Judicial Commission of New South Wales

CRIMINAL TRIAL COURTS BENCH BOOK

Update 72

April 2023

SUMMARY OF CONTENTS OVERLEAF

Judicial Commission of New South Wales

Level 5, 60 Carrington Street, Sydney NSW 2000

GPO Box 3634, Sydney NSW 2001

SUMMARY OF CONTENTS

Update 72

Update 72, April 2023

Update 72 amends the *Criminal Trial Courts Bench Book* to incorporate recent case law and legislative developments. The amendments include new chapters titled **Defence of mental health impairment or cognitive impairment** and **Substantial impairment because of mental health impairment or cognitive impairment**.

The following chapters have been revised:

Intoxication

- **[3-255] Suggested intoxication direction — offence of specific intent** to add reference to *Cliff v R* [2023] NSWCCA 15 regarding intoxication and specific intent offences and what issues a jury should be directed to consider.

Tendency, coincidence and background evidence

- **[4-225] Tendency evidence** to add reference to *Bektasovski v R* [2022] NSWCCA 246 which held tendency evidence required a sufficient link between distinct events but that link need not be peculiar, and *Kanbut v R* [2022] NSWCCA 259 where the cross-admissibility of tendency evidence is discussed.

Voluntary act of the accused

- **[4-360] A voluntary act** to update cross-references to **[6-050] Automatism — sane and insane** and **[6-200] Defence of mental health impairment or cognitive impairment**.

Cross-examination concerning prior sexual history of complainants

- **[5-110] The exclusions in s 294CB(4)** to add reference to *Cook (a pseudonym) v R* [2022] NSWCCA 282 and *R v Elsworth* [2022] NSWCCA 276 where various aspects of the exclusions in s 294CB(4) *Criminal Procedure Act* 1986 are discussed.

Automatism — sane and insane

- **[6-050] Preliminary notes** to add reference to *R v DB* [2022] NSWCCA 87 as an illustration of non-insane automatism, and to update commentary and suggested directions to reference the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 which commenced 27 March 2021.

The following chapters have been re-written or substantially revised:

Defence of mental health impairment or cognitive impairment

- **[6-200]**ff have been re-written to provide commentary and suggested directions for the defence of mental health or cognitive impairment and to include the new special verdict of act proven but not criminally responsible, following the commencement

of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020. This chapter replaces the chapter previously titled **Mental illness — including insane automatism**.

Substantial impairment because of mental health impairment or cognitive impairment

- **[6-550]**ff have been significantly revised to include commentary and suggested directions for the partial defence to murder of substantial impairment because of mental health impairment or cognitive impairment in s 23A *Crimes Act* 1900. Commentary on the effect of self-induced intoxication, following the commencement of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 has also been included. This chapter replaces the chapter previously titled **Substantial impairment by abnormality of mind**.

Judicial Commission of New South Wales

CRIMINAL TRIAL COURTS BENCH BOOK

Update 72

April 2023

FILING INSTRUCTIONS OVERLEAF

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FILING INSTRUCTIONS

Update 72

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Intoxication

[3-250] Introduction

The effect of self-induced intoxication upon the mental element of an offence is set out in Pt 11A *Crimes Act* 1900. In effect, Pt 11A divides offences committed after 16 August 1996 into two types: (a) offences of specific intent, and (b) other offences.

Offences of specific intent are set out in s 428B of the Act and are offences "of which an intention to cause a specific result is an element". Generally, intoxication (however caused) is relevant to whether the accused had the necessary specific intention at the time when the act was committed giving rise to the offence: s 428C. It does not extend to the basic or general element to commit the act: *Harkins v R* [2015] NSWCCA 263 at [34], [39]. Although offences involving recklessness are not included in s 428B (even where recklessness is proved by intent), reckless murder is an offence of specific intent: *R v Grant* (2002) 55 NSWLR 80.

For other offences, self-induced intoxication cannot be taken into account when determining whether the person had the mens rea of the offence: s 428D.

Where evidence of intoxication results in the accused being acquitted of murder, self-induced intoxication cannot be taken into account in determining whether the person has the requisite mens rea for manslaughter: s 428E. As to intoxication and **Substantial impairment because of mental health impairment and cognitive impairment** see **[6-550]**; **Self-defence** see **[6-470]**ff; **Indecent assault** see **[5-600]**; **Sexual intercourse without consent** (for offences alleged before 1 January 2008 see **[5-800]** and offences alleged thereafter see **[5-820]**).

Where a reasonable person test is applicable, the reasonable person is one who is not intoxicated: s 428F. Self-induced intoxication cannot be taken into account on the issue of voluntariness: s 428G.

The application of Pt 11A gives rise to some apparent anomalies that may complicate a summing-up. For example, the offence of robbery is not an offence of specific intention (it is a stealing accompanied by threats or violence) but an assault with intent to rob is an offence of specific intent. Yet often the assault offence will be an alternative to the completed offence.

As to intoxication see generally *Criminal Practice and Procedure NSW* at [8-s 428B.1] and *Criminal Law (NSW)* at [CLP.1180].

[3-255] Suggested intoxication direction — offence of specific intent

It is erroneous to direct the jury in terms of whether the accused had the *capacity* to form the relevant intent and a direction in those terms may give rise to a miscarriage of justice: *Bellchambers v R* [2008] NSWCCA 235. The issue is whether the accused formed the specific intent referred to in the charge notwithstanding his or her intoxication.

It may be disputed on the evidence whether a defendant was intoxicated and whether any intoxication was so extensive as to affect the formation of the relevant intent. There

must be sufficient evidence so that it is fit to be considered by a jury, but it is not a demanding standard and can still include substantial, and even reasonable, doubts on those issues: *Cliff v R* [2023] NSWCCA 15 at [21].

It is suggested that the jury would be assisted by written directions in a case where intoxication is relevant to some counts but not others.

In considering the question of whether the Crown has proved that [*the accused*] had the intention to [*specify the required intent*] one matter that you need to consider is the effect upon [*the accused*] of the [*alcohol/drugs*] which [*he/she*] says [*he/she*] consumed. Whether [*the accused*] was affected by [*alcohol/drugs*] at the relevant time and the degree of that intoxication are issues for you to consider. But as a matter of law, intoxication by alcohol or drugs is a relevant matter to be taken into account in determining whether an accused person had formed the intent to commit the offence charged. When I am speaking of intention at this time, I am not referring to the intention to commit the acts relied upon by the Crown that give rise to the offence alleged [*specify acts relied upon if necessary*]. I am referring to the specific intention that is stated in the charge, which is [*identify the specific intention alleged*]. [*In murder it will be the state of mind relied upon by the Crown including reckless indifference.*] [*The accused's*] intoxication is only relevant to that issue.

It is for the Crown to satisfy you beyond reasonable doubt that [*the accused*] had the intent to [*specify the intention*] in spite of the evidence of [*his /her*] consuming [*alcohol/drugs*] before the alleged conduct giving rise to the charge. If the Crown fails to satisfy you beyond reasonable doubt on that issue [*the accused*] must be acquitted of [*the offence of specific intent*].

In some circumstances, an intoxicated person may act without forming any particular intention at all. On the other hand, a person may be considerably affected by alcohol and/or drugs and yet still commit an act with a specific purpose in mind. The fact that the person may have no recollection of the incident afterwards does not necessarily mean that he or she was not acting with a specific intention at the time of the incident. The fact that his or her judgement was affected so that the person acts in a way different to how he or she would have acted if sober does not necessarily mean that the person was not acting with a specific intention. For example, if a person in a drunken fury picks up a hammer and hits another over the head with it, there may be little doubt that the person intended to cause the other really serious harm, even though the judgement of the person using the hammer was affected by alcohol.

[*Set out the evidence and arguments by the accused relied upon for asserting that he or she did not have the specific intention required to prove the offence and the Crown's response.*]

Having considered the evidence and arguments on this issue the question for you is whether, having regard to the evidence of [*the accused's*] intoxication, you find the Crown has proved beyond reasonable doubt that [*he/she*] acted with the intention to [*specify the specific intention*]. Keep in mind that there is no obligation on [*the accused*] to prove either that [*he/she*] could not or did not act with that intention. It is an essential fact that the Crown must prove before you can find [*the accused*] guilty of the offence charged.

[*Where there is an alternative charge add*

If the Crown fails to satisfy you that, for whatever reason, [*the accused*] did intend to [*specify the specific intention stated in the charge*], you would find [*the accused*] not guilty of the first count on the indictment. If you came to that decision then you would consider the alternative charge of [*specify the alternative charge relied upon by the Crown*].]

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Tendency, coincidence and background evidence

Pt 3.6 *Evidence Act* 1995 (NSW)

[4-200] Introduction

This section deals with directions to be given in relation to evidence that raises the bad character of an accused (sometimes referred to as "propensity evidence") where it is relevant to an issue in the trial.

Part 3.6 *Evidence Act* 1995 contains provisions dealing with the admissibility of tendency and coincidence evidence. This is the use of evidence of other acts of misconduct for a propensity purpose: that is, to reason that because of the accused's conduct in the past he or she is more likely to have committed the offence(s) charged.

However, there is a third category of evidence of a similar nature that is not dealt with by the *Evidence Act* explicitly but which falls within s 95 of the Act. This is evidence which is not being used to prove tendency or coincidence even though it may raise the accused's past misconduct. It is often referred to as relationship or background evidence. In sexual assault cases it is called "context evidence". This category of evidence is not used for propensity reasoning, as it is under ss 97 and 98, but to explain the conduct of the accused and/or another person (usually the alleged victim) against the background of the incident giving rise to the offence charged. This type of evidence is based upon the common law and has not been excluded by the provisions of the *Evidence Act*: *R v Quach* [2002] NSWCCA 519.

Evidence can be admitted for various reasons on a non-propensity basis within s 95: eg to rebut good character, *R v OGD (No 2)* (2000) 50 NSWLR 433; or to prove the state of mind of another person, *R v Fordham* (unrep, 2/12/97, NSWCCA) (non-consent of complainant).

It is always necessary for the trial judge to require the Crown to specify the purpose for which the evidence is to be placed before the jury as that will determine what sections of the Act apply: *DJV v R* [2008] NSWCCA 272 at [16]. Where evidence is not admitted as tendency or coincidence evidence then the issues will be whether the evidence is relevant and whether it should be rejected under ss 137 or 135 of the Act.

Generally where evidence is admitted under Pt 3.1 it will be necessary to give a warning against tendency reasoning where there is a real possibility that the jury might use it in that way: *Toalepai v R* [2009] NSWCCA 270 at [48]; *JMW v R* [2014] NSWCCA 248 at [147]–[150]; *R v Jiang* [2010] NSWCCA 277 at [44].

At the time tendency and/or coincidence evidence is adduced, consideration should be given to directing the jury as to the permissible use of the evidence and warning them against its misuse, particularly where they may wonder about the purpose of such evidence, for example, if it is not the subject of a charge in the indictment: *Qualtieri v R* [2006] NSWCCA 95 at [80].

The judge should avoid using the term "uncharged acts" in relation to evidence of this nature for whatever purpose it is being admitted: *HML v The Queen* (2008) 235 CLR 334 at [1], [129], [251], [399], [492]; *KSC v R* [2012] NSWCCA 179 at [64].

[4-210] Context evidence

Although not confined to particular offences, context evidence is most often admitted in child sexual assault cases. The complainant is permitted to give evidence of other acts of a sexual nature allegedly committed against him or her by the accused even though those acts are not charges in the indictment. The purpose of the evidence is to place the specific allegation(s) in the indictment in the context of the complainant's overall allegations against the accused in order to assist the jury in understanding the particular allegation(s) in the charge(s).

It is essential to identify the purpose of the evidence tendered by the Crown. Evidence is not admissible simply because it proves the relationship between the complainant and the accused: *R v ATM* [2000] NSWCCA 475. It must be necessary and capable of providing context to the complainant's allegations: *Norman v R* [2012] NSWCCA 230, otherwise the evidence is irrelevant or proves a tendency: *DJV v R* at [17], [29]–[30], [39]; *RWC v R* [2010] NSWCCA 332 at [130].

A discussion by the judge of "context evidence" as "relationship evidence" can cause confusion and result in a misdirection, because of the risk of the jury applying tendency reasoning: see for example *DJV v R*, *JDK v R* [2009] NSWCCA 76 at [37] and *SKA v R* [2012] NSWCCA 205 at [280]–[281].

As to the purpose of context evidence, see *RG v R* [2010] NSWCCA 173 at [38]. It answers hypothetical questions that may be raised by the jury about the allegations giving rise to the charges in the indictment. It may overcome false impressions conveyed to the jury such as that the incident "came out of the blue": *KTR v R* [2010] NSWCCA 271 at [90] or "occurred in startling isolation": *KJS v R* [2014] NSWCCA 27 at [38]. It may also be admitted to explain lack of complaint by the complainant: *DJV v R* at [28]; *KJS v R* at [34](v).

