INDEX

Strategies and Practical Considerations in Sexual Assault Matters

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Notation

1. The reader is reminded that this paper is not intended to include detailed legal research, either as to the common law or legislation relating to sex matters. It is intended to provide the 'basics" in some terminology and directions given by a trial judge; and to get the reader thinking about potential strategies and which may be best suited to you and/or your client's case; together with some very real practical considerations, some of which may not have previously been encountered.

2. This paper will refer to some case studies from which one will be able to discern the strategies employed to assist the advocate/instructing solicitor.

1. Some Relevant Terminologies in Sex Cases

Complaint Evidence

Evidence of complaint by an alleged victim is admissible under s.66(2) Evidence Act 1995, where the complainant gives evidence. It is some evidence of the fact that the accused person assaulted the victim as alleged in the complaint. The evidence can also be used to show consistency of conduct by the complainant. This type of evidence is not restricted to sexual assault cases. It can be admitted under this section as relevant to any offence provided it is first person hearsay under s.62 of the Evidence Act.

Evidence of complaint can also be admissible under s.65(2) Evidence Act, where the person making the complaint is not available to give evidence, for example where the complainant is dead or for some other reason is not available: see clause 4 of the Dictionary to the Evidence Act.

Further, such evidence can be admitted with leave under s.108(3)(b), in order to re-establish the credibility of the complainant. In that case, the complaint can become evidence of the truth of the allegation made in the complaint by the operation of s.60 of the Evidence Act, unless limited under s.136.

Context and Relationship Evidence

"Relationship" is a nebulous term that has been associated with both sexual interest (previously guilty passion)/tendency evidence and contextual evidence. It is also used in s.293 of the Criminal Procedure Act 1986 to refer to a relationship between the complainant and the accused that is "existing or

recent" at the time of the alleged prescribed offence and is part of a connected set of circumstances in which the prescribed sexual offence was alleged to have occurred. The use of "relationship" in such a general and non-specific manner has led to the blurring of these vastly different legal heads of admissibility.

In *HML v the Queen* [2008] 82 ALJR 723, the Court clearly held that it was no longer appropriate for a judge to describe other sexual incidents to the jury as "uncharged acts" as this may invite speculation about why no charges were laid; further, it is not helpful to use the term "guilty passion" as this term obscures more than it illuminates.

If the Crown proposes to lead evidence of this type, which is potentially admissible on a number of different bases, it must clearly and precisely identify what evidence will be called and upon what bases or basis it is tendered. Anecdotally, it seems that in many incidents of identified appellable error in this area, it has often been the case that insufficient attention was given to the confining and defining of the evidence and its purpose.

Potential purposes [for the admission of Context/Relationship evidence] include:

- As contextual evidence to establish the true nature and extent of the relationship between the complainant and the accused: *R v Tully* [2006] 81 ALJR 391; *HML v the Queen* (Supra); *DJ v R* [2008] NSW CCA 272;

- As tendency (propensity or sexual interest evidence: see ss.97, 101 of the Evidence Act: *R v AH* (unreported – 27/11/97, NSW CCA); and *R v Fraser* (unreported – 10/8/98, NSW CCA);

- As coincidence (similar fact) evidence: see ss.98, 101 of the Evidence Act; *R v Merritt* [1999] NSW CCA 29; and *R v Bell* [2002] NSW CCA 2;

- As a part of a connected set of circumstances (but not necessarily contemporaneous circumstances) in which the alleged prescribed sexual offence was committed. For instance, in the context of an existing or recent relationship between an adult complainant and the accused: see s.293 of the Criminal Procedure Act 1986;

- As part of the circumstances immediately before, or immediately after, the alleged prescribed sexual offence. For instance, in cases involving adult complainants where consent is a live issue, this evidence may be relevant to the question of whether the complainant had, or had not, consented and whether the accused knew the complainant had not been consenting. In some cases, it might be relevant to the issue of whether the charged sexual act actually took place at all;

- As relevant to subsidiary matters, such as rebuttal of good character, rebuttal of innocent explanation, rebuttal of other possible forensic issues raised by defence and to explain delay, or lack of, complaint: see *R v Fraser* (Supra).

