CROWN COURT BENCH BOOK AND SPECIMEN DIRECTIONS
THIRD EDITION-2010
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INTRODUCTION TO THE THIRD EDITION

The origin of this Bench Book may be said to lie in a collection of specimen charges to juries in criminal cases prepared more than thirty years ago by Lord Lowry LCJ and widely used by the judges of the Crown Court, although developments in the criminal law since then meant that in many instances these specimen charges required extensive revision. In England the Judicial Studies Board recognised the need to provide a collection of specimen directions for the use of judges, and the first edition was published in 1984. The English specimen directions covered a wider range of issues than the specimen charges drawn up by Lord Lowry, and have been revised and expanded in succeeding years to reflect the many changes in the criminal law that have occurred since the first edition.

In the 1990s the Judicial Studies Board for Northern Ireland felt that it might be helpful to the judges of the Crown Court in Northern Ireland were the opportunity taken to revise the specimen charges prepared by Lord Lowry, and to adapt the English specimen directions where appropriate to reflect differences between the law in Northern Ireland and England and Wales. This is the Third Edition of the Northern Ireland Specimen Directions.

As in the First and Second editions the specimen directions contained in this Bench Book are therefore largely based upon the specimen directions prepared by the Judicial Studies Board, and the compilers and the Judicial Studies Board for Northern Ireland gratefully acknowledge the permission readily given by the Judicial Studies Board to make use of its material. As before the opportunity has been taken to incorporate some additional material in the form of the provisions of the Criminal Evidence (Northern Ireland) Order 1988 (as amended), and the Practice Direction issued by the Lord Chief Justice under Article 4 of the Order. In addition, a number of specimen directions covering those criminal offences most frequently encountered in practice have been prepared and are included, several of which have no equivalent in the English specimen directions.

The following observations by Lord Lane CJ in his foreword to the 1984 edition of the English specimen directions are worthy of repetition.

"They are not intended as a substitute for the careful preparation which every summing up requires. They are not intended to limit the freedom of the trial judge to direct the jury as he thinks fit – providing he does so in accordance with the law.

The directions will often require adaptation to the circumstances of a particular case. They should not be regarded as a magic formula to be pronounced like an incantation.

They are not intended, it should be emphasised, to offer solution to vexed questions of law. Indeed, where the law is uncertain no specimen direction is provided."

It is intended that as appropriate additional or revised specimen directions will be issued by the Board and any suggestions for corrections or improvements will be most welcome, and should be sent to the Secretary to the Judicial Studies Board.

Each specimen direction is headed by a description and date. “New” means that the direction is a new one, “Revised” means that the previous direction has been extensively revised, whilst “Updated” means that the previous direction has only been altered by updating the references to Archbold and Blackstone. The date refers to the date upon which each direction was prepared.

Words in square brackets inserted and substituted by
Criminal Justice and Public Order Act 1994 c.33 s.168, Sch 10
10 April 1995

STATUTORY INSTRUMENTS

1988 No. 1987 (N.I.20)

NORTHERN IRELAND

The Criminal Evidence (Northern Ireland) Order 1988

Made ..... 14th November 1988

Coming into operation in accordance with Article 1

At the Court at Buckingham Palace,
the 14th day of November 1988
Present,
The Queen's Most Excellent Majesty in Council

Whereas a draft of this Order has been approved by a resolution of each House of Parliament:

Now, therefore, Her Majesty, in exercise of the powers conferred by paragraph 1 of Schedule 1 to the Northern Ireland Act 1974 **(a)** and of all other powers enabling Her in that behalf, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:-

TITLE AND COMMENCEMENT

1. - (1) This Order may be cited as the Criminal Evidence (Northern Ireland) Order 1988.

(2) Articles 2 and 4 shall come into operation on the seventh day after the day on which this Order is made and the other provisions of this Order shall come into operation on the expiration of one month from the day on which it is made.

(a) 1974 C.28

INTERPRETATION AND SAVINGS

2. - (1) The Interpretation Act (Northern Ireland) 1954 **(a)** shall apply to Article 1 and the following provisions of this Order as it applies to a Measure of the Northern Ireland Assembly.

(2) In this Order –

> "child" means a person under the age of fourteen;
> "place" includes any building or part of a building, any vehicle, vessel, aircraft or hovercraft and any other place whatsoever;
> "statutory provision" has the meaning assigned by section 1(f) of the Interpretation Act (Northern Ireland) 1954.

(3) In Articles 3(2), 4(4), 5(2) and 6(2), references to an offence charged include references to any other offence of which the accused could lawfully be convicted on that charge.

(4) A person shall not be committed for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in Article 3(2), 4(4), 5(2) or 6(2).

(5) A judge shall not refuse to grant such an application as is mentioned in Article 3(2)(b) solely on an inference drawn from such a failure as is mentioned in Article 3(2).

(6) Nothing in this Order prejudices the operation of any statutory provision which provides (in whatever words) that any answer or evidence given by a person in specified circumstances shall not be admissible in evidence against him or some other person in any proceedings or class of proceedings (however described, and whether civil or criminal).

In this paragraph the reference to giving evidence is a reference to giving evidence in any manner, whether by furnishing information, making discovery, producing documents or otherwise.

(7) Nothing in this Order prejudices any power of a court, in any proceedings, to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.

Circumstances in which inferences may be drawn from accused's failure to mention particular facts when questioned, charged, etc.

3. - (1) Where, in any proceedings against a person for an offence, evidence is given that the accused -

(a) 1954 C.33 (NI)

(a) at any time before he was charged with the offence, on being questioned (under caution) by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned (under caution) charged or informed, as the case may be, paragraph (2) applies.

(2) Where this paragraph applies -

(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer;

(b) a judge, in deciding whether to grant an application made by the accused under Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 **(a)** (application for dismissal of charge where a case of fraud has been transferred from a magistrates' court to the Crown Court under Article 3 of that Order); and

(c) the court or jury, in determining whether the accused is guilty of the offence charged,

may -

(i) draw such inferences from the failure to appear proper;

(ii) on the basis of such inferences treat the failure as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This Article applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in paragraph (1) "officially informed" means informed by a constable or any such person.

(a) S.I. 1988/1846 (N.I.16)

(5) This Article does not -

(a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this Article; or

(b) preclude the drawing of any inference from any such silence or other reaction of the accused which could be drawn apart from this Article.

(6) This Article does not apply in relation to a failure to mention a fact if the failure occurred before the commencement of this Article.

Accused to be called upon to give evidence at trial

4. - (1) At the trial of any person (other than a child) for an offence paragraphs (2) (and (4)) apply unless -

(a) the accused's guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to ... give evidence;

but paragraph (2) does not apply if, (at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence).

((2) Where this paragraph applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of the proceedings of indictment conducted with a jury, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.)

(3) ...