As to the distinction between context and tendency evidence see *Qualtieri v R* [2006] NSWCCA 95 particularly at [119]ff which was applied in *SKA v R*, above. In particular the evidence is not admitted to prove the guilt of the accused but may have the effect of bolstering the credit of the complainant.

As to context evidence see generally: P Johnson "Admitting evidence of uncharged sexual acts in sexual assault proceedings" (2010) 22(10) *JOB* 79; *Criminal Practice and Procedure NSW* at [3-s 97.15]; *Uniform Evidence Law* (15 ed, 2020) at [EA.101.150]; *Uniform Evidence in Australia* (3 ed, 2020) at 59-10.

[4-215] Suggested direction — context evidence

Before you can convict the accused in respect of any charge in the indictment, you must be satisfied beyond reasonable doubt that the particular allegation occurred. That is, the Crown must prove the particular act to which [*the/each*] charge relates as alleged by the complainant.

In addition to the evidence led by the Crown specifically on the count/s in the indictment, the Crown has led evidence of other acts of alleged misconduct by the accused towards the complainant. I shall, for the sake of convenience, refer to this evidence as evidence of "other acts".

The evidence of other acts is as follows:

[*Specify the evidence of other acts upon which the Crown relies*].

It is important I explain to you the relevance of this evidence. It was admitted solely for the purpose of placing the complainant's evidence towards proof of the charges into what the Crown says is a realistic and intelligible context. By context I mean the history of the conduct by the accused toward the complainant as [*he/she*] alleges it took place.

[*Outline the Crown's submission of the issue/s justifying the reception of context evidence.*]

Without the evidence of these other acts the Crown says, you may wonder, for example, about the likelihood of apparently isolated acts occurring suddenly without any reason or any circumstance to link them in anyway. If you had not heard about the evidence of other acts, you may have thought the complainant's evidence was less credible because it was less understandable. So the evidence is placed before you only to answer questions that might otherwise arise in your mind about the particular allegations in the charges in the indictment.

[*The following should be adapted to the circumstances of the case:*]

If, for example, the particular acts charged are placed in a wider context, that is, a context of what the complainant alleges was an ongoing history of the accused's conduct toward [*her/him*], then what might appear to be a curious feature of the complainant's evidence — that [*she/he*] did not complain about what was done to [*her/him*] on a particular occasion — would disappear. It is for that reason the law permits a complainant to give an account of the alleged sexual history between herself or himself and an accused person in addition to the evidence given in support of the charge/s in the indictment. It is to avoid any artificiality or unreality in the presentation of the evidence from the complainant. The complainant's account of other acts by the accused allows [*him/her*] to more naturally and intelligibly explain [*her/his*] account of what allegedly took place.

The Crown can therefore lead evidence of other acts of a sexual nature between the accused and the complainant to place the particular charge/s into the context of the complainant's account of the whole of the accused's alleged conduct.

However, I must give you some important warnings with regard to the use of this evidence of other acts.

Firstly, you must not use this evidence as establishing a tendency on the part of the accused to commit offences of the type charged. You cannot act on the basis that the accused is likely to have committed the offence/s charged because the complainant made other allegations against [*him/her*]. This is not the reason the Crown placed the evidence before you. The evidence has a very limited purpose as I have explained it to you, and it cannot be used for any other purpose or as evidence that the particular allegations contained in the charges have been proved beyond reasonable doubt.

Secondly, you must not substitute the evidence of the other acts for the evidence of the specific charges in the indictment. The Crown is not charging a course of misconduct by the accused but has charged particular allegations arising in what the complainant says, was a course of sexual misconduct. You are concerned with the particular and precise occasion alleged in [*the/each*] charge.

You must not reason that, just because the accused may have done something wrong to the complainant on some or other occasion, [*he/she*] must have done so on the

occasion/s alleged in the indictment. You cannot punish the accused for other acts attributed to [*him/her*] by finding [*him/her*] guilty of the charge/s in the indictment. Such a line of reasoning would amount to a misuse of the evidence and not be in accordance with the law.

[*Note: attention should be directed to any particular matters that might affect the weight to be given to the evidence.*]

[4-220] Background evidence

This is usually evidence of the misconduct of an accused that is being tendered for a non-propensity purpose and, therefore, is admissible under Pt 3.1.

The term "background evidence" is adopted here to refer to relationship and transactional evidence. Relationship evidence is used here in a narrow sense and is to be clearly distinguished from "context evidence" in child sexual assault offences. Not only is the use to be made of the evidence different from context evidence, but also the nature of the evidence will usually be different.

Background evidence places the accused's alleged conduct and/or state of mind within the surrounding events including the relationship between the accused and the victim, or a series of other incidents which form part of chain of events. Background evidence tends to have a close temporal connection with the incident giving rise to the charge. Background evidence is admissible to prove that the accused committed the offence charged as circumstantial evidence.

Background evidence, however, is not tendency evidence. It does not require tendency reasoning to make it relevant although as circumstantial evidence it relies upon available inferences or conclusions arising from the background evidence to prove the charge.

See generally: *Criminal Practice and Procedure NSW* at [3-s 97.1] and [3-s 97.10] and *Uniform Evidence Law* (15 ed, 2020) at [EA.101.150]; *Uniform Evidence in Australia* (3 ed, 2020) at 97-7.

(a) Relationship evidence

Simply because the evidence concerns the relationship between the accused and the alleged victim it does not follow that the evidence is admissible: *Norman v R* [2012] NSWCCA 230 at [33]. The significant questions on admissibility are:

(i) Is the evidence relevant?

(ii) What is the purpose for which it is being tendered?

The evidence can be admitted to show why certain persons acted as they did where that is a relevant consideration: *R v Toki (No 3)* [2000] NSWSC 999; *R v FDP* (2009) 74 NSWLR 645.

It can prove animosity between the accused and the deceased in order to rebut accident: see *Wilson v The Queen* (1970) 123 CLR 334; or to prove the accused's state of mind: *R v Serratore* [2001] NSWCCA 123; or to prove identification of the offender: *R v Serratore* (1999) 48 NSWLR 101.

It can be used to prove that the relationship between two persons was not an innocent one but was based upon the supply of drugs, see *Harriman v The Queen* (1989) 167 CLR 590; *R v Quach* [2002] NSWCCA 519, *R v Cornwell* (2003) 57 NSWLR 82.

Admissibility can depend upon the temporal connection between the evidence and the offence: *R v Frawley* [2000] NSWCCA 340 (6 weeks was considered not to be too long).

(b) Transactional evidence

Evidence showing a set of connected events (or a course of conduct) can be admissible even though revealing misconduct by the accused. Transactional evidence is distinguishable from tendency evidence and evidence proving an accused had a continuing state of mind: *Haines v R* [2018] NSWCCA 269 at [219], [224]–[226]. It will be admissible whether it occurred before or after the alleged offence: *R v Mostyn* [2004] NSWCCA 97 at [119]; *Haines v R* at [224]. It can be used to identify the accused as the offender or the state of mind of the accused at a particular time proximate to the time of the offence. The following are some further examples:

- Conduct during a massage before an alleged sexual assault: *Jiang v R* [2010] NSWCCA 277.
- Identification of the accused as the offender, see *O'Leary v The King* (1946) 73 CLR 566; *Haines v R* [2018] NSWCCA 269.
- Evidence which shows the state of mind of the accused at a time close to the commission of the alleged offence: see *R v Adam* [1999] NSWCCA 189 at [26]; *R v Player* [2000] NSWCCA 123 at [22]; *R v Serratore* [2001] NSWCCA 123; *R v Mostyn* at [135].
- A system of work: see *R v Cittadini* [2008] NSWCCA 256 at [26]–[27].

A direction warning the jury against tendency reasoning is necessary where there is a real possibility that the jury might use the evidence for a tendency purpose: *Jiang v R* at [44].

[4-222] Suggested direction — background evidence

The function of a direction in the case of background evidence is to inform the jury of the limited purpose for which the evidence is admitted and to direct them against using the evidence for tendency reasoning. The content of the direction will depend substantially upon the nature of evidence and the purpose it is being admitted. For example, if it is admitted to rebut a defence of accident. The direction should contain the following components:

> The evidence led by the Crown [*recite the form of the background evidence*] was placed before you as evidence of background to the incident giving rise to the charge/s before you. The Crown's argument is that without that evidence you would not have the whole history necessary to understand the full significance of the incident upon which the charge is based. The Crown argues that this evidence:
>
> [*State Crown argument eg explains why the accused and the victim acted in the way they did or reveals the state of mind of the accused at the relevant time or rebuts accident or identifies the accused as the offender*].

That is why this evidence was placed before you and how the Crown relies upon it in proof of the charge. However, that is the only reason the evidence is before you and you cannot use it for any other purpose. Whether you give it the significance the Crown asks you to place on the evidence is a matter for you. But that is the only relevance it has to your deliberations.

In particular you must not use that evidence to reason that, because the accused has behaved in a certain way on a particular occasion, [*he/she*] must have behaved in that or a similar way on the occasion giving rise to the charge. You must not use that evidence to reason that the accused is the type of person who would commit the offence with which [*he/she*] has been charged. You cannot punish the accused for other conduct attributed to [*him/her*] by finding [*him/her*] guilty of the charge/s in the indictment. That is not the Crown's argument and it would be contrary to the law and your duty as a juror to use the evidence for a purpose other than the specific basis relied upon by the Crown.

[4-225] Tendency evidence

The admission of tendency evidence is governed by Pt 3.6 *Evidence Act*. It requires two preconditions: (a) the giving of notice and (b) that the evidence has "significant probative value".

(a) The requirement to give notice was considered in *R v Gardiner* [2006] NSWCCA 190 at [128], *Bryant v R* [2011] NSWCCA 26 and *Bangaru v R* (2012) 269 FLR 367 at [256] where the tendency of the accused was not specified. See also *R v AC* [2018] NSWCCA 130 at [21]ff. As to dispensing with the requirement of notice for the tendering of tendency evidence, see s 100 and *R v Harker* [2004] NSWCCA 427.

(b) As to the admissibility of evidence under s 97 see *The Queen v Dennis Bauer (a pseudonym)* (2018) 266 CLR 56; *IMM v The Queen* (2016) 257 CLR 300 and *Hughes v The Queen* (2017) 263 CLR 338. Tendency evidence should be distinguished from coincidence evidence: *R v Nassif* [2004] NSWCCA 433.

See generally *Criminal Practice and Procedure* at [3-s.94.1]ff; *Uniform Evidence Law* at [EA.96.30]ff; *Uniform Evidence in Australia* (3 ed, 2020) at Pt 3.6-1ff.

Section 94(4), which was inserted into the Act in 2020 and affects hearings which commenced from 1 July 2020, states that any principle or rule of the common law or equity preventing or restricting the admissibility of tendency or coincidence evidence is not relevant when applying Pt 3.6.

The following discussion of the caselaw must be read with the terms of s 94(4) in mind. *Taylor v R* [2020] NSWCCA 355 contains a useful summary of the caselaw: at [94]–[122].

In determining the probative value of evidence for the purposes of ss 97(1)(b) and 137, a trial judge should assume the jury will accept the evidence and, thus, should not have regard to the credibility or reliability of the evidence: *IMM v The Queen* at [51]–[52], [54], [58]; *The Queen v Bauer* at [69].

For evidence to be admissible as tendency it is not necessary that it exhibit an "underlying unity", "a modus operandi" or a "pattern of conduct": *Hughes v The Queen* at [34] approving the approach in *R v Ford* [2009] NSWCCA 306, *R v PWD* [2010] NSWCCA 209, *Saoud v R* (2014) 87 NSWLR 481 and disapproving *Velkoski v R* (2014) 45 VR 680 at 682. It is not necessary that the common features be "striking". What is needed is a sufficient link between the distinct events as to mean that one piece of conduct has significant probative value as regards another. That link need not be peculiar: *Bektasovski v R* [2022] NSWCCA 246 at [93]; *The Queen v Bauer* at [57]. There is no general rule requiring close similarity between the tendency evidence and the offence: *TL v The King* [2022] HCA 35 at [29]. Depending upon the issues in the trial, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it: *Hughes v The Queen* at [37]. Section 97(1) does not condition the admissibility of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. Commonly there may be a similarity between the tendency asserted and the offences charged: *Hughes v The Queen* at [39].

A "close similarity" between the tendency evidence and the charged offence will almost certainly be required where the evidence is adduced to prove the identity of an offender: *Hughes v The Queen* at [39]. However, this should be understood as referring to situations where there is little or no other evidence of identity apart from the tendency evidence and the identity of the perpetrator is "at large": *TL v The King* at [30], [38].