'Tendency' Evidence

Having regard to s.97 and the Dictionary of the Evidence Act 1995, tendency can be defined as being evidence of the character, reputation or conduct of the person or a tendency that a person has or had which proves, or is capable of proving, that a person has or had a tendency, whether because of the person's character or otherwise, to act in a particular way, or to have a particular state of mind.

A tendency to act, in a particular way, or to have a particular state of mind at a certain time or times, leads to the inference that such a person has a propensity to act in a particular way, or have a particular state of mind thereafter, or at other times if the same circumstances exist. Therefore, evidence of an abnormal sexual interest in a young person, for a period of time, suggests the existence of that sexual interest, was an abnormal or wrong passion; which is capable of amounting to a tendency as defined by the Evidence Act 1995.

Tendency evidence will include other acts alleged by the complainant and may also be established by other acts alleged against other complainants of a similar nature and involving an identical or similar *"modus operandi", although, it is not essential to its admissibility to establish same.*

In a sense, the tendency principle is a deceptively simple concept. However, the practical application of the principle is seemingly more problematic. Hence, clear and concise directions are required.

There have been relatively recent changes to the application of the admissibility and use of tendency evidence: see *Hughes v the Queen* [2017] HCA 20; The *Queen v Dennis Bauer (pseudonym)* [2018] HCA 40 [12 September 2018].

Shorthand principles out of *Hughes*:

- Where the occurrence of the conduct constituting the offence is at issue (as opposed to a case where the identity of the offender is the issue), there is no requirement that the evidence the subject of the tendency evidence be similar to the conduct charged or be shown to have an "underlining unity", "pattern of conduct" or "modus operandi": at [34], [37].

- The relevant test (where the occurrence of the conduct constituting the offence is in issue) is whether the tendency evidence (either by itself or in combination with other evidence) make more likely, to a significant

extent, the facts that make up the elements of the offence in question: at [40].

- This test involves consideration of the following two (2) matters:

  i. The extent to which the evidence supports the tendency it is led to prove; and

  ii. The extent to which that tendency makes it more likely the accused committed the offence:

  at [41].

- In a case where the real issue is not the occurrence of the offence but the identity of the offender, the situation is different. In that type of case the probative value of tendency evidence will almost certainly rest on a "close similarity" between the facts constituting the alleged offence and the conduct the subject of the tendency evidence: at [39].

Shorthand principles out of *Bauer*

- Put simply, in *Bauer*, the High Court held that tendency evidence should be distinguished from coincidence evidence and that, in determining the probative value of the evidence for the purposes of ss.97 and 137, the trial judge should assume that the jury will accept the evidence and, thus, should not have regard to the credibility or reliability of the evidence.

- Provided that the evidence is rationally capable of being accepted by the jury, the possibility of contamination, concoction or collusion should be assessed by the jury as part of its assessment of factors that may affect the credibility and reliability of the evidence (whereas previously, reasonable evidence of concoction/contamination, was an issue that went to admissibility, namely, the assessment of whether the tendency evidence had significant probative value).

- There is no requirement under the Evidence Act that, an accused's tendency must be proved beyond reasonable doubt, however, the Court envisaged that a direction in those terms may be necessary if there was a significant possibility of a jury treating the uncharged acts as an indispensable link in their chain of reasoning to guilt: at [86].

- In child sexual assault cases, evidence of a tendency of the accused to have a sexual interest in the complainant is likely to meet the significant probative value test in s.97, even if that evidence is only given by the complainant: at [48].

- In cases involving alleged offending against multiple complainants "there must ordinarily be some feature of or about the offending which

links the two together". If there is "some common feature of or about the offending, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the count of the offence under consideration is true": at [58].