(4) (Where this paragraph applies) the court or jury, in determining whether the accused is guilty of the offence charged, may -

(a) draw such inferences (as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question);

Article 4(1)(b) words repealed and Article 4(3) repealed by Criminal Justice and Public Order Act 1994 c.33 s.168, Sch 10

(b) on the basis of such inferences, treat the refusal as, or as capable of

amounting to, corroboration of any evidence given against the accused in relation to which the refusal is material.

(5) This Article does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of (failure to do so).

(6) For the purposes of this Article a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless -

(a) he is entitled to refuse to answer the question by virtue of any statutory provision, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

(7) Where the age of any person is material for the purposes of paragraph (1), his age shall for those purposes be taken to be that which appears to the court to be his age.

(8) This Article applies -

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this Article;

(b) in relation to proceedings in a magistrates' court, only if the time when the court begins to receive evidence in the proceedings falls after that commencement.

(9) ...

(10) ...

Inferences from failure or refusal to account for objects, marks etc.

5. - (1) Where -

(a) a person is arrested by a constable, and there is -

(i) on his person; or
(ii) in or on his clothing or footwear; or
(iii) otherwise in his possession; or

Article 4(3), (9), and (10) repealed by Criminal Justice and Public Order Act 1994 c.33 s.163, Sch 11

(iv) in any place in which he is at the time of his arrest,

any object, substance or mark, or there is any mark on any such object; and

(b) (that or another constable investigating the case) reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by (that or another constable investigating the case); and

(c) the constable informs the person arrested that he so believes, and requests him to account for the presence of the object, substance or mark; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence so specified, evidence of those matters is given, paragraph (2) applies.

(2) Where this paragraph applies -

(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer;

((aa) a judge, in deciding whether to grant an application made by the accused under Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (application for dismissal of charge where a case of fraud has been transferred from a magistrates' court to the Crown Court under Article 3 of that Order);) and

(b) the court or jury, in determining whether the accused is guilty of the offence charged,

may -

(i) draw such inferences from the failure or refusal as appear proper;

(ii) on the basis of such inferences, treat the failure or refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure or refusal is material.

(3) Paragraphs (1) and (2) apply to the condition of clothing or footwear as they apply to a substance or mark thereon.

((3A) This Article applies in relation to officers of customs and excise as it applies in relation to constables.)

(4) Paragraphs (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in paragraph (1)(c) what the effect of this Article would be if he failed or refused to comply with the request.

(5) This Article does not preclude the drawing of any inference from a failure or refusal to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this Article.

(6) This Article does not apply in relation to a failure or refusal which occurred before the commencement of this Article.

Inferences from failure or refusal to account for presence at a particular place

6. - (1) Where -

(a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and

(b) (that or another constable investigating the case) reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and

(c) the constable informs the person that he so believes, and requests him to account for that presence; and

(d) the person fails or refuses to do so,

then if, in any proceedings against the person for the offence, evidence of those matters is given, paragraph (2) applies.

(2) Where this paragraph applies -

(a) the court, in determining whether to commit the accused for trial or whether there is a case to answer;

((aa) a judge, in deciding whether to grant an application made by the accused under Article 5 of the Criminal Justice (Serious Fraud) (Northern Ireland) Order 1988 (application for dismissal of charge where a case of fraud has been transferred from a magistrates' court to the Crown Court under Article 3 of that Order);) and

(b) the court or jury, in determining whether the accused is guilty of the offence charged,

may -

(i) draw such inferences from the failure or refusal as appear proper;

(ii) on the basis of such inferences, treat the failure or refusal as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure or refusal is material.

((2A) This Article applies in relation to officers of customs and excise as it applies in relation to constables.)

(3) Paragraphs (1) and (2) do not apply unless the accused was told in ordinary language by the constable when making the request mentioned in paragraph (1)(c) what the effect of this Article would be if he failed or refused to (comply with the request).

(4) This Article does not preclude the drawing of any inference from the failure or refusal of a person to account for his presence at a place which could properly be drawn apart from this Article.

(5) This Article does not apply in relation to a failure or refusal which occurred before the commencement of this Article.

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PRACTICE DIRECTION: CROWN COURT

CRIMINAL EVIDENCE (NORTHERN IRELAND) ORDER 1988, ARTICLE 4

1. At the conclusion of the evidence for the prosecution, Article 4(2) of the Criminal Evidence (Northern Ireland) Order 1988 (as amended with effect from 10th April 1995 by paragraph 61(3)(b) of Schedule 10 to the Criminal Justice and Public Order Act 1994) requires the court to satisfy itself that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

2. **IF THE ACCUSED IS LEGALLY REPRESENTED**

(a) **Where there is one accused**

(i) Article 4(1) of the 1988 Order provides that Article 4(2) does not apply if, at the conclusion of the evidence for the prosecution, the accused's legal representative informs the court that the accused will give evidence. In the case of proceedings on indictment conducted with a jury this should be done in the presence of the jury. If counsel indicates that the accused will give evidence, the case should proceed in the usual way.

(ii) If the court is not so informed, or if the court is informed that the accused does not intend to give evidence, the judge should (in the presence of the jury in the case of proceedings on indictment tried with a jury) enquire of counsel in these terms:

> "Have you advised your client that the stage has now been reached at which he may give evidence and, if he chooses not to do so or, having been sworn, without good cause refuses to answer any question, the (court) (jury) may draw such inferences as appear proper from his failure to do so?"

(iii) If counsel replies to the judge that the accused has been so advised, then the case shall proceed. If counsel replies that the accused has not been so advised, then the judge shall direct counsel to advise his client of the matters set out in paragraph 2(a)(ii) hereof and should adjourn briefly for this purpose before proceeding further.

(b) **Where there are more than one accused**

(i) At the conclusion of the evidence for the prosecution, the judge should address

counsel in the following terms:

> "The stage has now been reached at which your clients may give evidence, and if any of them chooses not to do so or, having been sworn, without good cause refuses to answer any question, the (court) (jury) may draw such inferences as appear proper from his failure to do so. When the time comes for each accused to present his

> case, I shall ask counsel for each if his client intends to give evidence, and if not whether he has been advised about the inferences which may be drawn if he chooses not to do so."

(ii) The judge should then proceed to ask counsel for the accused named first on the indictment whether that accused intends to give evidence, and if not whether he has been so advised about the inferences which may be drawn from his failure to do so. The judge should repeat this inquiry at the time when the case for the second and each subsequent accused is ready to commence.

3. IF THE ACCUSED IS NOT LEGALLY REPRESENTED

(a) Where there is one accused

If the accused is not legally represented the judge should at the conclusion of the evidence for the prosecution (and, in the case of proceedings on indictment tried with a jury, in the presence of the jury) say to the accused:

> "You have heard the evidence against you. Now is the time for you to make your defence. You may go into the witness box and give evidence on oath, and be cross-examined like any other witness. If you do not give evidence or, having been sworn, without good cause refuse to answer any question, the (court) (jury) may draw such inferences as appear proper. That means the (court) (jury) may take it into account against you.
>
> You may also call any witness or witnesses whom you have arranged to attend court.
>
> Afterwards you may also, if you wish, address the jury by arguing your case. But you cannot at that stage give evidence.