The test posed by s 97(1)(b) is whether the disputed evidence, together with other evidence, makes significantly more likely any facts making up the elements of the offence charged: *Hughes v The Queen* at [40]. In the case of multiple counts on an indictment, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible: *Hughes v The Queen* at [40].

Where there is cross-admissible tendency evidence between two or more complainants, it is an error to group the conduct of each complainant together then formulate an alleged tendency in a manner specific to both of them: *Kanbut v R* [2022] NSWCCA 259 at [65]. Further, the tendency should not be expressed in precisely the same terms as the facts making up the charged offence: *Kanbut v R* at [97]; *Hughes v The Queen* at [41].

Matters that must be considered under s 97

In assessing whether evidence has significant probative value in relation to each count, two interrelated but separate matters must be considered: first, the extent to which the evidence supports the tendency; and, second, the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but of whether an offence was committed, it is important to consider both matters: *Hughes v The Queen* (2017) 263 CLR 338 at [41].

Therefore, there is likely to be a high degree of probative value where: (i) the evidence, alone or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged: *Hughes v The Queen* at [41].

Unlike the common law preceding s 97(1)(b), the statutory words do not permit a restrictive approach to whether probative value is significant. However, the

open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means it is inevitable that reasonable minds might reach different conclusions: *Hughes v The Queen* at [42]; *The Queen v Bauer* (2018) 266 CLR 56 at [61].

Prejudicial effect of tendency evidence

If the evidence is admissible under s 97, it must then satisfy s 101, which is concerned with balancing its probative value against its prejudicial effect. Since 1 July 2020, the test in s 101(2) is whether the probative value of the evidence outweighs the danger of unfair prejudice — the word "substantially" was removed. As to the transitional provisions for these amendments, see *Bektasovski v R* [2022] NSWCCA 246 at [51]–[52]. In *The Queen v Bauer* (2018) 266 CLR 56 at [73], the High Court described prejudice as conveying the idea of harm to an accused's interests by reason of a risk the jury would use the evidence improperly in some unfair way. See also *Hughes v R* [2015] NSWCCA 330 at [189]–[193]. In *Hughes v The Queen* (2017) 263 CLR 338 at [17], the High Court articulated how tendency evidence may occasion prejudice to an accused:

> The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.

In determining the prejudicial effect that evidence may have on an accused, it is legitimate and appropriate for the judge to take into account the ameliorating effect of any directions that may reduce the prejudicial effect: *Mol v R* [2017] NSWCCA 76 at [36]; *DAO v R* (2011) 81 NSWLR 568 at [171]. It is important that the prejudice to a defendant be specifically identified for the purposes of the weighing exercise required by s 101 and in considering appropriate directions: *BC v R* [2015] NSWCCA 327 at [107]–[110]; *Mol v R* at [36].

Concoction and contamination

Section 94(5) of the Act, which took effect on 1 July 2020, provides that in determining the probative value of tendency or coincidence evidence the court must not have regard to the possibility the evidence may be the result of collusion, concoction or contamination. Previously, *The Queen v Bauer* (2018) 266 CLR 56 at [69]–[70] had exempted from an exclusion of consideration of credibility and reliability a risk of contamination, concoction or collusion that is so great it would not be open to the jury rationally to accept the evidence. The Second Reading Speech of the Attorney General (Evidence Amendment (Tendency and Coincidence) Bill 2020, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1917) included: "Proposed section 94(5) … closes that small gap left open by the courts …".

[4-226] Standard of proof — s 161A Criminal Procedure Act 1986

Section 161A of the *Criminal Procedure Act* 1986 was inserted by the *Stronger Communities Legislation Amendment (Miscellaneous) Act* 2020 and took effect on 1 March 2021: s 2, *Stronger Communities Legislation Amendment (Miscellaneous) Act*.

Section 161A(1) states that when evidence is adduced as tendency or coincidence evidence, the jury must not be directed that evidence needs to be proved beyond reasonable doubt. The only exception is provided for in s 161A(3) when the case is one where there is a significant possibility the jury will rely on that evidence as being essential to its reasoning in reaching a finding of guilt: see *Shepherd v The Queen* (1990) 170 CLR 573; *The Queen v Bauer* at [86]. Such cases are likely to be rare. An example is *Adams v R* [2017] NSWCCA 215.

In *JS v R* [2022] NSWCCA 145, it was held at [47] that s 161A(1) was not restricted to only uncharged acts but also had application to charged acts which were cross-admissible on a tendency basis.

It is appreciated that the structure of a summing-up is a matter for the personal preference of judges. However, consideration should be given as to when a tendency direction might best be given to minimise the risk of confusion on the jury's part as to any standard of proof to be applied. For example, it may be given before the directions about the onus and standard of proof and the essential elements of the offence/s. Alternatively, it may be given shortly after directions concerning the drawing of inferences. The timing may vary depending on the issues in the particular trial.

The suggested direction at [4-227] is based on the text of s 161A. As with all suggested directions, the direction will require adaptation to suit the evidence and issues arising in the case at hand. The observations in *JS v R* should also be taken into account, including at [40] that the directions need to be crafted carefully to avoid undermining general directions concerning proof beyond reasonable doubt for each charge, and at [41] that the important direction is, that having weighed *all* of the relevant evidence, the jury must be satisfied beyond reasonable doubt that each element of each charge has been established. It was held in *JS* that such directions may also be necessary in relation to cross-admissible charged acts: [41].

In *BRC v R* [2020] NSWCCA 176, it was held that a warning a jury should not reason that because the accused had committed one or more other acts relied upon to establish a tendency the accused was a person of "bad character" may negate a tendency direction: Simpson AJA at [72]; Hamill J similarly at [96]. It was also held that a warning the jury "cannot punish" an accused for conduct the subject of other charges in the indictment would be inapposite: Simpson AJA at [74]. Hamill J likened this to a "no substitution" warning and agreed it was only apposite in respect of uncharged conduct: at [103], [105].

[4-227] Suggested tendency evidence direction — applies to charged acts, other acts or combinations thereof

The following suggested direction complies with s 161A(1) *Criminal Procedure Act* 1986 in not directing that tendency evidence needs to be proved beyond reasonable doubt. It will require modification by directing as to that standard of proof where the exception in s 161A(3) applies.

A tendency may be proved by evidence of "the character, reputation or conduct of a person, or a tendency that a person has or had": s 97(1) *Evidence Act*. The suggested direction refers only to "conduct" and will require modification in a case in which it is sought to be proved in an alternative way.

Inferential reasoning is usually involved in deciding whether a tendency has been established so it will be helpful if the jury has already been directed as to the care required in the drawing of inferences generally.

Trial judges should be alive to any possible prejudicial misuse of tendency evidence that might arise in a particular case and add any further warning that may be required.

Part of the Crown case is that the accused had a tendency to [*short description of the tendency*].

The Crown says you would be satisfied the accused had this tendency because of [*his/her*] conduct in [*describe the conduct relied upon by the Crown, be it the subject of counts in the indictment, or not, or both*].

The Crown says this conduct reveals the accused had a tendency to [*short description of the tendency*] which makes it more likely [*he/she*] committed the offence(s) charged in the indictment.

You will need to consider the evidence relating to this alleged conduct of the accused and decide whether [*he/she*] did in fact conduct [*him/herself*] in the way the Crown alleges. In doing so, you do not consider each of the acts in isolation. You should consider all the evidence and decide what conduct you are satisfied occurred.

If you decide that all, or at least some, of the conduct occurred, you then need to consider whether it enables the inference to be drawn that the accused had the tendency to [*short description of the tendency*].

You will recall the direction I gave to you about the care that needs to be applied to the drawing of inferences. I directed you to consider whether there might be alternative explanations for the evidence. I directed you that you should not draw an inference from the direct evidence unless it is a rational inference in the circumstances. You should bear in mind those directions when you are considering this part of the evidence.

If you are not satisfied that any of the conduct the Crown relies upon occurred, then there is no basis upon which the tendency could be inferred. In these circumstances, you must put the whole issue of tendency to one side and confine your consideration to the other parts of the Crown's case.

If you find the accused did [*short description of the tendency*], then you can use that in considering whether it is more likely [*he/she*] committed the specific offences with which [*he/she*] is charged. However, it is essential you consider in relation to each charge whether the accused [*acted in that particular way/had that particular state of mind*] on that specific occasion.

Finding the accused did have the tendency the Crown alleges is not enough to prove guilt. It may assist the Crown to prove the accused committed the offences, but it is not enough by itself. The question is whether it makes it more likely the accused conducted [*him/herself*] in the way the Crown alleges on any of the occasions that are the subject of the charges. That is the only way the accused's tendency to [*short description of the tendency*] may be used.

Ultimately, you must decide whether the specific offences with which the accused has been charged have been proved. That decision must be based upon the evidence relevant to each of the charges. This includes the evidence of the complainant about what the accused did. It will include the tendency alleged by the Crown, provided you are satisfied it has been established. It will also include [*briefly describe other categories of evidence that are relied upon*].

When considering whether a charge has been proved, you will have to decide whether the Crown has proved the essential elements of that charge. Shortly I will be telling you what those essential elements are for each of the charges.

[Add, if appropriate — usually where the conduct relied upon is not the subject of a count in the indictment: In directing you that the tendency evidence cannot be used other than in the way I have described, part of what I am saying is that you must not substitute the conduct of the accused on some other occasion for the conduct that is relied upon by the Crown to prove a particular charge.**]**

[Add, if appropriate: The evidence the Crown relies upon to establish that the accused had this tendency is of a type that might provoke people to have an emotional response to it because it might be regarded as a distasteful way for a person to have behaved. You must be careful to avoid allowing any emotional response or prejudice to distract you from a calm and objective assessment of this issue.**]**

[Add, if appropriate: Some of the evidence before you that is relied upon by the Crown to prove the tendency alleged concerns incidents that are not the subject of any charge in the indictment. If you are not satisfied that an incident that is not the subject of a charge occurred, then the evidence relating to it should be put completely aside. There is no other issue in the case to which it is relevant.**]**

I will now summarise the case for the Crown and the case for the accused on this issue of tendency.

The Crown argues [*summarise arguments as to how the conduct is said to establish the tendency and how the tendency is said to be relevant in proving the charges*].

The defence argues [*summarise the counter arguments*].

[4-230] Tendency evidence in child sexual assault proceedings — s 97A

Section 97A applies to proceedings in which the commission by the defendant of an act that constitutes, or may constitute, a child sexual offence is a fact in issue. It took effect on 1 July 2020. The Attorney General described the provision as altering the operation of s 97(1)(b) for child sexual abuse prosecutions in order to facilitate greater admissibility of tendency evidence (see Second Reading Speech, Evidence Amendment (Tendency and Coincidence) Bill 2020, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1914).

The transitional provisions for the amendment state s 97A does not apply where the hearing of proceedings began before the amendment commenced: Sch 2, cl 28. Where the application of the transitional provisions is in issue, it will be necessary to identify the relevant "hearing" of the proceedings and to determine when it began: *JW v R* [2022] NSWCCA 206 at [54]. For example, with respect to fitness to plead inquiries and special hearings under the *Mental Health and Cognitive Impairment Forensic*

Provisions Act 2020 (and its predecessor, the *Mental Health (Forensic Provisions) Act* 1990 (rep)), fitness inquiries are a preliminary step and the special hearing is the substantive hearing of the underlying proceedings: *JW v R* at [57]–[58].

Under s 97A(2) there is a presumption that tendency evidence about the following will have significant probative value for the purposes of ss 97(1)(b) and 101(2):

(a) the sexual interest the defendant has or had in children (regardless of whether they have acted on the interest)

(b) the defendant acting on a sexual interest they have or had in children.

A court retains a discretion to determine such evidence does not have significant probative value if satisfied there are sufficient grounds to do so: s 97A(4). However, s 97A(5) lists the following matters (whether considered individually or collectively) the court is *not* to take into account in determining whether there are sufficient grounds, unless there are exceptional circumstances in relation to those matters:

(a) the tendency sexual interest or act is different from the sexual interest or act alleged in the proceeding

(b) the circumstances in which the tendency sexual interest or act occurred are different from circumstances in which the alleged sexual interest or act occurred

(c) the personal characteristics of the subject of the tendency sexual interest or act (for example their age, sex or gender) are different to those of the subject of the alleged sexual interest or act

(d) the relationship between the defendant and the subject of the tendency sexual interest or act is different from the relationship between the defendant and the subject of the alleged sexual interest or act

(e) the period of time between the occurrence of the tendency sexual interest or act and the occurrence of the alleged sexual interest or act,

(f) the tendency sexual interest or act and alleged sexual interest or act do not share distinctive or unusual features

(g) the level of generality of the tendency to which the tendency evidence relates.