The Murray Direction

There is a common misconception amongst criminal lawyers, that the *Murray* direction no longer applies because of the introduction of s.294AA of the Criminal Procedure Act 1986, which commenced on 1 January 2007. However, a careful consideration of the decisions in *Ewen v R* [2015] NSW CCA 117 and *AL v Regina* [2017] NSW CCA 34 [22 March 2017] make it clear, that, given the right circumstances, the *Murray* direction is very much "alive and kicking".

The term *"Murray direction"* tends to be loosely used, and to be undefined. It is commonly used to refer to a direction that, in any case in which the sole evidence of the commission of the crime is that of a single witness, the evidence of that witness must be scrutinised with great care: *R v Murray* [1987] 11 NSWLR 12 and Ewen (supra) at 104.

Her Honour Simpson J, in Ewen said at [140]:

> *"A 'Murray direction', based **only** on the absence of corroboration, is, in my opinion, tantamount to a direction that it would be dangerous to convict on the uncorroborated evidence of the complainant"* [bold emphasis added].

At 141 of the same judgement, her Honour, Simpson J, made it clear that a *Murray* direction would have no application:

> *"If the direction given suggests that merely – I emphasis merely – because a complainant's evidence is uncorroborated, it would be, on that account dangerous to convict, it transgresses s.294AA(2)…"*

Also, in *Ewen*, his Honour Basten JA at [26] – [27] said in relation to the judgement of his Honour, Lee J in Murray:

> *"However, Lee J had in mind only sex offences, where "absence of corroboration of the complainant's evidence" might previously have given rise to a mandatory warning. Indeed, if that is the true scope of a Murray direction, it must now be reformulated to comply with s.294AA. There is no basis in the terms or intendment of s.294AA to qualify the well-established principle as to the burden of proof in relation to criminal prosecutions. However, there is a fine line, which must be approached with some care between a warning focusing the minds of the jury on the burden of proof borne by the prosecution, and a "suggestion" that complainants as a class are unreliable.*

> ***Whilst none of the statutory provisions prevent a trial judge from giving a jury a warning necessary to prevent a miscarriage of justice****, care must be taken as to the nature of the warning and the basis upon which it is given so as not to contravene the provisions" [bold emphasis added]*

In *AL v Regina* [supra] at [77] the Court held:

> *"In all cases a direction cautioning the jury about the possible unreliability of the evidence of the child complainant in a sexual assault case can only focus on matters relevant to the particular child in the particular circumstances of the case. It cannot focus on the mere fact that the witness is a child, or derived from a feature about the witness which is an inherent feature of children more generally, such as a warning based on an assumption about the capacity of the child to lay down memory or accurately recall memory later".*

Hence, where the Crown case (typically) almost entirely relies upon the credibility of the complainant, **and** where there is evidence to which the defence can point that suggests that some important aspect of the complainant's evidence may be unreliable then the Court may indeed give a *Murray* type warning/direction, in terms careful not to infringe the provisions of s.294AA of the Criminal Procedure Act.

The Liberato Direction

In *Liberato v the Queen* [1985] 159 CLR 507 at 515, Brennan J in his dissenting judgement (Dean J agreeing) said:

> *"When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is common place for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bares the onus of proving. The jury must be told that, even if they preferred the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt about the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue"*

The Markuleski Direction

This direction arises from the decision of *R v Markuleski* [2001] 52 NSWLR 82 and relates to a trial where there are multiple counts involving one complainant or essentially, the evidence of one complainant. The jury would

be told that in giving separate consideration, to the individual counts, it means that the jury is entitled to bring in verdicts of guilty on some counts and not guilty on some other counts if there is a logical reason for that outcome. However, the jury would also be told that if it was to find the accused not guilty on any count, particularly, if that was because the jury had doubts about the reliability of the complainant's evidence, the jury would have to consider how that conclusion affected its consideration of the remaining counts.

2. Strategies and Practical Considerations

Do I Attend Police Station with my Client [serious indictable offences]?

It is common for many criminal lawyers to advise clients, that he/she should attend the police station with the [suspected] client to "protect your rights" or something similar. That may well have been the correct position, but no more, since the introduction of s. *89A Evidence Act 1995*.