Do you now intend to give evidence?"

(b) **Where there are more than one accused**

(i) Where none of the accused are legally represented the judge should at the conclusion of the evidence for the prosecution (and, in the case of proceedings on indictment tried with a jury, in the presence of the jury) address all of the accused in the following terms:

> "You have heard the evidence against you. Now is the time for you to make your defences. Each of you in turn and in the order in which you are named on the indictment may go into the witness box and give evidence on oath, and be cross-examined like any other witness. If any of you do not give evidence or, having been sworn, without good cause refuse to answer any question, the (court) (jury) may draw such inferences as appear proper. That means the (court) (jury) may take it into account against you.
>
> Each of you may also call any witness or witnesses whom you have arranged to attend court.
>
> Afterwards you may also, if you wish, address the jury by arguing your case. But you cannot at that stage give evidence."

(ii) The judge should then proceed to ask the accused named first on the indictment whether he intends to give evidence and if not whether he understands that certain inferences may be drawn from his failure to do so. At the conclusion of the case for each accused the judge should ask the same questions of the next accused named on the indictment and should repeat so much of the greater address as he thinks advisable and appropriate.

11 April 1997 Lord Chief Justice

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1.0 SUMMING UP: A SUGGESTED STRUCTURE

A FUNCTIONS OF JUDGE AND JURY

1. The Jury:

To decide on the evidence what the facts are: to decide which evidence they accept and which they reject: they alone are the judges of facts.

2. The Judge:

To tell the jury what the law is - directions which the jury must accept and apply to the facts; and to remind the jury of such evidence as he thinks may help them, but the jury to take into account anything omitted by him which they consider important and to ignore if they think fit to do so any view of the facts which the judge expresses or which the jury thinks he holds.

B BASIC DIRECTIONS ON LAW

(NB If it is necessary or desirable to repeat any direction, do so in identical terms.)

1. Burden and Standard of Proof

a. Burden of Proof

"The burden of proof is upon the prosecution. It is for the prosecution to establish the defendant's guilt."

b. Standard of Proof

"Before you can convict you must be satisfied beyond reasonable doubt of the defendant's guilt."

2. Separate Consideration - to the case of each defendant and separate consideration to each count in the indictment - illustrate from the indictment.

3. The Indictment

Refer to the offences set out in each count. If there are several counts relating to the same type of offence (eg theft) take one count as an example.

a. Define the Office

If in doubt take the definition straight from Archbold/Blackstone.

b. Explain the ingredients of the offence

eg theft:

"Dishonest"
"Appropriation"
"Another persons property"
"With intention to deprive the owner of the property permanently"
etc.

The advantage of 'spelling out' the offence in this way is that you can eliminate all matters which are not in dispute, at the start of your summing up, eg:

"In this case, it is not disputed that there was an appropriation of the property from the shop by the defendant - the only dispute is whether the appropriation was dishonest."

This enables you, when embarking upon the review of the evidence, to deal with those matters not in dispute, in a few sentences, and to concentrate in some detail on the matters which **are** in dispute.

c. Having defined the offences set out in the Indictment, point out:

i. those counts which are 'coupled' in the alternative eg
GBH with intent
ABH
and explain the differing ingredients which must be proved in each count;

ii. those counts which are alternative,
eg Theft and
Dishonest handling.

C OTHER DIRECTIONS

Deal as necessary with

1. Attempts

2. Joint Enterprise

3. Corroboration

4. Identification

5. Other matters of evidence, eg

a. Admissions/Confessions
b. Recent complaints
c. Co-defendant's statements or evidence
d. Previous inconsistent statements
e. Circumstantial evidence

6. Law relevant to the defence, eg

a. Alibi
b. Automatism
c. Drunkenness/Influence of drugs
d. Duress
e. Provocation
f. Self defence. (Unlawful) - for prosecution to prove ..... with ingredients of offence

7. Defendant not giving evidence

a. effect of under Articles 3 and 4 of the Criminal Evidence (NI) Order 1988 (as amended)
b. mixed statements

8. Lies of defendant - effect of

9. Plea of guilty by one defendant - effect on co-defendant

10. Hostile witness

D SUMMARY OF EVIDENCE FOR PROSECUTION AND DEFENCE

Where possible, avoid referring to those parts of the evidence which have nothing to do with matters in issue, and concentrate in some detail on evidence which is relevant to those matters. **Do not forget to review the case for the defence**. Always mention the defendant's good character if he has one (relevant to his credibility): deal with his bad character if necessary, providing (obviously) it has been properly admitted to evidence.

E DIRECTIONS RE VERDICTS ETC

1. Remind the jury that:

separate verdicts must be returned in respect of each defendant named in each count;

2. If you are not yet prepared to accept a majority verdict, tell the jury:

"I must ask you once more to retire and continue to try to reach a unanimous verdict; but if you cannot, I will accept a majority verdict which is a verdict with which at least 10 of you agree." See Specimen Direction 6.1A

3. If bring back - do the talking yourself.

F AIDS TO SUMMING UP

don't be a reader out: summarise interviews

"We would take this opportunity to remind Crown Court judges of the desirability of attempting to deal in their charges to a jury, for the sake of clarity and ease of comprehension, with a series of issues as a structure and then bolting on what I might call the cladding of the evidence in relation to each issue. We would remind Crown Court judges that a simple rehearsal of one witness's evidence after another, however carefully and accurately done, may not make it as clear to the jury as is desirable and that they must look at each issue and consider the evidence in relation to it." Sir Robert Carswell LCJ in R v McMoran [1999] NIJB 50 at 51f. "Directions to juries should not be formulaic mantras, nor should they introduce instructions or qualifications which are unnecessary for their consideration of the particular case before them. Rather they should be adapted to the facts and issues of each case, to give the jury the most effective guidance." Sir Robert Carswell LCJ in R v Stevens (as yet unreported, 5/7/2002)

1. In all but the simplest cases, prepare an outline of your summing up, containing the references which you intend to make to the evidence, before you begin.

2. Keep your notebook (and the depositions when you can use them) tabulated so that reference to particular parts of the evidence may be made without undue delay. It often helps to enumerate the issues, for your own purposes, at an early stage so that they can be identified with the evidence in your notebook.

3. Retire after speeches, even if only for a few minutes, if you feel the need to do so.

4. **Long case: work on summing up every day.**

G ANSWERS TO QUESTION BY JURY - put in writing if necessary

1. Consider it in your room and prepare a draft answer to it if it is in any way difficult or controversial.

2. In the absence of the jury but in open court in the presence of the defendant show counsel the question and inform them how you propose to answer it. Then invite the assistance of counsel with your proposed answer before deciding upon its final form. If it involves a matter of law and you think it would be helpful to the jury, put your answer in writing and, having invited counsels' comments on it, give it to the jury accompanied by an oral explanation, but if already covered in summing up - direct in same terms as far as possible.