The terms "sufficient grounds" (in s 97A(4)) and "exceptional circumstances" (in s 97A(5)) are not defined. As to the former, the Attorney General, during the Second Reading Speech introducing this amendment, said (Second Reading Speech, NSW, Legislative Assembly, *Debates*, 25 February 2020, p 1915):

> such grounds should be considered in light of the objective of this reform to facilitate greater admissibility of tendency evidence and, specifically, the intent of the proposed section 97A to facilitate greater admission of tendency evidence in child sexual offences.

And of the latter:

> The threshold of exceptional circumstances … was chosen intentionally … to set a high bar. Further, it is intended that the exceptional circumstances must relate to those specific matters [identified in s 97A(5)], either individually or [in] combination, rather than relating to any other aspects of a particular matter. Matters outside those specifically enumerated in [s 97A(5)] should not be taken into account … to determine whether the exceptional circumstances threshold has been met.

[4-235] Coincidence evidence

The admissibility of coincidence evidence is governed by s 98 *Evidence Act*. It requires two preconditions: (a) the giving of notice and (b) that the evidence has "significant probative value".

See generally *Criminal Practice and Procedure NSW* at [3-s 98.1]ff; *Uniform Evidence Law* (15 ed, 2020) at [EA.98.60] ff; *Uniform Evidence in Australia* (3 ed, 2020) at 98-1.

(a) The requirement to give notice was considered in *R v Zhang* [2005] NSWCCA 437 at [131] and *Bryant v R* [2011] NSWCCA 26. As to the dispensing of the requirement of notice for the tendering of coincidence evidence, see s 100 and generally *R v Harke*r [2004] NSWCCA 427.

(b) The approach to the admissibility of coincidence evidence was considered in *DSJ v R* (2012) 84 NSWLR 758 at [6]–[9], [11], [56], [72]–[82], especially as to the role of the judge and that of the jury in the finding of facts. The decision approved *R v Zhang*. See also the discussion in *R v Gale* [2012] NSWCCA 174 at [29]–[31]. These three decisions were explained and applied in *R v Matonwal* [2016] NSWCCA 174 at [70]–[76]. As to the difference between coincidence and tendency evidence: see *O'Keefe v R* [2009] NSWCCA 121; *R v Nassif* [2004] NSWCCA 433 at [51]; *Doyle v R* [2014] NSWCCA 4 at [109].

If the evidence is admissible under s 98, it must then satisfy s 101, which is concerned with balancing its probative value against its prejudicial effect. The questions posed by ss 98 and 101 turn on a mode of reasoning based on the improbability that something was a coincidence: see the explanation in *Selby v R* [2017] NSWCCA 40 at [24]–[26]; *Ceissman v R* [2015] NSWCCA 74 at [42]. The improbability that something was a coincidence is not displaced by the fact that the two (or more) events bear some dissimilarities. The question is whether the dissimilarities are relevant in that they undercut the improbability of something being a coincidence and whether they detract from the strength of the inferential mode of reasoning permitted by s 98: *Selby v R* at [24], [26].

As to the possibility of concoction, see **Tendency evidence** at [4-225] above.

[4-237] Suggested direction where coincidence evidence admitted as part of a circumstantial case

In cases where the coincidence evidence is not the only evidence against the accused, there is no requirement that the coincidence evidence be proved beyond reasonable doubt: s 161A(1) *Criminal Procedure Act* 1986. However where there is a significant possibility that a jury will rely on the coincidence evidence as being essential to its reasoning in finding guilt, then it will have to be proved beyond reasonable doubt: s 161A(3) *Criminal Procedure Act* 1986. See [4-226] **Standard of proof — s 161A Criminal Procedure Act 1986**.

See the discussion at [4-200] **Introduction** concerning the timing of a direction when such evidence is given.

The coincidence evidence may arise from the charges in the indictment, in that the joinder of the charges was based upon the admissibility of each of the charges

as evidence of coincidence in respect of each of the other charges, see for example *O'Keefe v R* [2009] NSWCCA 121. In such a case the suggested direction will need to be amended. However, simply because the charges are joined on the basis of the availability of coincidence reasoning, the judge is not required to direct the jury that it must find one of the offences proved beyond reasonable doubt before it can use that charge as basis of coincidence reasoning: *Folbigg v R* [2005] NSWCCA 23 at [103].

The suggested direction concerns proving the accused's identity but the coincidence evidence can be used as proof of a state of mind, for example, to rebut accident. Coincidence evidence is a form of circumstantial evidence and will usually form part of the circumstantial case together with other evidence that may indirectly prove the guilt of the accused.

As should be apparent to you, the accused is charged only with the offence/s stated in the indictment. You have before you evidence the Crown relies upon as establishing [*he/she*] committed [*that/those*] offence/s.

[*Briefly refer to that evidence other than the coincidence.*]

However, as part of its case against the accused, the Crown has led evidence the accused … [*specify the coincidence evidence*].

That evidence is before you because sometimes there may be such a strong similarity between two different acts and the circumstances in which they occur that a jury would be satisfied the person who did one act (or set of acts) must have done the other/s. That is to say, there is such a significant similarity between the acts, and the circumstances in which they occurred, that it is highly improbable the events occurred simply by chance, that is, by coincidence. The improbability of two or more events occurring by chance, or coincidently, may lead to a conclusion an accused person committed the act (or had the state of mind) the subject of the charges.

In this case, the Crown says that, provided you are satisfied the accused did … [*specify conduct which is the basis of the coincidence evidence*], then [*that/those*] act/s, and the circumstances in which [*it/they*] [*was/were*] done, were so similar to the act/s alleged in the indictment, that you would conclude beyond reasonable doubt that the accused must have committed the offence/s with which [*he/she*] has been charged.

The evidence of the pattern of behaviour can only be used in the way the Crown asks you if you find two matters: firstly, that the accused did the other acts; and secondly, that they are so similar to the acts giving rise to the charge, that you find it is highly improbable both acts were committed by a different person. If you accept those two matters, then you can use that evidence, together with the other evidence in the Crown's case, to be satisfied beyond reasonable doubt that the accused committed the acts giving rise to the offence/s charged in the indictment.

However this is the only way you can use the evidence of other acts. You cannot reason that because the accused may have committed the other acts [*he/she*] is the type of person who will commit criminal activity generally or that [*he/she*] is a person who is likely to have committed the offence/s charged. The evidence is not placed before you for that type of general reasoning. You cannot punish the accused for other conduct attributed to [*him/her*] by finding [*him/her*] guilty of the charge/s in the indictment.

[4-240] Suggested direction where coincidence evidence relied upon for joinder of counts of different complainants

Coincidence evidence may be admitted to bolster the evidence of the witnesses, for example in a case where the evidence of two complainants is admitted in respect of charges in the indictment of offence committed against each: *R v F* [2002] NSWCCA 125; *Saoud v R* (2014) 87 NSWLR 481 at [49]–[53]. If the evidence of the two witnesses shows sufficient similarity to be admissible as coincidence evidence, it can be used to prove that the two witnesses would not make up those versions independently and by chance. In such a case the issue of concoction may arise and require a direction to the jury that they should reject the possibility of concoction before using the evidence for coincidence reasoning.

On the indictment there are allegations against the accused made by two complainants [*complainant A and complainant B*]. Of course what [*complainant A*] says about what [*he/she*] alleges the accused did to [*him/her*] is primary evidence relied upon by the Crown to prove the charge/s in respect of [*her/him*]. It is the same situation with [*complainant B*]. Ultimately you have to be satisfied beyond reasonable doubt that each complainant is honest and accurate in [*his/her*] allegations upon which the charges are based.

[*Detail in respect of each complainant the allegation and the evidence in respect of each complaint, for example, evidence of complaint, if any.*]

As I have explained to you, although the trial of the accused in respect of each of the complainant's allegations is being heard at the same time you still have to reach separate decisions on each of the allegations made by each of the complainants.

The trials of the charges concerning the two complainants are being heard together because the Crown says you can use the evidence given by one of the complainants as evidence against the accused in respect of the charges involving the other complainant. The Crown argues that, in determining whether it has proved beyond reasonable doubt the allegations made by [*complainant A*] and giving rise to the charges involving [*her/him*], you can take into account, in the way I shall explain to you, the evidence given by [*complainant B*] and visa versa.

The Crown argues that, because the allegations made by each of the complainants against the accused are so similar in the particular conduct attributed to the accused, it is highly likely that each is telling you the truth in giving [*his/her*] separate accounts. The Crown in effect says the accused has a particular and unusual way of conducting [*himself/herself*] or a peculiar pattern of behaving which is apparent from the accounts given by [*complainant A and complainant B*] when they are considered together. The Crown's argument is that the possibility of each making allegations that are so similar by chance or coincidence is so remote that the only explanation is the accused acted in the same way towards both of them and, therefore, their accounts are true. The Crown alleges that the similarities in the allegations are as follows:

[*Outline the similarities relied upon by the Crown as its coincidence evidence*].

The Crown's argument can only succeed if: firstly, you find that those similarities are present in respect of the allegations made by [*complainant A and complainant B*] and, secondly, that they are so similar they amount to a particular and peculiar pattern of behaviour such that it is highly improbable that each could be giving such an account

by sheer chance or coincidence. In other words the Crown argues the accounts are such that the only explanation for their similarity is that they are true accounts of what the accused did to each. The more similar the accounts, then the less likely it may be that the accounts can be explained by chance or invention.

Of course if you do not accept that such similarities exist, or you reject the argument that they disclose a particular pattern of behaviour attributed to the accused, then you would reject the Crown's argument and look at the evidence of [*complainant A and complainant B*] independently without having regard to the evidence of the other.

[*Refer to arguments of defence including dissimilarities and, if appropriate, the possibility of concoction accounting for the similarity in the allegations.*]

You should understand that this argument of the Crown is the only reason why the allegations made by [*complainant A and complainant B*] are being dealt with together in the one trial. If you do not accept the Crown's argument, then you must disregard any similarities in the accounts and deal with the charges involving [*complainant A and complainant B*] completely separately. You cannot use the evidence of one to prejudice the accused in respect of the charges involving the other if you reject the Crown's argument as to the accounts disclosing a pattern of behaviour that can be relied upon as proof of the charges.

[The next page 651]

Voluntary act of the accused

[4-350] Introduction

The question of whether there was a voluntary act of the accused that caused the harm to the victim which is the subject of the charge may involve one, or both, of two issues (see *R v Katarzynski* (2005) NSWCCA 72 at [17]):

(a) Was there any act of the accused that caused the harm?

(b) Was the act of the accused that caused the harm a voluntary one?

[4-355] An act of the accused causing the harm inflicted on the victim

This issue is dealt with generally under the topic "Causation" and the general direction given at **[2-310]** can be adapted where the issue is whether there was an act of the accused that caused the harm even though the particular act cannot be identified.

An issue can arise as to whether the act causing the injury was the act of the deceased or the act of the accused where the general directions on causation require considerable amendment. This is not a case where as discussed under causation, the issue is whether there was a break in the chain of causation by some act of the deceased or another person. But rather identifying whether the act causing death was the act of the deceased or the accused. For example, the issue can arise where the victim is given a substance by another person that results in the harm caused. In such a case the resolution of the question may depend upon the capacity of the victim to make a reasoned decision whether to ingest the substance knowing the consequences of doing so: see *Justins v R* [2010] NSWCCA 242; (2010) 79 NSWLR 544.

In *Burns v The Queen* (2012) 246 CLR 334 at [86] it was held that act of ingesting drugs that were supplied by the accused to the deceased, was not the act of the accused. The ingestion of the drugs by the deceased was a voluntary and informed act of an adult.

[4-360] A voluntary act

The issue arises usually where the act causing death can be identified but the question is whether the act was voluntary. This can lead to a consideration of what should be considered to be the act causing death and is a question for the jury.

It is unnecessary for a trial judge to raise the issue of voluntariness with the jury if the evidence clearly suggests no lack of voluntariness: *R v Whitfield* [2002] NSWCCA 501 at [80].

As to voluntariness see generally: *Ryan v The Queen* (1967) 121 CLR 205; *Criminal Practice and Procedure NSW* at [8-s 18.15]; *Criminal Law (NSW)* at [CLP.160].

Where an issue of voluntariness due to automatism arises (as to which, the accused bears an evidential burden of showing a reasonable possibility that the act was not willed: *R v Youssef* (1990) 50 A Crim R 1 at 3), consideration has to be given as to the aetiology of the automatism, since the manner in which the issue is left to the jury depends on the distinction drawn between sane and insane automatism. As to automatism generally, see **[6-050]**.

As to the relevance of self-induced intoxication on voluntariness, see s 428G *Crimes Act* 1900 (NSW).

