfilling your role in representing your client includes making the Magistrates job easier. Consider the dynamics of the court room. There are likely to be persons present in court who have just given evidence and are listening to what the Magistrate says about that evidence. For example, a submission that “you would not accept the evidence of Constable Smith because he is a liar”, is unlikely to assist the Magistrate. A more appropriate submission may be that your honour should not place significant weight on the evidence of Constable Smith because his ability to observe the defendant was severely limited because he was dealing with one of the other co-accused. Your choice of language is important. **Don’t overstate the evidence**.

If there is only one real issue in the case do not waste time addressing on other matters that are not seriously in dispute.

Consider asking the Magistrate to give himself or herself the relevant warnings pursuant to section 165 of the *Evidence Act*. However, again it is important to couch the submission in the correct way. You will be unlikely to be received favourably if you say to an experienced Magistrate “Your honour must warn yourself of the

dangers of identification evidence pursuant to s165 of the *Evidence Act*". To take a different example, a more subtle way of putting it may be, "your Honour would be aware of the possible dangers involved in convicting an accused based on the uncorroborated evidence of the complainant".

If you are going to take the Magistrate to matters of law you must have a copy of the relevant decision and be able to take the Magistrate to the relevant section at short notice. On numerous occasions I have seen Prosecutors (and practitioners) say "your Honour I rely on the decision in Leonie's case" only to misstate the law and not demonstrate how it applies to the relevant facts. If you want the Magistrate to take you seriously then be precise and make your submissions relevant.

Practitioners should also be cognisant of the availability publicly of the Bench Book which is maintained by the Judicial Commission. The Bench Book contains many of the relevant directions that the Magistrate should give himself or herself when considering the evidence. Directions which arise regularly in summary hearings include, drawing inferences (for example -regarding the defendant's state of mind) and lies and flight used as evidence of guilt.

It is quite appropriate and effective in closing to say to the court, "your Honour there are ten reasons why you will have a reasonable doubt". When you are first starting out with summary hearings this is an excellent method which helps focus your attention to the real issues in the case.

14. Questions from the Bench

At various stages throughout the hearing you will be met with questions from the bench. Your natural inclination will be to assist the Magistrate as much as possible. However, if you do not know an answer to the question just say, “I don’t know” or “I can’t assist”. I have seen many practitioners and prosecutors just make up the answer. It is apparent to everyone in the room they are making it up and, as they do, they are losing credibility with the Magistrate. A far better practice is to say something like, “your Honour I can’t assist at the moment but I will make some inquiries during morning tea and try and assist your Honour after the break”.

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