In summary, if you attend to police station with your client and your client is given a 'special caution' in your presence, and your client participates in an ERISP, but fails to mention a fact that is later relied upon in his/her defence, then the prosecutor and/or the judge [at trial] may suggest to the jury that the jury may draw an unfavourable inference about the accused having made mention of that facts during the ERISP.

Consequently, you must consider very carefully, whether you should attend the police station with your client, particularly, if there is a reasonable possibility, your client may participate in an ERISP.

Should my Client participate in an ERISP?

Not one brush fits all. Don't blindly follow the Commandment that your accused client should not participate in an ERISP – that no good can come from it.

Remember this: although a bad ERISP may lose the case; a good ERISP may win the case for your client; and obviate the need for your client to have to give evidence at trial.

If the Crown case is somewhere between good to strong, the likelihood is that, at trial, the jury will at the least, want to hear from your client, for him/her to have any reasonable chance to be acquitted. That is where a good ERISP has the added value of avoiding the need to call him/her, when the Accused would be cross examined by the Crown Prosecutor or Trial Advocate. If the Accused participated in a good ERISP, when he was asked questions by police [not a Crown prosecutor], the Crown may be deprived of the opportunity to make a host of *other* submissions to the jury in his/her closing address.

I suggest, you are disadvantaged in advising your client as to whether he/she should or shouldn't participate in an ERISP, unless you have [some]

instructions AND have carefully considered the Facts Sheet; your client's background and ability to handle police questioning; the nature and seriousness of the charges; AND at least some consideration as to the potential/likely defence(s):

- Identity – Accused not known to complainant
- Alleged offence didn't happen – Accused known to complainant
- The Complainant consented
- Non-communication of non-consent by Complainant to Accused

When do I take a Proof of Evidence and ask That Question ['Did you do it'?]

Criminal lawyers are often advised not to ask 'that question(s)' of your client unless you have to do so. Again, one brush does not fit all.

In any event, there is nothing to prevent you from taking a detailed proof of evidence as soon as practicable after taking instructions. If you consider not to ask that question, then don't, but get those detailed instructions.

That said, you certainly to make it clear to your client, if you are going to ask that question, that you will be bound by his/her instructions and that they must carefully think about what it is they want to tell you.

A detailed and signed proof, quite aside from enabling you to get about the preparation of the defence case, including whether to seek further particulars, issue of subpoena, making of a No Bill application [ETC], may provide you with a substantial tactical advantage at trial. Allow me to elaborate.

It is not uncommon for Crown Prosecutor's, particularly, less experienced ones, to put to an accused at trial [assuming the accused gives evidence], that he/she 'made up' that evidence, or that he/she, is "making it up as you go along". If you had taken a detailed proof of evidence [likely, 1-2 years before trial], you would have zero need to despair, because you would then be in the position where you could re-establish your client's credit by tendering your client's statement as a prior consistent statement: s. 108 (3) Evidence Act.

Don't think very experienced Crowns Prosecutors don't fall into that category. I appeared in a murder trial [R v O'Grady, Supreme Court NSW, 1999], when my opponent, Mark Tedeschi, QC, suggested to my client Accused, that he had just fabricated his evidence [going to his state of mind – mental health at the time of the alleged offence]. I made a successful application under s. 108 (3) and his Honour, RS Hulme QC, was quite critical of the Crown in opening up the opportunity of a "free kick" for the defence to tender the detailed statement of the Accused, which contained very significant statements, two years prior, consistent with his oral evidence.

Do I call my Client to Give Evidence?

As you will have gathered from what I have said above, the answer to that question will largely depend on a number of variables:

i. If, at its close, the Crown case is weak, whether your client participated in an ERISP or not – most likely, NO!
ii. If your client has participated in a good ERISP, that is, there is not anything of significance, he/she could add by giving evidence, and your assessment is that the jury is 'on-side' – NO!
iii. However, if your client has participated in a good ERISP, but, your assessment of the case/jury, is that it is 'not looking good', then in my view, you would have little choice but to advise your client he/she should give evidence. That is particularly so, if your assessment is that your client will be able to handle what is thrown at him/her. What would your client have to lose? It may well be, that the jury, wants to hear your client deny the allegations in the face of cross examination by the Crown.
iv. If your client did not participate in an ERISP and your assessment is that the case did not go well, or you are uncertain as to the jury's assessment of it at the close of the Crown case, in my view, where there is no ERISP, contemporary juries, will want to hear from the Accused and, generally, your advice should be that your client give evidence.