NEW 19 OCTOBER 2010

1.1 DIRECTION TO THE JURY AT THE BEGINNING OF THE TRIAL NOT TO DISCUSS THE CASE WITH ANYONE OUTSIDE THE JURY ROOM OR TO GO ON THE INTERNET

"As you have undertaken to do by your oaths and affirmation(s) you must decide this case only on the evidence and the arguments that you hear in court, and not on anything you may have seen, or heard, or read, or may see, hear, or read outside the court.

During the trial you will hear all of the evidence, and the relevant law, that you need in order to reach your verdict. It is wrong for any juror to seek, or to receive, further evidence or information of any sort about the case, whether by speaking to anyone about it, or engaging in private research on the internet or anywhere else. That is because that could result in your considering material that has nothing to do with this case, and which neither the prosecution or the defence know about. That would be unjust because it would be unfair to them.

You must not talk to anyone about the case, save to the other members of the jury and then only when all twelve of you are deliberating in the jury room. You should not discuss the case amongst yourselves as the trial proceeds because you will not hear all of the evidence, and what counsel and myself say to you about it and the relevant law, until you retire to consider your verdict. If you discuss the case amongst yourselves before you retire to consider your verdict(s) there is a danger that you might make up your minds about something without realising that there is more evidence to come about that point.

You must not allow anyone to talk to you about the case unless that person is a juror and he or she is in the jury room deliberating about the case, and that includes discussing the case, or describing what is happening in the case, on the internet on a social network site such as Facebook, Twitter or anything else.

There have been cases where jurors have, quite wrongly, tried to do their own research, or discussed the case with their friends, online, and by doing so they create a real risk that a juror will be influenced by something he or she has been told outside the trial that no one knows about, and so will influence their colleagues, and that could imperil the trial. Therefore jurors are told in all trials not to do any of these things.

As in virtually every trial there will be times when you have to leave the court, either because a matter of law is being discussed, or because the trial is continuing on another day. When you leave the court you should try to set this case on one side until you return to court."

NOTE.

(1) This direction should be given as soon as the jury is empanelled, or on the first occasion when the jury separates during the trial itself, particularly if the case is one

which has been, or may be, the subject of media reports and/or comments.

(2) In R v Oliver [1996] 2 Cr. App. R. at pp 520-521 the Court of Appeal suggested a form of words that is the basis for Specimen Direction 6.2. The Court also said:

"It is not necessary for the judge to use any precise form of words provided that the matters set out above are properly covered in whatever words he chooses to use. We consider it would be desirable for this direction to be given in full on the first dispersal of the jury and a brief reminder to be given at each subsequent dispersal.

Finally, we would add that there may be particular circumstances in a particular case when it is appropriate for a judge to give further or other directions. It is not possible for this Court to anticipate every factual situation that may arise. It will not be in every case where these directions are not given that it will amount to a material irregularity. We enumerate these four points only for guidance to judges in future cases."

(3) The reference to the internet has been included to try to avert the dangers identified by Lord Judge CJ in R v Thompson & ors [2010] EWCA 1623.

ARCHBOLD 2010: 4-425

BLACKSTONE 2010: D18.8

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2.0 FUNCTIONS OF JUDGE AND JURY.

LAW FROM JUDGE

"It is my function to explain to you what the law is that applies to this case. You must accept what I say about the law and act upon it."(1)

FACTS FOR THE JURY

"The position so far as the facts are concerned is quite different. (You and I try a case together and it is my duty to give you the benefit of my knowledge of the law and to advise you in the light of my experience as to the significance of the evidence (2) if I think that it might help you in your deliberations.) You will of course pay careful attention to the comments of counsel for both the prosecution and the defence upon the evidence.

But you are the sole judges of the facts, it is for you to decide what evidence you accept and what you reject, what facts you find to be proved and what conclusions you draw from the parts of the evidence which you accept. In the case of each witness, consider whether he or she has been telling you the truth and whether he or she has been accurate in the account given. (In the case of each witness you may accept or reject all, or some, of what he or she has told you.)

If I seem to express a view of the facts it is your duty to reject that view if it does not appeal to you. (I do not propose to refer to every piece of evidence) and if I omit to mention evidence which you think is important you must take it into account, just as if I stress evidence which you think is unimportant you must disregard the fact that I have stressed it."

NOTE: (1) The judge should only refer the jury to such law as they need to determine the issue(s) of fact before them and only to such of the evidence as goes to those issues.

(2) For this part see Lawton LJ in R v Sparrow 57 Cr.App.R. at p.363.

ARCHBOLD 2010: 4-376

BLACKSTONE 2010: D17.26

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UPDATED 5 FEBRUARY 2009

2.0A FUNCTIONS OF JUDGE AND JURY

"Our functions in this trial have been and will remain quite different. It has been my duty to preside over the trial and to ensure that it has been conducted fairly, according to the law. It is now my duty to direct you as to the law which applies in this case, and to remind you of the prominent features of the evidence.

The directions I give you as to the law you must accept and apply. However, whenever I refer to the evidence the position is quite different: All questions of evidence and fact are for you and you alone to decide.

From the moment the evidence in this trial commenced you will have been assessing the witnesses and the evidence which each of them gave. When I have completed this summing up, it will be for you to decide (eg what actually happened or what was the state of mind of the defendant when he came to play his part in the events about which you have heard). That you must do by having regard to the whole of the evidence in the case (that includes the evidence which has been agreed between the prosecution and the defence and placed before you as agreed/admitted evidence) and forming your own judgment as to the reliability of the witnesses whose evidence is in dispute. (The defendant has chosen to give evidence (and call witnesses). You must judge that evidence by precisely the same fair standards as you apply to any other evidence in the case).

You must decide this case only on the evidence which has been placed before you. There will be no more. You are perfectly entitled to draw inferences, that is come to common sense conclusions, based upon the evidence which you accept as reliable; but you may not speculate about what evidence there might have been or allow yourselves to be drawn into speculation.*

I have told you that the facts of this care are your responsibility. Therefore, although you will wish take into account the arguments of learned counsel, you are not bound to accept them. Equally, in the course of my review of the evidence, it is possible that I may express a view concerning the evidence and the facts of this case, or I may emphasise a particular feature of them. That is something which I may do in an effort to assist you, but it is important that you should understand that if you disagree with that view or with that emphasis, it is your duty to act on your own views. Again, if I do not refer to a feature of the evidence which you think is important, then you should have regard to it, and give it such weight as you think fit, providing, of course, you have regard to and apply the principles of law which I shall explain to you. When it comes to the facts of this case, it is your views that count. My views about the facts (in so far as I express them) are there for you to accept or to discard as you will."

* **Speculation** - Here see also **Circumstantial Evidence** at 4.1.

ARCHBOLD 2010: 4-376
BLACKSTONE 2010: D17.26

REVISED AND UPDATED 5 FEBRUARY 2009

2.1 BURDEN AND STANDARD OF PROOF

ALWAYS GIVE THESE DIRECTIONS AT THE OUTSET OF THE SUMMING UP, EVEN IF YOU INTEND TO INCORPORATE THEM IN SPECIFIC DIRECTIONS LATER IN THE SUMMING UP.