The particular issue of identifying the act causing death has arisen in homicide cases involving the use of a firearm: see *Ryan v The Queen*; *Murray v The Queen* (2002) 211 CLR 193; *R v Katarzynski* (2005) NSWCCA 72; *Penza v R; Di Maria v R* [2013] NSWCCA 21 at [167] but see also *Ugle v The Queen* (2002) 211 CLR 171 and *R v Whitfield*. The issue in the firearm cases is whether the involuntary discharge of a weapon can be seen as the act causing death in the light of all the evidence surrounding the production and discharge of the weapon. This is a question for the jury.

It is difficult to set out a suggested direction because what needs to be said to the jury will depend upon the particular facts. But the direction should include the following general statements.

[4-365] Suggested direction — voluntary act

The act causing [*the harm*] must be the deliberate act of a person before that person can be held criminally responsible for the consequences of that act. An act is not deliberate if it was not voluntary. To give rise to criminal responsibility the act must be a willed act of the person accused of committing an offence. A spontaneous, unintended reflex action is not itself a voluntary act. In common speech a person will describe an involuntary act as being an accidental one. The Crown must prove beyond reasonable doubt that any act of [*the accused*] upon which it relies as causing [*the harm*] inflicted to [*the victim/deceased*] was a voluntary act: that is, a willed act on the part of the accused. This is distinct from the issue of whether the accused intended certain consequences from his or her act. It is a more fundamental concept that is concerned with the nature of the act itself.

Here [*the accused*] has raised the issue of whether [*his/her*] act resulting in [*the harm*] to [*the victim*] was a voluntary one.

[*Indicate the basis upon which it is asserted the act was not voluntary and the evidence in support.*]

The Crown must prove beyond reasonable doubt that the act alleged as causing [*the harm*] to the [*the victim*] was a voluntary act of [*the accused*]. If you consider that the Crown has failed to eliminate the reasonable possibility that the act [*of the accused*] relied upon by the Crown was not a voluntary one, you must find [*the accused*] not guilty.

[*If the issue of what act of the accused caused the harm arises see the suggested direction for causation at [2-310].*]

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Sexual assault trials — procedural matters

[The next page is 711]

Cross-examination concerning complainant's prior sexual history

[5-100] Introduction

Section 293 *Criminal Procedure Act* 1986 was renumbered as s 294CB on 1 June 2022: *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021: Sch 2[4].

Sections 294CB(2) and 294CB(3) provide that, for prescribed sexual offence proceedings, evidence relating to the prior sexual history of the complainant is inadmissible subject to exceptions outlined in s 294CB(4)(a)–(f). Evidence falling within the exceptions can only be admitted if its probative value outweighs any distress, humiliation or embarrassment the complainant might suffer as a result of its admission: s 294CB(4).

Sections 294CB(5) to 294CB(8) set out the procedure for determining whether evidence said to fall within the identified exceptions in s 294CB may be admitted. In summary:

- evidence related to the complainant's sexual reputation, sexual experience or sexual activity cannot be given unless the court has first decided the evidence is admissible: s 294CB(5)
- questions of the admissibility of the evidence or the right to cross-examine the complainant are determined in the absence of the jury: s 294CB(7)
- the accused may be permitted to cross-examine a complainant concerning evidence of the complainant's sexual experience, or lack of it, or participation or lack of participation in sexual activity, if the evidence was disclosed or implied in the prosecution case, and the accused would be unfairly prejudiced if not able to do so: s 294CB(6)
- if the court decides the evidence is admissible, written reasons must be given identifying with clarity the nature and scope of the evidence and the reasons for concluding it is admissible, before the evidence is led: s 294CB(8).

Note: in cases where evidence has been admitted under s 294CB, see also [5-240] and the note to the suggested direction **Circumstances in which non-consensual sexual activity occurs — s 292A**.

There has been some controversy associated with s 294CB (previously s 293) since it was first enacted, principally because of its capacity to prejudice an accused in the conduct of their trial. A five-judge Bench was convened in *Jackmain (a pseudonym) v R* [2020] NSWCCA 150 to consider how s 293 (now s 294CB) applied in the context of allegations of previous unrelated false complaints and the correctness of *M v R* (unrep, 15/9/93, NSWCCA) (where it was held, in respect of an earlier version of s 293, that it extended to exclude such evidence). The controversy concerning the section and the relevant case law was summarised by Leeming JA in *Jackmain (a pseudonym) v R* at [88]–[178].

Section 293 (now s 294CB) was designed to exclude, to a significant degree, cross-examination of a complainant's sexual activity or experience with only limited exceptions: *Jackmain v R* at [15]. Its purpose is to protect sexual assault complainants

and prevent embarrassing and humiliating cross-examination of a complainant about their past sexual activities: *Jackmain v R* at [23]–[24]; [233]; [246]–[247]; *GP v R* [2016] NSWCCA 150 at [40].

Section 294CB renders otherwise relevant evidence inadmissible; if the evidence in question is irrelevant, or otherwise inadmissible, it does not fall within the parameters of s 294CB: *Decision Restricted* [2021] NSWCCA 51 at [42]; *R v Morgan* (1993) 30 NSWLR 543 at 544; see also *HG v The Queen* (1999) 197 CLR 414 at [24].

The procedure for determining admissibility

The procedure contemplated by s 294CB(7) (previously s 293(7)) for determining whether evidence is admissible is a voir dire: *Uddin v R* [2020] NSWCCA 115 at [56]. To facilitate the conduct of the voir dire, s 294CB must be read down to permit evidence that would otherwise be inadmissible to be given so the task under ss 294CB(6) and 294(7) can be performed. The effect is that the exclusionary rules in ss 294CB(2) and 294CB(3) do not apply to evidence given during the voir dire: *Uddin v R* at [53]–[58]; [94]; *Jackmain v R* at [16]; [91]–[95]; [248].

Generally, counsel should provide a detailed written statement of the evidence proposed to be led so the trial judge can determine whether the evidence falls within the parameters of s 294CB(4) and its probative value: *Taylor v R* (2009) 78 NSWLR 198 at [44]–[45]. In *Jackmain v R*, at [248], Wilson J (Johnson J agreeing at [234]) observed that ordinarily the voir dire would be conducted on the documents as "it would be wholly inconsistent with the intention of the legislature … for a complainant to be required to give evidence *viva voce* and endure the sort of humiliating and distressing cross-examination that the Parliament sought to prevent." In an appropriate case, however, it may be necessary for oral evidence to be given: see for example *Uddin v R* at [94], where the oral evidence was to be given by persons other than the complainant.

Before the evidence is given, precise written reasons must be given for admitting the evidence and recording the nature and scope of the admitted evidence (s 294CB(8)): *Taylor v R* at [44]–[47]; *Dimian v R* (unrep, 23/11/95, NSWCCA). However, there is no need for the questions that are to be asked to be specifically identified: *Taylor v R* at [48].

Whether the evidence discloses the complainant has had sexual experience or taken part in sexual activity in s 294CB(3) is determined according to ordinary evidentiary principles: *Uddin v R* at [107].

[5-110] The exclusions in s 294CB(4)

Within the very narrow parameters of the provision, s 294CB(4) (formerly s 293(4)) should be construed broadly in the interests of the accused: *R v Taylor* at [36]; *Decision Restricted* [2021] NSWCCA 51 at [55]–[57]. However, it is important to bear in mind the intent of the legislature in introducing the section and its predecessors. In *GP v R* [2016] NSWCCA 150, Payne JA (McCallum and Wilson JJ agreeing) said at [40]–[41]:

> [Section 294CB] … clearly strikes a balance between competing interests being, on the one hand the interest of preventing distressing and humiliating cross-examination of sexual assault victims about their prior sexual history and on the other, the interest of

> permitting an accused person to cross-examine victims about defined aspects of their sexual history in the circumstances prescribed in the exceptions contained within [s 294CB].
>
> …
>
> [A]n approach to construction which seeks to discern a single purpose, and construing the legislation as though it pursued that purpose to the fullest extent possible may be contrary to the manifest intention of the legislation.

A number of cases have considered aspects of the exclusions in s 294CB(4). As to:

- the meaning of the expression "connected set of circumstances" and "at or about the time of" in s 294CB(4)(a) see, *Jackmain v R* at [189]–[195] and particularly at [191] where emphasis was given to the very short temporal period intended to apply; *Cook (a pseudonym) v R* [2022] NSWCCA 282 at [104]–[118] where it was held an 18-month gap in time between events was insufficiently temporal and ongoing legal proceedings for previous offences were not relevantly connected, but cf Beech-Jones CJ at CL at [17]–[24]; *Elsworth v R* [2022] NSWCCA 276 at [118] where evidence of a sexual experience from five years prior was not considered to be part of the complainant's continuing sexual experience at the time of the charged act; *R v Morgan* (1993) 30 NSWLR 543 (decided under s 409B, the then predecessor provision); *R v Edwards* [2015] NSWCCA 24 at [25]–[30]; *GEH v R* [2012] NSWCCA 150 at [11]–[13] (Basten JA) and [35] (Harrison J); and *Decision Restricted* [2021] NSWCCA 51 at [59]–[60] (Leeming JA, Walton J agreeing), but cf Adamson J at [88]–[91].
- the meaning of "sexual experience" and "sexual activity" in s 294CB(4), see *Elsworth v R* at [119] where it was held such terms did not encompass a complainant's memory of some past experience or activity simply because the memory is held at or about the time of the charged act or is said to be connected to the charged act because past experience informed present conduct. See also *GEH v R* at [63]–[65] for the distinction between the two terms "experience" and "activity".
- the meaning of "relates to" in s 294CB(4)(b), see *Cook (a pseudonym) v R* at [119]–[122], where it was confirmed the phrase is "wide in import" but did not extend to complaint evidence disclosed about a different perpetrator.
- the fact false complaint evidence may have the capacity to fall within the exceptions in s 294CB(4) see: *Adams v R* [2018] NSWCCA 303 at [163]–[177]. Where there is false complaint evidence years remote from the alleged offending, the temporal requirement in s 294(4)(a) cannot be satisfied: *Jackmain v R* at [25]; [190]; [235]; [238]; [240].
- whether evidence of fear and anxiety constitutes "disease or injury … attributable to the sexual intercourse so alleged" referred to in s 294CB(4)(c) see: *GP v R* [2016] NSWCCA 150 at [34], [44]; a psychological condition of diagnosed depression and suicidal ideation falls within the term "disease or injury": *JAD v R* [2012] NSWCCA 73 at [83].
- the phrase "sexual intercourse so alleged" in s 294CB(4)(c)(i) includes only the physical act and excludes issues of consent: *Taleb v R* [2015] NSWCCA 105 at [93].
- the admissibility of evidence of "the presence of semen [which] … is attributable to the sexual intercourse alleged to have been had by the accused" (s 294CB(4)(c)(ii))

see *WS v R* [2022] NSWCCA 77. In that case, a miscarriage of justice occurred because evidence the complainant was raped by another person at a similar time to the relevant offences was excluded, but evidence she had undergone a pregnancy test around that time was admitted. In the circumstances of that case, the court concluded both limbs of s 294CB(4)(c) were satisfied: at [78]–[80] (Macfarlan JA; Walton J agreeing); cf Rothman J at [108]–[111].

In *Decision Restricted* [2021] NSWCCA 51, Leeming JA (Walton J agreeing; Adamson J dissenting) observed, at [64], that when weighing the probative value of the evidence, "the distress, humiliation or embarrassment" to the complainant that is relevant is that which is over and above that which will inevitably occur by giving evidence even without reference to the matters caught by s 294CB. *WS v R* is an example of a case where the probative value of the evidence was found to outweigh the distress, humiliation and embarrassment the complainant might suffer: at [62]–[66], [84].

[The next page is 741]

Defences

Self-defence

Substantial impairment because of mental health impairment or cognitive impairment

[The next page is 1205]

Automatism — sane and insane

[6-050] Preliminary notes

1. Criminal responsibility does not attach to an act done in a state of automatism, that is, where the act is not done in consciousness of the nature of the act and in exercise of a choice to do an act of that nature: *Ryan v The Queen* (1967) 121 CLR 205 at 213; *R v Falconer* (1990) 171 CLR 30 at 39.

2. The general presumption that an accused has the mental capacity to act in such a way as to incur criminal responsibility includes a presumption that the relevant act was willed or voluntary, that is, if the accused was apparently conscious at the time: *R v Falconer* at 40.

3. Where an issue of voluntariness due to automatism arises (as to which, the accused bears an evidential burden of showing a reasonable possibility that the act was not willed: *R v Youssef* (1990) 50 A Crim R 1 at 3), consideration has to be given as to the aetiology of the automatism, since the manner in which the issue is left to the jury depends on the distinction drawn between sane and insane automatism.