My Client Lied During his ERISP – What do I do?

If you are aware well before trial that your client lied during the ERISP and that the 'lie' will be established during trial, serious consideration should be given to arranging for your client to participate in a further ERISP, with a view to minimising the damage at trial.

The same considerations, as to your client's ability to handle himself/herself [by police questioning] also apply here.

Further, the importance or unimportance of the lie is crucial in determining your strategy to deal with such a problem. The more important the lie, the more likely, you will want it corrected before trial. Additionally, that 'correction' should then come out in the Crown case, as the further ERISP should be led by the Crown. Sometimes, the police will be reluctant to allow the Accused to participate in a further ERISP, however, effective communication with the DPP should see it come about.

Obviously, if your client is going to participate in a further ERISP, he/she will need to explain why he/she lied to police? That leads me to the next point.

That is, juries, generally, understand human emotions and live in the 'real world'. I have appeared in two sexual assault trials over the years where the Accused have lied to police, denying that they had sex with the Complainant – "it didn't happen".

Eventually, like "extracting hen's teeth", I made it clear that, the biggest problem with the case was his/their denial – denying that there was any sex between him/them and the Complainant, because there was other evidence pointing to the accused having been in the house of the Complainant, or having had sex with the Complainant; only to then be instructed he/they lied to police because they did not want their wife/fiancé to know they'd had consensual sex with the Complainant.

Whilst, the lie is certainly a problem and goes to the credit of the accused, when there is a reasonable explanation for the lie, it is not the end of the world. You then have the opportunity, to take what would have been a negative – evidence that you could not explain – the DNA evidence as to sex or whatever other evidence was against your client – and to turn that negative into a positive. The positive being that, he is now 'coming clean', he has explained why he lied to police [most jurors would at least understand the reason for such a lie] and suggesting to the jury, they can now believe the accused; and at least, your client is back in the race.

Anecdotally, in those cases in which I have been involved, each of my clients were acquitted.

Subpoena of Documents - Sexual Assault Communication Privilege [SACP]

Relevant legislation: Sections 295 – 306 Criminal Procedure Act, 1986

A protected confidence means a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence, even if the communication was made before the alleged commission of any offence, or not made in connection with any sexual offence: s 296 (1)- 296 (2). See sub-sections (3) – (5) for the meaning of 'counselling communication'.

In respect of indictable proceedings, the legislation prohibits a party compelling by subpoena, **in the Local Court**, the production of documents that may include a 'protected confidence'. That said, surprisingly, it often happens: s 297.

When the matter progresses to the District Court, you are required to obtain the leave of the court, before filing a subpoena seeking production of documents that may include a 'protected confidence': s 298.

Sections 299C and 299D, sets out the provisions in respect of seeking and determining leave respectively.

The legal representative of the Complainant has standing to appear in respect of the issue or leave to issue a subpoena: s 299A.

The practical effect of the legislation and the common law is that, where a subpoena has been issued without leave, and that subpoena does, or arguably does require the production of a protected confidence, the court will likely move to s 299D, to determine whether to grant leave to the issuing party (usually the accused), to have access to the documents.

There is plenty of law on the SACP and interpretation of the SACP legislation and it is not proposed to provide a treatise of same in this paper.

I suggest, if you are considering issuing a subpoena to departments such as FaCS, counselling service, or any other authority or organisation, including police, that may require production of a protected confidence, that you carefully consider the SACP legislation [and authorities], with the intent that you file and Application for Leave [s 299C] as soon as reasonably possible after arraignment in the District Court.

Your focus will need to particularly be, on s 299D.

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