BURDEN

"The prosecution must prove the defendant's guilt. He does not have to prove that he is innocent. (1)"

STANDARD

"The prosecution must prove that the defendant is guilty beyond reasonable doubt.(2)

Proof beyond reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based upon your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand you think that there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty. (3)

You will note that I have referred to the prosecution's obligation to prove its case beyond reasonable doubt. That does not mean that every peripheral fact has to be established up to this standard, in other words every I does not need to be dotted and every T crossed. What has to be proved is the body of material facts which make up the charge against the defendant." (4)

NOTE

(1) If an issue arises as to which the defendant bears the 'legal' or 'persuasive' burden of proof, but not where the defendant bears only an 'evidential' burden, the following is appropriate.

"If the prosecution has not proved beyond reasonable doubt that the defendant has (set out what the prosecution must prove) that is the end of the matter and you must find the defendant not guilty. But if, and only if, you are satisfied beyond reasonable doubt of those matters, you must go on to consider whether the defendant (had a reasonable excuse etc.) for what he did. That is for him to prove on all of the evidence by showing that it is probable, that is more likely than not, that he (had a reasonable excuse etc.) for doing it. If you conclude that probably he did have a (reasonable excuse etc.) you must find him not guilty. If you do not find that, then, providing that the prosecution has proved beyond reasonable doubt what it has to prove, you must find him guilty."

(2) The traditional phrase "beyond reasonable doubt" is used throughout these

specimen directions in preference to "sure", having been used in Article 74(2) of the Police and Criminal Evidence (NI) Order 198

(3) This passage is taken from the model instruction proposed by the US Federal Judicial Centre and approved by Justice Ginsburg in the Supreme Court decision in Victor -v- Nebraska, 611 U.S.1 (1994) at p.27.

(4) Although this may not be necessary in simple cases, it may be helpful in other cases, especially those which involve circumstantial evidence.

(5) If in an exceptional case the jury ask for an explanation of a reasonable doubt, in Walters v R [1969] 2 AC 26, approved in R v Gray 58 Cr. App. R. 177 at 183, the Privy Council upheld the following direction by the trial judge 'A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow you to influence you one way or the other'. However, this explanation should only be provided in exceptional cases and it is unwise to attempt any further explanation.

ARCHBOLD 2010: 4-384 to 385

BLACKSTONE 2010: F3.39

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UPDATED 5 FEBRUARY 2009

2.2 ACCORDING TO THE EVIDENCE

"It is your duty to decide the case according to the evidence you have heard in court, (and not be influenced by anything which you have heard, read or seen elsewhere). You must clear your minds of all sympathy for or against either the prosecution or the accused or the victim of the crime. You must decide the case calmly and fairly in the light of the evidence and nothing else.

(The evidence means the evidence for the prosecution as well as the evidence by (and/or on behalf of) the defendant. (The defendant did not have to give evidence but chose to do so and what he had to say is just as much evidence in the case as the evidence of the other witnesses who gave evidence.) You must consider all of the evidence before arriving at your verdict(s) and there may be something in the prosecution evidence which assists the defence case or in the defence case which assists the prosecution's case.)"

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REVISED AND UPDATED 6 FEBRUARY 2009

2.3 SEPARATE TREATMENT

(1) ONE DEFENDANT AND MORE THAN ONE COUNT

"You must consider the case against and for the defendant separately. (There may of course be something in the evidence relating to one count that may assist you in reaching your verdict on (the other(s)/another count(s)) (Identify such evidence) (1) If you consider that there is such evidence you must be careful not to assume that your decision on that other evidence necessarily means that you must take the same view of the evidence relating to the count you are considering.) (For example, if you do not accept that one count relating to (the complainant) has been proved beyond reasonable doubt, it does not automatically follow that you have to reject (the complainant's) evidence relating to another count.) (2)

(2) TWO OR MORE DEFENDANTS AND TWO OR MORE COUNTS

"You must consider the case against and for each defendant separately. There may of course be something in the evidence relating to one count or to one defendant that may assist you in reaching your verdict on the counts against the other defendant(s). (1) (Identify such evidence, for example if one defendant has given evidence which implicates or exonerates another defendant.) For example, if you do not accept that one or more counts have been proved beyond reasonable doubt against one defendant, it does not automatically follow that you have to reach the same verdict on that count, or indeed on any count, in respect of another defendant. The evidence is different and therefore your verdicts need not be the same." (2)

NOTE.

(1) See Specimen Direction 2.2.

(2) See the observations of Kerr LCJ in R v CK [2008] NICA 31 at [5] to [10] on the need to take great care in framing such a direction if it is considered necessary.

(3) Illustrate from the indictment, and deal with both in the direction on the law and in the summing up of the evidence.

(4) In some circumstances it may be desirable to consider the evidence against one defendant on all the counts first, in which case the direction should be adjusted accordingly, always stressing that the evidence on each count must be considered separately.

(5) There may be cases where, on the facts, if the jury finds a defendant guilty, or not guilty, on one count, it would be difficult for them to come to a different conclusion on another count. If so, say that to them.

(6) See Specimen Direction 2.11 for direction where a co-defendant has pleaded guilty.

ARCHBOLD 2010: 4-377

BLACKSTONE 2010: D17.28

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NEW 13 OCTOBER 2008

2.3A SPECIMEN CHARGES.

A. Where the specimen is a separately identifiable offence (see Note 1)

Count... is a specimen Count. The prosecution allege that D also committed [numerous/state number] other offences of the same kind. Instead of loading up the Indictment with Counts charging many offences, they have selected one as an example, as they are entitled to do. However, you may convict D only if you are satisfied beyond reasonable doubt that he committed the particular offence charged in the Count..., whether or not you are satisfied beyond reasonable doubt that he also committed other such offences.

B. When the specimen is not a separately identifiable offence (see Note 2)

Count... is a specimen Count. The prosecution allege that, during the period referred to in that Count, D committed [numerous/state number] other offences of the same kind. Instead of loading up the Indictment with Counts charging many offences, they have selected one as an example, as they are entitled to do. To convict D you must be satisfied beyond reasonable doubt that he committed one such offence during the period concerned, whether or not you are satisfied beyond reasonable doubt that he also committed other such offences.

NOTE.

1. An example would be a Count of obtaining social security benefits by deception a specific sum of money on a specific day, evidence being adduced of a pattern of other such offences.

2. An example would be a Count of indecent assault on a child who claims to have been abused in the same way on many occasions, but cannot say precisely when or how often.

3. These directions will, of course, need adapting when there is more than one specimen Count.

ARCHBOLD 2010: 1-131 to 132.

BLACKSTONE 2010: D 11.33 to 35.