4. Where there is some evidence of automatism which points to an aetiology other than a mental health or cognitive impairment, the Crown must prove beyond reasonable doubt, that the relevant act was a willed and voluntary one, that is, was not the result of a condition of automatism, otherwise the accused is entitled to an outright acquittal.

5. The relationship between voluntariness, intent and mental disease was considered by the High Court in *Hawkins v The Queen* (1994) 179 CLR 500.

6. As to the distinction between an underlying mental infirmity which is prone to recur, which deprives the accused of the capacity to control his or her act and which prevents him or her from appreciating its nature and quality (insane automatism); and a transient, non-recurrent mental malfunction caused by external factors (whether physical or psychological) which the mind of an ordinary person would be likely not to have withstood and which produces an incapacity to control his or her acts (sane automatism), see: *R v Falconer* at 30, 53.

7. Illustrations of sane automatism include —

   (a) the act of a sleepwalker: *R v Tolson* (1889) 23 QBD 168 at 187; *R v DB* [2022] NSWCCA 87 at [43];

   (b) post-traumatic loss of control due to head injury: *Bratty v Attorney-General (Northern Ireland)* (1963) AC 386 at 401 and 415; *Cooper v McKenna* (1960) Qd R 406;

   (c) an act done in a state of temporary or transient dissociation following severe emotional shock or psychological trauma, which was not prone to recur and which the mind of an ordinary person (of the accused's age and circumstances and of normal temperament and control) would be likely not to have withstood: *R v Falconer* at 56–57;

(d) an act done under the influence of an anaesthetic: *R v Sullivan* (1984) AC 156.

(e) some forms of epilepsy, depending on their aetiology: *R v Youssef*.

8. It will be a matter for the trial judge to determine whether there is evidence sufficient for the issue of automatism to be left to the jury and the basis on which it should be left: *R v Mcleod* (1991) 56 A Crim R 320. Commonly, it will be clear that the condition is referable exclusively to a mental health or cognitive impairment in which case only those defences should be left, as to which see **[6-200]**. It would be inappropriate in such a case to direct the jury as to sane automatism. In other cases, the reverse may be the position.

9. If the evidence is capable of demonstrating either form of automatism, then it must be left to the jury for them to decide whether the automatism was sane or insane in nature, and to consider it accordingly in relation to the issue to which it thereby becomes relevant: *R v Youssef* at 5–6. In such cases, a full direction will need to be given as to the distinction between the two strands of automatism and as to the evidential burden and standard of proof. Additionally, the special directions required under s 28 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 would need to be given, see **[6-280]**.

[6-060] Suggested direction

In order for an accused to be convicted of a crime, his or her act (giving rise to the unlawful conduct) must be voluntary.

Where an act (otherwise criminal) is done in a state of automatism, that is, without control or direction of the will of the accused over what is being done, then no crime is committed and the accused must be found "not guilty". Here automatism raises itself for your consideration because of the evidence … [*outline the evidence*].

Although the defence has raised this issue for you to consider, this does not mean that it is the accused who bears the onus of proving that [*his/her*] act was done in a state of automatism. It is for the Crown to prove beyond reasonable doubt that all of the ingredients of [*the offence*] were present, and one of these is the requirement that the act be voluntary.

It is therefore for the Crown to prove beyond reasonable doubt that the act of the accused was voluntary, that is, it is for the Crown to remove any reasonable doubt from your minds as to whether the accused was acting as an automaton, divested of the control and direction of [*his/her*] will over what [*he/she*] was doing.

[*Where the case involves sane automatism*] Automatism in this case does not involve any question of mental health impairment or cognitive impairment. It is concerned with involuntariness, which does not derive from any of those conditions.

To summarise, unless the Crown proves beyond reasonable doubt that the act of the accused was subject to the control and direction of [*his/her*] will, then [*he/she*] must be acquitted because no offence has been committed.

[*Where the case involves insane automatism*] If you conclude the Crown has proved beyond reasonable doubt that the act of the accused was voluntary, you must then

consider whether the accused had a mental health or cognitive impairment so as not to be responsible according to law. [*Follow with suggested direction under s 28 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 at [6-280]*].

[The next page is 1241]

Defence of mental health impairment or cognitive impairment

[6-200] Introduction

The defence of mental health impairment and/or cognitive impairment, formerly the defence of mental illness, is provided in the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 ("the Act") which commenced on 27 March 2021 and replaced the *Mental Health (Forensic Provisions) Act* 1990 ("the 1990 Act").

For fitness to be tried, which is dealt with in Pt 4 of the Act, see **[4-300] Procedures for fitness to be tried (including special hearings)** which includes some general observations about some of the terms and concepts in the Act.

For the partial defence to murder of what used to be termed "substantial impairment by abnormality of mind" in s 23A of the *Crimes Act* 1900, see **[6-550] Substantial impairment by mental health impairment or cognitive impairment**.

The present chapter is concerned with the provisions of Pt 3 of the Act and what used to be referred to as the defence of mental illness and the special verdict of "not guilty by reason of mental illness" in Pt 4 of the 1990 Act. If the defence of mental health impairment and/or cognitive impairment in s 28 of the Act is established the special verdict that must be returned is "act proven but not criminally responsible": s 30.

The Attorney General, the Hon Mark Speakman, said in the Second Reading Speech for the Mental Health and Cognitive Impairment Forensic Provisions Bill 2020 that Pt 3 updated and legislated what was the common law test for the defence of mental illness and rewrote the special verdict. The defence provided in what became s 28 was said to "closely mirror" the common law M'Naghten's test "but with updated terms": NSW, Legislative Assembly, *Debates*, 3 June 2020, p 2351. Consequently, authorities concerned with the mental illness defence at common law, for example, *R v Porter* (1933) 55 CLR 182, have continued relevance.

See generally, *Criminal Practice and Procedure NSW* at [17-s 28]–[17-s 34] and accompanying annotations; *Criminal Law NSW* at [MHCI.28.20]–[MHCI.28.240]. See also "Introducing the new Mental Health and Cognitive Impairment Forensic Provisions Act 2020", The Hon Justice Mark Ierace, (2021) 33(2) *JOB* 15 and "Clinical issues with the Mental Health and Cognitive Impairment Forensic Provisions Act 2020", Dr Kerri Eagle and Anina Johnson, (2021) 33(7) *JOB* 67.

[6-210] Transitional provisions

Savings and transitional provisions are made in Sch 2 of the Act, including the extent to which the Act may apply to existing proceedings. Clause 5 provides that if a question has been raised prior to the commencement of the Act as to whether the accused was mentally ill at the time of commission of the offence, the 1990 Act continues to apply until a determination is made as to whether a special verdict should be entered (or the defence is no longer being raised). If it is determined that the special verdict of not

guilty by reason of mental illness would have been found, the court must instead find the special verdict of act proven but not criminally responsible. This is what occurred in *Masters v R* [2022] NSWCCA 228.

[6-220] Sequence of determination of issues

While it is theoretically necessary for the Crown to prove beyond reasonable doubt that the act (or omission) constituting the offence was a voluntary one, that is a matter that is presumed unless the accused discharges an evidentiary onus to indicate otherwise. If the issue is raised on the evidence it is then necessary for the Crown to prove beyond reasonable doubt that the act was a voluntary act of the accused: *The Queen v Falconer* (1990) 171 CLR 30 at 56, 63, 77. See **[4-350] Voluntary act of the accused** and **[6-050] Automatism**.

Where no issue is raised as to the voluntariness of the accused's act, it is only necessary for the Crown to prove the physical elements of the alleged crime before the impairment defence falls for determination. That is, consideration of whether the mental element has been proved is only necessary if it is determined that the defence has failed: *R v Tonga* [2021] NSWSC 1064 at [15]; *R v Siemek (No 1)* [2021] NSWSC 1292 at [16]; *R v Jawid* [2022] NSWSC 788 at [97]–[98]. The proposition is traced to *Hawkins v The Queen* (1994) 179 CLR 500 at 512–517 and *R v Minani* (2005) 63 NSWLR 490 at [32]–[33]. In *R v Jawid* at [99]–[106], Davies J provided reasons for concluding that the issue of criminal responsibility must be considered before any question of substantial impairment.

It was held in *Hawkins v The Queen* at 512–513, 517 that medical evidence going to a defence of mental illness cannot be taken into account in determining whether an act is voluntary but may be taken into account in determining whether the act was done with a specific intent. Having regard to the rationale for this as explained by the High Court (at 513), this would appear to apply to both the mental health and the cognitive impairment defences.

[6-230] The impairment defence

Section 28 of the Act provides for a "defence" of mental health impairment, cognitive impairment "or both".

While it is commonly referred to as a "defence", it is not something that may only be raised by the accused. There are cases in which the Crown has contended the special verdict should be returned whereas the accused contended there should be an acquittal as a result of sane automatism (absence of voluntariness) or in a murder trial there should be a verdict of guilty of manslaughter by reason of substantial impairment because of mental health or cognitive impairment. The former was the case in *R v DB* [2022] NSWCCA 87 and the latter was the case in *R v Jawid* [2022] NSWSC 788. In *R v Jawid*, Davies J applied *R v Ayoub* [1984] 2 NSWLR 511 and s 28(2) of the Act in holding that the Crown is entitled to raise the issue of criminal responsibility by contending that the accused has a mental health impairment and that despite s 141 of the *Evidence Act* 1995, the standard of proof is on the balance of probabilities.

As to the reference in s 28(1) to "or both", in their article referred to above, Eagle and Johnson observe (at 68) that mental health impairments and cognitive impairments

may overlap clinically and diagnostically and the reference in s 28 (and in the test for fitness in s 36) to both "avoids the need for clinicians and courts to make potentially artificial determination as to which disorder is contributing to the relevant impairment".

The terms, "mental health impairment" and "cognitive impairment" are defined in ss 4 and 5 of the Act respectively (and in identical terms in ss 4C and 23A of the *Crimes Act*). The definitions of mental health impairment and cognitive impairment each have three limbs set out conjunctively in s 4(1)(a)–(c) and s 5(1)(a)–(c).

The three subsections of s 4 comprise in subs (1) a definition of what is a mental health impairment; in subs (2) a non-exhaustive list of disorders from which a mental health impairment may arise; and in subs (3) an exclusion of two matters from solely giving rise to a mental health impairment (the temporary effect of ingesting a substance and a substance use disorder). Section 5 follows a similar structure in subss (1) and (2) but with terms and concepts relevant to cognitive impairment and without the exclusion of the temporary effect of ingesting a substance, or a substance use disorder.

It was held by a majority in *R v DB* at [43] that under the common law, the acts of a person who is asleep and engaging in somnambulistic activity are not willed acts. The accused was not legally responsible for them and would be entitled to an outright acquittal. It was further held (at [64]) that the Act did not alter this position in that there was no mental health impairment as defined in s 4: there was no disturbance of volition within s 4(1)(a) and the lack of volition while asleep was of no clinical significance for the purposes of s 4(1)(b).

It has been held in two single judge decisions that the onus of proof of the exclusion in s 4(3) is upon the Crown: *R v Miller* [2022] NSWSC 802 at [53]–[62] and *R v Sheridan* [2022] NSWSC 1669 at [20]–[26]. In the latter, the court rejected a proposition that the onus was upon the Crown to prove the matter beyond reasonable doubt and held that the standard of proof on the Crown was on the balance of probabilities. These matters appear to involve issues that were not considered and neither have the judgments been the subject of appellate review.

In *R v Miller* at [50]–[51], Cavanagh J held that an impairment by way of a substance induced disorder which existed at the time of the event which was temporary in nature, and which was caused solely by the ingestion of drugs without any underlying cause would be within the possible operation of s 4(3). He was not satisfied that the exception in s 4(3) could only apply where the accused was intoxicated by drugs at the time of committing the act or could never apply if s 4(2) is satisfied.

There are two limbs to the defence set out in s 28(1): *R v Siemek (No 1)* [2021] NSWSC 1292 at [84]–[86]. First, whether at the time of carrying out the act constituting the offence the accused had a mental health and/or cognitive impairment. Second, whether such impairment(s) had the effect that the accused did not know the nature and quality of the act or did not know that the act was wrong (that is, could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong). It is presumed that the accused did not have either such impairment until the contrary is proved, with such proof being on the balance of probabilities: s 28(2)–(3). Whether the accused did not know the nature and quality of the act involves an assessment of whether the accused knew the physical nature of what he/she was doing or the implications of it: *The King v Porter* (1933) 55 CLR 182 at 188; *Willgoss v The Queen* (1960) 105 CLR 295 at 300.

The definition within s 28(1)(b) of not knowing that the act was wrong meaning that the accused "could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong" adopts the formulation of Dixon J in *The King v Porter* at 189–190 which included his Honour saying that "wrong" meant "wrong having regard to the everyday standards of reasonable people". It was confirmed in *Stapleton v The Queen* (1952) 86 CLR 358 at 375 that the issue is whether the accused was able to reason as to what is right and wrong according to the ordinary standards adopted by reasonable people as opposed to knowing that the act was contrary to and punishable by law.