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REVISED AND UPDATED 19 FEBRUARY 2009

2.4 ALTERNATIVE OFFENCES

"Counts 1 and 2 are alternative counts. You cannot find the defendant guilty on both. First, consider count 1, which is the more serious one (set out ingredients briefly). If you find the defendant guilty on that count, do not consider count 2 at all, but if you are not satisfied beyond reasonable doubt that the defendant is guilty on count 1, then consider count 2 (which involves etc)." (1)

NOTE.

(1) Where an indictment contains alternative counts, a verdict should be taken first on the more serious alternative, and if the verdict is guilty the jury should be discharged from returning a verdict on the less serious charge. R v Hill 96 Cr. App. R. 456 at 459. This allows the Court of Appeal to substitute a verdict of the lesser alternative, or an alternative of equal gravity if there is one. See also R v Fulton [2009] NICA 39 at [117] et seq.

ARCHBOLD 2010: 4-443.

BLACKSTONE 2010: D18.69 and 18.70.

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UPDATED 19 FEBRUARY 2009

2.5 CHILD DEFENDANT, CRIMINAL RESPONSIBILITY.

By Article 3 of the Criminal Justice (Northern Ireland) Order 1998 the rebuttable presumption that a child between the ages of 10 and 14 is incapable of committing an offence (unless he knew that what he was doing was seriously wrong) is abolished. The Article came into force on 1 December 1998. This direction should therefore only be given in relation to offences committed before that date. In relation to offences committed after the Article came into force no direction should be given.

"You are trying a child of (age). A child of that age cannot be guilty of a criminal offence unless at the time of the alleged offence he knew that what he was doing was seriously wrong as distinct from an act of mere naughtiness or childish mischief.

Therefore, if you are satisfied beyond reasonable doubt that the defendant committed the acts alleged, you must go on to ask yourselves whether you are satisfied beyond that he knew that what he was doing was seriously wrong as distinct from an act of mere naughtiness or childish mischief. Only if you are satisfied beyond reasonable doubt both that he did those things and knew that what he was doing was seriously wrong can you find him guilty."

NOTE.

(1) In C (a minor) v DPP [1995] 2 Cr. App. R 166 the House of Lords reaffirmed that a child under the age of 10 was incapable of committing a crime. Over the age of 14 he was fully responsible for his actions. A child between those ages was presumed not to be capable of criminal behaviour and not to know the difference between right and wrong unless that proposition was rebutted by the prosecution. The words underlined have been included to reflect the observations of Lord Lowry in C v DPP at pp.181C and 187B.

(2) Where a specific intent or state of mind is an element of the offence, an appropriate direction must be given in addition to the above.

ARCHBOLD 2010: 1-91

BLACKSTONE 2010: A3.39

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REVISED 19 FEBRUARY 2009

2.6 FITNESS TO PLEAD

By Art. 49(4)A of the Mental Health (NI) Order 1986 (the 1986 Order) (as amended by s. 23(4) of the Domestic Violence, Crime and Victims Act, 2004, the issue of fitness to plead is now to be determined by the judge and not by the jury. The previous specimen direction has therefore been removed.

For the procedure to be adopted when the issue of unfitness arises see Art. 49 of the 1986 Order.

ARCHBOLD 2010: 4-169 to 174.

BLACKSTONE 2010: D12.6 to 9.

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REVISED 3 DECEMBER 2008

2.7 JOINT ENTERPRISE

(A) "The prosecution's case is that (the defendants committed this offence together) (the defendant committed this offence jointly with ...). Where an offence is committed by two or more persons, each of them may play a different part, but if they are acting together as part of a joint plan to commit the offence, they are each guilty of it. The word 'plan' does not mean that that there has to be a formal agreement about what has to be done. A joint plan to commit an offence may arise on the spur of the moment. It can be made with a nod or a wink, or a knowing look (and even without such actions you may infer from the behaviour of those involved that they agreed to commit the offence(s)). Put simply, the question for you is "Were they in it together"? [Mere presence at the scene of a crime is not enough to prove guilt, but if you find that the defendant was at the scene, and intended by his presence alone to encourage the others in the offence(s), and did encourage them by his presence, then he is equally guilty.(1)]

Your approach to the case should therefore be as follows: If, looking at the case of [the/either/any] defendant, you are satisfied beyond reasonable doubt that he committed the offence on his own or that he did an act or acts as part of a joint plan with others/ with B and C he is guilty."

(B) In the ordinary case, the above direction should suffice. However, where there is evidence and argument of unusual consequences etc and of non-participation of one defendant, B, because it is said that the act of another, A, was outside his foresight, it will be necessary to give further directions, for example if the issue arises whether participants in a concerted attack are liable for the use of a weapon which may have been different in character to any weapon foreseen by the others. This issue has to be considered in the light of the decision of R v Rahman [2008] 4 AER 351 where the House of Lords considered the leading authorities and, doubting the correctness of R v Gamble [1989] NI 268, at [68] restated the law as stated by Lord Lane CJ in R v Hyde [1991] 1 QB 134, [1990] 3 AER 892 as follows:

"If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."

The application of these propositions will require to be carefully tailored to the circumstances of each case, and it will almost always be desirable to discuss the proposed direction with counsel before the closing speeches. The suggested direction given below is, therefore, merely offered as a starting point, and is partly based on the trial judge's direction in Rahman modified to reflect the restatement above. It assumes there is not an alternative count to be considered by the jury.

"In the circumstances of this case you have to consider a number of questions in order to decide whether B is guilty of the murder of V.

(1) The first question is whether you are satisfied beyond reasonable doubt that A caused the death of V by (e.g. stabbing him with a knife/shooting him/striking him repeatedly with an iron bar) and intended to kill V or cause him really serious injury? If you answer this question "No" then you should find B not guilty because, as a matter of law, B cannot be guilty of murder unless A committed the offence of murder. If you answer this question "Yes" then you must go to the second question.

(2) Are you satisfied beyond reasonable doubt that B participated in the attack upon V? (Mere presence at, or very near, the scene of the attack is not enough to prove participation. But if you find that B was at the scene, and intended and did by his presence alone encourage A to attack V, that would be participation in the attack(1)) If you answer this question "No" you should find B not guilty. If you answer this question "Yes" then you must go to the third question.

(3) Are you satisfied beyond reasonable doubt that in taking part in the attack on V B realised that A might use such violence by the use of lethal weapons against V as to kill him or cause him really serious injury, even if B did not agree to such violence being used? If you answer this question "No" then you should find B not guilty. If you answer this question "Yes" then you must go to the fourth question.

(4) Was A's action in (stabbing V with a knife/shooting V/striking V repeatedly with an iron bar) fundamentally different from anything foreseen by B? A's action will not be fundamentally different from anything foreseen by B unless B knew nothing about (the knife/the gun/the iron bar) which A produced and used, and (the knife/gun/iron bar) was more lethal than any weapon that B contemplated that A may be carrying. If you are satisfied beyond reasonable doubt that A's action was not fundamentally different from anything foreseen by B then you should find B guilty. If you consider that A's action was, or might be, fundamentally different from anything foreseen by B then you should find B not guilty.

(C) If the defendant admits that he agreed to a joint plan, but claims he withdrew, the jury will have to be directed accordingly, and the direction carefully tailored to the circumstances of the case, particularly if the prosecution allege that the defendant could and should have done something to neutralise his earlier agreement or assistance. In such a case consideration should be given to the authorities discussed in **ARCHBOLD 18-26 et seq.**

" B has admitted that he agreed with A that they would commit this offence of (e.g. burglary), but he says that he had a change of heart and made quite clear to A that he intended to withdraw from their plan before A had time to commit the offence. Before you can convict B of this offence you have therefore to be satisfied beyond reasonable doubt that he did **not** withdraw from their joint plan, in other words you have to be satisfied that they were still in it together. It is for you to decide whether B had withdrawn from the joint plan in all of the circumstances of the case, but when considering this there are a number of matters which you may think are important. For

example, did B tell A that he was withdrawing? Did B make it absolutely clear to A that he was withdrawing, or was B ambiguous about whether he was still taking part in what they had planned to do? The prosecution allege/B admits he (e.g. gave A a key to the house), what did B do to stop A carrying out their plan? Was that all B could have done to prevent the plan from being carried out?"

NOTE.

(1) This should not be included unless relevant.

ARCHBOLD 2010: 18-15 et seq; 19-24 et seq.
BLACKSTONE 2010: A 5.5 to 15.

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REVISED AND UPDATED 20 FEBRUARY 2009

2.8 AIDING AND ABETTING

"Before you can convict A of aiding and abetting B to commit the offence of ... you must be satisfied beyond reasonable doubt:

(1) That B committed the offence;

(2) That A knew at the time what B was doing (though not necessarily that it was an offence);

(3) (That A was present at the commission of the offence and helped B to commit it)
or
(That A, with the intention of helping B to commit the offence, was near enough to help should the need arise, (eg by keeping watch etc) and that B knew that A was available to help him;)
or
(That A was present at or very near the commission of the offence and both intended to encourage B to commit it and deliberately did encourage him to commit it.

To prove aiding and abetting by encouragement the prosecution must prove that A intended to encourage and deliberately did encourage B to commit the offence. The mere voluntary presence of A at the scene of the offence is not in itself enough. But the fact that he was there, voluntarily and deliberately, watching the commission of the offence and doing nothing to prevent it, even though he could have done so, or to indicate his disapproval of what B was doing, may be strong evidence upon which you could conclude that he intended to and did encourage and so aided and abetted B in the commission of the offence.)"

(4) (Where the act of assistance was done in advance of the crime and the crime was committed in the defendant's absence then the following may be appropriate.

"Before you can convict A of aiding and abetting B to commit the offence of ... you must be satisfied beyond reasonable doubt:

(1) that B committed the offence; and
(2) that the assistance given by A did assist B to commit that crime; and
(3) at the time A gave assistance to B he foresaw as a real possibility that B would commit that offence; and
(4) that A deliberately gave assistance to B realising that it was capable of assisting B to commit that crime.

NOTE.

(1) Illustrate with one or more examples relevant to the type of offence charged.
(2) Though the principles governing liability as an aider and abettor are the same whatever the offence, it is usually necessary to consider their application in the context

of the primary offence.

(3) This direction will be appropriate to those cases where a defendant is expressly charged with aiding and abetting, rather than where he is jointly indicted as a principal by virtue of the doctrine of joint enterprise. In the latter case a direction based upon **2.7 Joint enterprise** will be appropriate.

ARCHBOLD 2010: 17-68 to 73 and 18-9 to 18-19

BLACKSTONE 2010: A 5.1 to 15

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REVISED AND UPDATED 20 FEBRUARY 2009

2.9 COUNSELLING AND/OR PROCURING

"Before you can convict A of counselling and/or procuring B to commit the offence of ... you must be satisfied beyond reasonable doubt:

(1) That B committed the offence;

(2) That A ordered, advised, encouraged or persuaded him to do it

or

(3) That A procured him to do it, that is, set out to cause B to do it (directly or indirectly) and did cause B to do it.

(In the case of counselling, as distinct from procuring, it is not necessary for the prosecution to prove that the counselling was a substantial cause of the commission of the offence. E.g. the counsellor may not know which house is to be burgled or person is to be murdered)

(The counselling and/or procurement must be continuing. If A changed his mind before B's commission of the offence and expressly instructed B not to do it, A is not guilty.)"

NOTE.

(1) For commission of a crime different from the one counselled or procured see **ARCHBOLD 18-24.**

(2) As with aiders and abettors, though the principles governing liability as a counsellor and/or procurer are the same whatever the offence, it is usually necessary to consider their application in the context of the primary offence.

(3) This direction will be appropriate to those cases where a defendant is expressly charged with counselling or procuring, rather than where he is jointly indicted as a principal by virtue of the doctrine of joint enterprise. In the latter case a direction based upon **2.7 Joint enterprise** will be appropriate.

ARCHBOLD 2010: 17-67 to 73 and 18-20 to 25

BLACKSTONE 2010: A 5.1 to 15.

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REVISED AND UPDATED 17 MARCH 2009

2.10 ASSISTING OFFENDERS

"Before you can convict A of ... you must be satisfied beyond reasonable doubt:

(1) That B has committed a relevant offence, which the offence of ... is;

(2) That A knew or believed him to be guilty of that offence (or of some other relevant offence)

and

(3) That A, in that knowledge or belief, acted with intent to impede (that is hinder) B's arrest or prosecution."

(4) That the act impeding (or hindering) B's arrest or prosecution was done without lawful authority or reasonable excuse.

NOTE.

(1) The concept of "an arrestable offence" has been replaced by that of "a relevant offence" from 1 March 2007.

(2) R v Brindley 55 Cr. App. R. 258 states that each of these four elements has to be proved, thereby inferring that in (4) the burden is on the prosecution to disprove that A has lawful authority or reasonable excuse. Blackstone suggests that the prosecution need not do so unless there is evidence before the court sufficient to raise the issue.

ARCHBOLD 2010: 18-37

BLACKSTONE 2010: B14.48 to 58.

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NEW 13 OCTOBER 2008

(Based on English 10)

2. 10A. ATTEMPTS

Before you can convict the defendant you must be satisfied beyond reasonable doubt of two things: first that he intended to commit [the offence in question] and second, that, with that intention, he did something which was more than mere preparation for committing that offence. In other words, did he actually try to commit the offence in question, in which case he is guilty of attempting to commit [the offence in question], or had he only got ready, or put himself in a position, or equipped himself, to do so, in which case he is not guilty. The prosecution say that (specify the evidence) amounted to more than mere preparation for the offence. If you accept that the defendant did this, it is for you to decide whether what he did went beyond mere preparation.

NOTE.

1. It is inappropriate to refer to any of the tests for an attempt that were in use before the Criminal Attempts Act 1981. See Jones (KH) 91 Cr. App. R. 351, CA and Campbell 93 Cr. App. R. 350.