[6-240] Evidence

There was no legal requirement to adduce medical evidence to prove the former defence of mental illness: *Lucas v The Queen* (1970) 120 CLR 171 at 174. However, it was observed in *Tumanako v R* (1992) 64 A Crim R 149 at 160 that there may be a practical necessity to do so and Johnson J noted in *R v Siemek (No 1)* [2021] NSWSC 1292 at [92] that it may be more than a practical necessity to have expert medical evidence for that part of the definition of a mental health impairment that a disturbance of thought, mood, volition, perception or memory "would be regarded as significant for clinical diagnostic purposes". The same is likely the case about aspects of the definition of cognitive impairment. Juries (and judges sitting alone) are not bound to accept and act upon expert evidence but must not disregard it capriciously: *R v Hall* (1988) 36 A Crim R 368; *Goodridge v R* [2014] NSWCCA 37 at [116]. Unanimous medical evidence ought not be rejected unless there is evidence which can cast doubt upon it: *R v Tumanako* at 160–161; *Da-Pra v R* [2014] NSWCCA 211 at [337].

[6-250] Mandatory information for the jury

Section 29 provides that the judge must explain the matters listed in paragraphs (a) to (e) to the jury. They are the findings which may be made on the trial and their legal and practical consequences: s 29(a)–(b). Paragraph (d) adds this includes that if the special verdict is returned, the accused may be ordered to be released by the Mental Health Review Tribunal only if the Tribunal is satisfied the safety of the accused and members of the public will not be seriously endangered. Paragraph (c) provides the jury is to be informed about the composition of the Mental Health Review Tribunal and its functions in respect to forensic patients. Paragraph (e) provides the jury be told that it should not be influenced in the return of a verdict by the consequences of a special verdict. The provision of such instruction to a jury appears to have derived from *R v Hilder* (1997) 97 A Crim R 70 at 81. The Attorney General indicated in his Second Reading Speech stakeholders had asked that this requirement be retained so that a jury is not deterred from returning a special verdict out of concern about indeterminate detention: NSW, Legislative Assembly, *Debates*, 3 June 2020, at 2352.

The Mental Health Review Tribunal is constituted under Ch 6 of the *Mental Health Act* 2007 (provisions relating to membership of the Tribunal are found in Sch 5.) The functions of the Tribunal in relation to forensic patients who have been the subject of a verdict of act proven but not criminally responsible are contained in Pt 5 of the Act. Information included in the suggested direction at **[6-280]** for compliance with s 29 of the Act has been drawn from these sources.

[6-260] Fast track determination where parties in agreement as to outcome

Section 31 of the Act provides for a streamlined procedure enabling a court to enter a special verdict at any time in the proceedings, even before a jury is empanelled. It is necessary that the defendant is legally represented and that the parties agree that the proposed evidence establishes the defence in s 28. If the court is satisfied the defence is established the special verdict may be entered. There is no requirement that a trial be convened, that the defendant elect to be tried by judge alone, or that the judge comply with the requirements for such a trial under ss 132 and 133 of the *Criminal Procedure Act* 1986. It remains necessary for a judge to provide reasons for the outcome as a necessary function of judicial proceedings. See *R v Sands* [2021] NSWSC 1325 at [3]–[4]; *R v Jackson* [2021] NSWSC 1404 at [7]–[13].

[6-270] Verdict and orders

If the defence of mental health or cognitive impairment has been established, the jury must return the special verdict of act proven but not criminally responsible: s 30. Section 32 provides that if the special verdict is entered, there is no requirement for the special verdict to be entered also in respect of an offence available as an alternative.

The orders a court may make upon the return of a special verdict are set out in s 33(1). They include an order for the unconditional or conditional release of the person from custody but before making such an order the court must be satisfied that the safety of the person or any member of the public will not be seriously endangered: s 33(3).

The court may request a report by a forensic psychiatrist, or a person of a class prescribed by the regulations as to the condition of the person and whether their release is likely to seriously endanger the safety of themself or any member of the public: s 33(2). Clause 4 of the *Mental Health and Cognitive Impairment Forensic Provisions Regulation* 2021 prescribes for the purposes of s 33(2) a person who is a registered psychologist who has, in the opinion of the court, appropriate experience or training in forensic psychology or neuro-psychology. Section 30L of the *Crimes (Sentencing Procedure) Act* 1999 enables a victim impact statement to be provided to the court following the return of a special verdict at a trial or special hearing (and a verdict at a special hearing that on the limited evidence available an accused person committed an offence). This has been described as a "significant" and "important" reform: *R v Siemek (No 2)* [2021] NSWSC 1293 at [3], [6]–[7]. Any victim impact statement must be provided to the Mental Health Review Tribunal: s 30N(3). Section 30M provides that a court may seek submissions by the "designated carer or principal care provider" (as defined in the *Mental Health Act* 2007) of an accused person after the return of such a verdict. It is suggested that an inquiry be made as to whether any of these provisions should be applied before the court finalises a matter by making orders pursuant to s 33 of the Act. There must be a referral of the person to the Mental Health Review Tribunal if a special verdict is returned unless an order is made for the person's unconditional release: s 34.

[6-280] Suggested direction

It is recommended that the jury be assisted by the provision of a document setting out the elements of the offence the Crown is required to prove together with the elements of the defence raised. A document setting out the composition and relevant functions of the Mental Health Review Tribunal in respect to forensic patients may also assist.

The suggested direction assumes the jury have been directed as to all of the elements of the offence the Crown is required to prove. It is based upon the more commonly encountered case in which there is no dispute that the accused committed the physical act constituting the offence and that the defence raised is one of mental health rather than cognitive impairment. The direction may be readily adapted if the case at hand is otherwise. A suggested substitution of an explanation of "cognitive impairment" to use in lieu of "mental health impairment" appears below.

If there is an issue as to whether the accused's act was voluntary, the following direction should be preceded by a direction as to that, see **[4-350] Voluntary act of the accused**. If an issue of automatism arises as the basis of an assertion of involuntariness, see also **[6-050] Automatism**.

If you are satisfied beyond reasonable doubt the accused committed the physical act that constitutes the offence, namely [*specify*], which the accused concedes, **[where appropriate add:** and that it was a voluntary act in the sense I have described**]** then you must decide whether it has been established that a special verdict of "act proven but not criminally responsible" should be returned. Whether or not the mental element of the offence that I have described, namely [*specify*] has been proved is irrelevant for the moment. The return of the special verdict which I am about to explain does not depend upon that mental element having been proved.

So, if you are satisfied the accused committed the act of [*specify*], the question then is did [*he/she*] have a mental health impairment which had the effect that [*he/she*]:

(a) did not know the nature and quality of the act, or

(b) did not know that the act was wrong.

If that has been proved, then you would return the "special verdict" which is "act proven but not criminally responsible".

I will explain these concepts shortly but will first explain some important matters concerning what I will call this impairment issue.

First, unless there is some evidence to the contrary, the law presumes that an accused did not have a mental health impairment that had one of the effects upon him that I have mentioned.

Second, you are concerned with the mental health of the accused at the time of committing the act that constitutes the offence. There is evidence of the state of [*his/her*] mental health before and after but it is only relevant to the extent to which it assists in a determination of what the accused's mental health condition was at the time of committing that act.

The third matter is that proof of this impairment issue is necessary only to the standard of the balance of probabilities. That stands in contrast to the requirement that the Crown prove the guilt of the accused to the standard of beyond reasonable doubt. I will say more about this in a moment.

I will now speak about the elements of the impairment issue itself. As I have said, it involves two matters: whether the accused had a mental health impairment at the time of carrying out the act constituting the offence and if so, whether this impairment had a certain effect upon the accused.

1. Mental health impairment

A person has a mental health impairment if each of the following three matters have been proved:

(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory; and

(b) the disturbance would be regarded as significant for clinical diagnostic purposes; and

(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

[*It will often not be necessary to refer to every aspect of (a) and (c); only to those which have been specifically raised by the evidence.*]

[*Discuss each of these three matters in turn by referring to the evidence and the submissions of the parties.*]

[Where appropriate add: A person does not have a mental health impairment if the person has an impairment caused solely by either:

(a) the temporary effect of ingesting a substance, or

(b) a substance use disorder.

[*Discuss either or both matters by reference to the evidence and the submissions of the parties.*]**]**

2. The effect of the impairment upon the accused

If you are satisfied that the accused had a mental health impairment at the time of carrying out the act constituting the offence, it is also necessary that this impairment had one or the other of the following effects:

(a) the accused did not know the nature and quality of the act, or

(b) the accused did not know that the act was wrong (that is, the accused could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).

As to the first of those matters, a person does not know the nature and quality of an act if they do not know of the physical nature of what they are doing, or do not know of the implications of doing that act.

The second matter is not concerned with whether the accused knew that the act was wrong in the sense of being something that was contrary to the law and punishable as a consequence. It is concerned with whether the accused was able to understand the difference between right and wrong as ordinary reasonable people are able to understand. This second matter will have been established if you are satisfied that the accused could not reason with a moderate degree of sense and composure about whether the act was wrong.

[*Discuss either or both matters by reference to the evidence and the submissions of the parties.*]

Standard of proof

I have mentioned that you have to decide on "the balance of probabilities" whether the accused had a mental health impairment that had a certain effect upon [*him/her*]

as I have described. That means you have to decide this issue on the basis of what is more probable than not. This is a different standard or level of proof than beyond reasonable doubt which applies to what the Crown must prove in order to establish that the accused is guilty of the offence charged. The issue you are concerned with here is whether the accused had a mental health impairment which had one or other of the effects of [*refer to the text of 2[a] or [b] above*] upon [*him/her*]. It is only necessary for you to be satisfied that it is more probable that [*he/she*] did than that [*he/she*] did not. It does not matter how slightly it might be more probable, only that it is more probable by some degree.

Special verdict

If you are satisfied on the balance of probabilities that at the time the accused carried out the act of [*specify*] [*he/she*] had a mental health impairment that had the effect upon [*him/her*] as I have described, then you must return what is referred to as the "special verdict" which is "act proven but not criminally responsible".

Explanation of the effect of the special verdict

[*required to be given pursuant to s 29 of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020*].

You may be interested to know what happens when a jury returns the special verdict, and this is information that the law says you must be given.

If your verdict is "not guilty", the accused walks from the court a free person and the criminal process comes to an end. If your verdict is "guilty", the court will determine the appropriate punishment to impose upon the accused.

However, if you return the special verdict of "act proven but not criminally responsible", neither of those things happens. Instead, the law provides for a process of review, to determine whether the accused poses a risk to him/herself or to others, and whether he/she should be released into the community or detained and treated.

If the court is satisfied that the safety of the accused and members of the community will not be seriously endangered by the accused's release into the community, he/she can be released, either unconditionally, or with conditions, such as a requirement that the accused accept medical treatment, or live at a particular place. If the court concludes that it is not appropriate to release the accused into the community at present, the court can order his/her detention until it is safe to release him/her. Detention can be in a prison, or a secure hospital or some similar facility, and it would continue until a Tribunal, called the Mental Health Review Tribunal, decided that the accused could be released.

The Mental Health Review Tribunal is a special body with expertise in this area. It has Members rather than judges, but the Members of the Tribunal are all people with special qualifications and expertise. They include judges or senior lawyers, but also medical and other professionals, such as psychologists and psychiatrists.

The Tribunal will review the accused's situation regularly and will not order the release of the accused until it is satisfied the safety of the accused or any member of the public would not be seriously endangered. Until that time, the accused would be held in a secure place, where medical treatment can be provided.

When you are considering the verdict(s) that you will return, it is useful for you to know what will happen if the verdict should be that of "act proven but not criminally responsible". Giving you this information is not, however, an invitation to decide the case based upon what you think is the best outcome for the accused or the community. You must, consistent with the oath or affirmation you took on the very first day of the trial, return a verdict based only upon the evidence placed before you.

Upon determination of the impairment issue

You will be satisfied that the special verdict should be returned if you are satisfied on the balance of probabilities that at the time of carrying out the act of [*specify*] the accused had a mental health impairment that had the effect that the accused did not know the nature and quality of the act or did not know that the act was wrong.

In that case, provided you are satisfied beyond reasonable doubt that the accused carried out that act **[where appropriate add:** and that it was a voluntary act**]** your verdict will be: "act proven but not criminally responsible".

If you are not satisfied on the balance of probabilities that this special verdict should be returned, then you must consider whether the Crown has proved the guilt of the accused by proving beyond reasonable doubt each of the essential elements of the offence that I have explained to you. .

[6-290] Suggested direction — cognitive impairment

The suggested direction for mental health impairment may be readily adapted for a case involving an issue of cognitive impairment (or both). The following is suggested for substitution of that part of the direction concerned with the nature of the impairment.

Cognitive impairment

A person has a cognitive impairment if each of the following three matters have been proved:

(a) the person has an ongoing impairment in adaptive functioning; and

(b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory; and

(c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind.

[*It will often not be necessary to refer to every aspect of (b) and (c); only to those which have been specifically raised by the evidence.*]

[*Discuss each of these three matters in turn by referring to the evidence and the submissions of the parties.*]

[The next page is 1275]

Substantial impairment because of mental health impairment or cognitive impairment

[6-550] Introduction

Section 23A *Crimes Act* 1900 provides a partial defence to murder of substantial impairment because of mental health impairment or cognitive impairment. It was previously termed substantial impairment by abnormality of mind but was amended with effect from 27 March 2021 by the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020.

There is no transitional provision in the legislation about the homicides to which the new version of the partial defence applies. There is authority, however, that it does not apply to proceedings commenced before the legislation did: see *R v Papanicolaou (No 4)* [2021] NSWSC 1698 at [36]–[46]. There is also authority that it does not apply to homicides alleged to have been committed before the commencement date of the legislation: see *R v Tran* [2022] NSWSC 1377 at [10]–[16].

"Mental health impairment" and "cognitive impairment" are defined in ss 4C and 23A(8) respectively of the *Crimes Act*. They are in identical terms to the definitions in ss 4 and 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act*.

Section 23A makes explicit in the opening words of subs (1) ("A person who would otherwise be guilty of murder …") that the partial defence only arises where all other issues on a charge of murder, such as self-defence and provocation, have been resolved in favour of the Crown. This includes a defence of mental health impairment or cognitive impairment or both under s 28 of the *Mental Health and Cognitive Impairment Forensic Provisions Act*: *R v Jawid* [2022] NSWSC 788 at [106] (Davies J).

Section 23A(3) provides that the effects of "self-induced intoxication", as defined in s 428A *Crimes Act*, are to be disregarded for the purpose of determining whether the accused, by reason of this section, is not liable to be convicted of murder. *R v Gosling* [2002] NSWCCA 351 at [25] and *Zaro v R* [2009] NSWCCA 219 at [34]–[37] are examples where a judge was required to give a direction that self-induced intoxication at the time of the offence was to be disregarded by the jury.

It is not enough that the accused suffers from a "substantial impairment because of mental health or cognitive impairment". Section 23A(1)(b) expressly requires that the impairment must have been so substantial as to warrant liability for murder being reduced to manslaughter. Section 23A(2) provides that opinion evidence on this issue is inadmissible.

The burden of proof is upon the accused in both provisions, and in both cases the Crown is entitled to raise mental illness if the accused raises substantial impairment, to be proved on the balance of probabilities, and vice versa: *R v Ayoub* [1984] 2 NSWLR 511; *R v Jawid* at [91]–[92].

Section 151 *Criminal Procedure Act* 1986 requires notice to be given of the intention to raise a defence of substantial impairment and also deals with the stage at which evidence in rebuttal may be given in the Crown's case. This section refers only to "substantial mental impairment" but it is defined in subs (6) to mean a contention that

the accused is not liable to be convicted of murder by virtue of s 23A of the *Crimes Act*. Accordingly, it is a reference to substantial impairment because of mental health impairment or cognitive impairment.

[6-570] Suggested written direction

It is noted that in contrast to the defence in s 28 of the *Mental Health and Cognitive Impairment Forensic Provisions Act*, the partial defence in s 23A of the *Crimes Act* is limited to either mental health impairment or cognitive impairment and not "both".

The following suggested written direction is for the more common case in which a mental health impairment is in issue. It may be readily adapted in the event the case concerns a cognitive impairment.

The partial defence of "substantial impairment because of a mental health impairment" will succeed if the accused has established more probably than not, both that:

1. at the time of the act causing death, [*his/her*] capacity either to:
   (i) understand events, or
   (ii) judge whether [*his/her*] actions were right or wrong, or
   (iii) control [*himself/herself*]
   was substantially impaired by a mental health impairment, and
2. the impairment was so substantial as to warrant [*his/her*] liability for murder being reduced to manslaughter.

As to the first matter, the issue is whether the accused's capacity to function in one or other of the three ways was substantially impaired, not whether [*he/she*] simply chose not to function in that way.

A person has a mental health impairment if each of the following three matters have been proved:

(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory; and

(b) the disturbance would be regarded as significant for clinical diagnostic purposes; and

(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

[Delete unnecessary elements of (a) and (c).]

[Where appropriate: A person does not have a mental health impairment if the person has an impairment caused solely by either:

(a) the temporary effect of ingesting a substance, or

(b) a substance use disorder.

"Impaired" has its ordinary meaning and requires proof of a capacity less or lower than the normal range.

"Substantial" also has its ordinary meaning of being "of substance" and "not slight or insignificant".

As to the second matter, the issue as to whether an impairment was so substantial as to warrant liability for murder being reduced to manslaughter calls for a value judgment applying community standards.**]**

[Where appropriate s 23A(3) — self-induced intoxication:

The effect of self-induced intoxication from drugs and/or alcohol at the time of the act(s) causing the death are to be disregarded in the assessment of both of these matters at 1 and 2 above.**]**

If the accused has not established the partial defence of substantial impairment because of mental health impairment, the appropriate verdict is one of "guilty of murder".

If the accused has established the partial defence of substantial impairment by abnormality of mind, you must find [*him/her*] "not guilty of murder but guilty of manslaughter".**]**

[6-580] Suggested oral direction

The following suggested direction is directed to a case involving mental health impairment but the term cognitive impairment and its meaning may be readily substituted.

I next come to what has been shortly referred to during the trial as "substantial impairment". This only arises for your consideration if you are satisfied beyond reasonable doubt that the Crown has established all of the essential ingredients of the crime of murder **[where appropriate:** including negating (disproving) the issue of self defence and/or provocation and/or that you are not satisfied on the balance of probabilities the accused is not criminally responsible because of a mental health impairment, a cognitive impairment, or both**]**. If that is the case, you next have to come to this question of substantial impairment.

The law provides that a person who would otherwise be guilty of murder is not to be convicted of that offence, but is to be convicted of the offence of manslaughter, if at the time of the act causing the death concerned [*his/her*] capacity either to understand events, or to judge whether [*his/her*] actions were right or wrong, or to control [*himself/herself*], was substantially impaired because of a mental health impairment; and furthermore, that that impairment was so substantial as to warrant liability for murder being reduced to manslaughter.

It is called a "defence to murder" because it is for the accused to raise it and to prove it. To do so, however, [*he/she*] is not put to the strict standard of proof beyond reasonable doubt which is required of the Crown. The standard of proof on the accused is on the balance of probabilities. This means that if, at the end of your deliberations, you are of the view that it is more likely than not that what the accused claims in respect of this defence is so, then [*he/she*] has succeeded. It is called a "partial defence" because, if it does succeed, then the appropriate verdict is "not guilty of murder but guilty of manslaughter".

[Where appropriate, add:

Rationale

Before turning to a more detailed discussion of the ingredients of this partial defence, I should first briefly explain the reasons why Parliament has provided for it. Persons

charged with committing a crime, if convicted, are to be punished for it. One of the most important factors in determining what punishment should be imposed for the crime of which he or she is convicted is whether there are matters in mitigation which would serve to reduce the extent of the blame which should attach to that crime.

Although both involve the death of a human being, the crime of murder is a more serious crime than the crime of manslaughter, and hence manslaughter is punished less severely than murder. This is so for a number of reasons, one of which is that the culpability of a person who commits the crime of manslaughter is less than that of a person who commits the crime of murder.

A person who, because of a mental health impairment has an impaired capacity either to understand events; to judge whether his or her actions were right or wrong; or to control himself or herself, is less responsible, according to the standards prevailing in our community, than a person who has full capacity in those respects.

With reference to the capacity to understand events, it is important that you should consider the accused's perception of events. These include [*his/her*] perception of physical acts and matters, the surrounding circumstances, what [*he/she*] was doing and its effects.

Accordingly, Parliament has provided for this defence which requires not only that the accused prove that [*his/her*] capacity was so impaired, but also requires that you, as the jury representing the community and applying the standards which you regard as current in the community, are satisfied that the impairment was so substantial that the liability of the accused to punishment should be reduced from that which would follow from a conviction of murder, to that which would follow from a conviction of manslaughter. Because the onus is on the accused in respect of these matters, as an exception to the general rule that the onus of proof is on the Crown, the standard of proof is the lesser standard of "on the balance of probabilities" rather than the higher standard of "proof beyond reasonable doubt" required of the Crown.**]**

Substantial impairment

Turning now to what is involved in this partial defence, there two matters which the accused must prove. The first matter is that at the time of the … [*specify act, for example, stabbing, shooting etc*] causing the death charged, [*his/her*] capacity either to understand events, or to judge whether [*his/her*] actions were right or wrong or to control [*himself/herself*] was substantially impaired because of a mental health impairment.

A person has a mental health impairment if each of the following three matters have been proved:

(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory; and

(b) the disturbance would be regarded as significant for clinical diagnostic purposes; and

(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

[*It will often not be necessary to refer to every aspect of (a) and (c); only to those which have been specifically raised by the evidence.*]

[*Discuss each of these three matters in turn by referring to the evidence and the submissions of the parties.*]

[Where appropriate: A person does not have a mental health impairment if the person has an impairment caused solely by either:

(a) the temporary effect of ingesting a substance, or

(b) a substance use disorder.

[*Discuss either or both matters by reference to the evidence and the submissions of the parties.*]**]**.

"Impaired" has its ordinary meaning and requires proof of a capacity less or lower than the normal range.

"Substantial" also has its ordinary meaning of being "of substance" and "not slight or insignificant".

In determining whether the accused has established that it is more likely than not that at the time of the act [*specify*] [*his/her*] capacity to understand events, to judge whether [*his/her*] actions were right or wrong, or to control [*him/herself*] was substantially impaired by a mental health impairment, you will need to carefully consider the evidence of the psychiatrists (or other expert witnesses). These are areas in which psychiatrists … [*etc, specify*] have particular expertise and experience.

You are not bound, however, to accept their evidence. You are entitled to act on other evidence in the case if you think that there is other evidence which conflicts with or undermines the basis upon which the psychiatrists expressed their opinions.

On the other hand, you would obviously pay careful and close attention to what the opinion evidence is as to these matters because of the experience and expertise which these witnesses have in this field.

You would only decline to act on the evidence of the psychiatrists [*and psychologists*] if you think that there is other evidence which outweighs the psychiatric evidence, or if you think that the facts differ from those on which the psychiatrists based their opinions, or if you think that the reasons expressed by the psychiatrists for their opinions (even having regard to their expertise) do not support their conclusion … [*a different direction would need to be given if, as often happens, the psychiatric or psychological evidence reaches different conclusions*].

Substantial impairment such as to warrant liability for murder being reduced to manslaughter

The second matter which the accused must prove is whether the substantial impairment relied upon by the accused was so substantial as to warrant [his/her] liability for murder being reduced to manslaughter.

This will only arise for consideration if the accused has satisfied you as to the first matter that there was a substantial impairment as I have described.

In deciding this second matter you must apply the standards which you regard as prevailing in our community (bearing in mind that manslaughter is regarded as a less serious crime than murder, and that the community places less blame and

condemnation upon a person guilty of manslaughter than of murder). In answering this question, you should approach the matter in a broad common sense way, applying (as I have said) the standards of the community which you are here to represent.

The question you should ask yourself is — "Has the accused satisfied you in the circumstances of this case that any impairment to [*his/her*] capacity (if you find that it is likely to have existed) was such that [he/she] should not be condemned or blamed as a murderer, and that rather, [*he/she*] should be treated as having been guilty of manslaughter?".

[Where appropriate s 23A(3) — self-induced intoxication:

The effect of self-induced intoxication from drugs and/or alcohol at the time of the act(s) causing the death are to be disregarded in the assessment of both matters that the accused is required to prove. You must consider both of them on the assumption that the accused was not affected by intoxication from drugs and/or alcohol.**]**

To summarise then, if, on the one hand, you have been satisfied by the Crown beyond reasonable doubt of all of the necessary matters which it has to establish in order to justify a conviction of murder, and also that the accused, on the other hand, has satisfied you that it is more likely than not that this partial defence is made out, the appropriate verdict is "not guilty of murder but guilty of manslaughter".

If, however, you have been satisfied by the Crown beyond reasonable doubt of all that it must prove to justify a conviction for murder, but the accused has failed to satisfy you that it is more likely than not that this partial defence has been made out, the appropriate verdict is one of "guilty of murder".

[The next page is 1401]