2. It is for the judge to determine whether there is evidence from which a reasonable jury properly directed could conclude that the defendant had done acts which were more than merely preparatory to the commission of the full offence: see e.g. Geddes [1996] Crim LR 894 and Tosti and Another [1997] Crim LR 746. It is for the jury to decide, having regard to the burden and standard of proof, where the line has to be drawn, but you can help them in an appropriate case by indicating by way of example one circumstance well on each side of the line.

ATTEMPTING THE IMPOSSIBLE.

(Where the issue arises first give the direction above and continue:) Here, the commission of the offence of [handling] was impossible because [the goods which the defendant is alleged to have attempted to handle were not in fact stolen goods]. But that does not prevent him from being guilty of attempting [to handle them]. You may convict the defendant of attempting [to handle the goods] if you are satisfied beyond reasonable doubt (1) [that he believed them to be stolen goods] and (2) that, with that belief, he [dishonestly handled or attempted to handle them.]

NOTE.

(1) See Shivpuri 83 Cr. App. R.178
(2) See Note (2) above.

ARCHBOLD 2010: 33-119 to 137.
BLACKSTONE 2010: A 6.55-64.

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UPDATED 3 MARCH 2009

2.11 PLEA OF GUILTY/CONVICTION OF ONE DEFENDANT - EFFECT ON DEFENDANT ON TRIAL

1. JOINT CHARGE WHERE ONE OR MORE DEFENDANTS HAVE PLEADED GUILTY BUT NO REFERENCE TO THIS HAS BEEN MADE TO JURY.

"The defendant whom you are trying is alleged to have committed the offence together with B. That is why you see B's name in the indictment. You are not trying B. Do not concern yourselves in any way with that has happened in his case. Do not speculate about that. You must concentrate upon the case of this defendant alone and decide whether the evidence before you makes you satisfied beyond reasonable doubt of his guilt."

2. JOINT CHARGE WHERE JURY IS INFORMED OF PLEA OF OTHER DEFENDANT FOR PURPOSES OF 'INFORMATION ONLY'.

"You have heard that B, who is named in the same count of the indictment as the defendant, has pleaded guilty. The only reason why you have been told this is to remove any question in your minds as to why you are not also trying him. The fact that he has pleaded guilty is now known to you, but it can have no bearing on your decision in the case of this defendant. The prosecution has to prove its case against this defendant so that you are satisfied beyond reasonable doubt of his guilt, just as it would have to if B had not pleaded guilty."

3. JOINT CHARGE WHERE ONE OF THE DEFENDANTS HAD PLEADED GUILTY (OR HAS BEEN CONVICTED) AND IT IS EITHER ADMITTED BY THE DEFENCE THAT HE COMMITTED THE OFFENCE OR THE FACT OF HIS CONVICTION IS ADMITTED IN EVIDENCE BY THE JUDGE PURSUANT TO ARTICLES 72 AND 73 OF THE POLICE AND CRIMINAL EVIDENCE (NI) ORDER 1989

"You have heard that B, who is named in the same count of the indictment, has pleaded guilty to/been convicted of this offence. The only reason why you have been given this information is to enable the prosecution to prove that (eg the offence itself was committed/and that B committed it.) (Here it is essential to identify the precise relevance of the conviction). That is the only purpose of this evidence, and it is for you to decide whether it assists you in this case. It cannot prove anything else, and apart from its relevance to this matter it can have no bearing on your decision as to whether the prosecution has satisfied you beyond reasonable doubt of the defendant's guilt."

ARCHBOLD 2010: 9-80 et seq.

BLACKSTONE 2010: F11.5 et seq.

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REVISED AND UPDATED 10 MARCH 2009

2.12 CONSPIRACY

"Just as it is a criminal offence to (here, specify substantive offence e.g. steal, rob, commit murder), so it is a criminal offence for two or more persons to **agree** with one another to commit that offence. An **agreement to commit an offence** is called a **conspiracy**; and that is the offence which is charged here.

Before you can convict either/any of these defendants of this conspiracy, you must be satisfied beyond reasonable doubt:

(1) That there was in fact an agreement between two or more persons to commit (the crime in question); and

(2) That the defendant whose case you are considering was a party to that agreement in the sense that he agreed with one or more of the other persons named in the count that the crime should be committed, and at the time that he agreed to this, he intended to play some part in the commission of the crime whether by planning it or actually carrying it out.

You may think that it is only in a rare case that a jury would receive direct evidence of a criminal conspiracy (e.g. eye witness/documentary evidence). When people make agreements to commit crimes you would expect them to do so in private. You would not expect them to agree to commit crime in front of others or to put their agreement into writing. But people may act together to bring about a particular result in such a way as to leave no doubt that they are carrying out an earlier agreement.

Accordingly, in deciding whether there was a criminal conspiracy at all, and if so whether the defendant whose case you are considering was a party to it, you are entitled to look at all the evidence as to what occurred during the relevant period (this is usually, but not necessarily, the period of time covered by the count), including the behaviour of each of the defendants/alleged conspirators. (1) If having done so you are satisfied beyond reasonable doubt not merely that there was a conspiracy but also that he was a party to it you must convict. If you are not satisfied beyond reasonable doubt you should find the defendant not guilty.

When criminal conspiracies are formed it may well happen that one or more of the conspirators is more deeply involved in and has a greater knowledge of the overall plan than the others. Also, a person may agree to join in the conspiracy after it has been formed or he may drop out of it before the crime has been fully carried out. Providing you are satisfied beyond reasonable doubt in the case of any defendant that he did at some stage agree that the crime (in question) should be committed and intended to take some part in it, whether by planning it or carrying it out, it does not matter precisely where his involvement appears on the scale of seriousness or precisely when he became involved, he is guilty as charged."

NOTE.

(1) In a case where the conduct of A may implicate B, the judge must be careful to identify what evidence is admissible against B, and direct the jury accordingly. A direction along the following lines may be appropriate, depending upon the circumstances of the case.

"In this case the prosecution seeks to rely upon things said and done by A, not only against A but also as part of the case against B. These are (identify precisely the relevant evidence) B was not present when these things were said or done, and was therefore unable to confirm or deny the truth of what A said. [Equally, B could not approve or disapprove of what A did]. For that reason you should treat this evidence with caution when you come to consider its effect upon the case against B. Before you hold this evidence, or any part of it, against B you should consider all of the evidence on which the prosecution relies (and the evidence for the defendant(s), and then ask yourselves whether you are satisfied beyond reasonable doubt

(1) That the evidence is true? And

(2) That it is evidence of things said or done by A in the course of, and for the purpose of, carrying out the conspiracy, and for no other reason (or motive)?

(3) (Only where appropriate) That when A said or did these things he was not deliberately and falsely involving B in a conspiracy to which B was not a party.

If the evidence passes these tests then you may take it into account when you consider the case of B, and it is for you to decide what weight you should give to it. If it fails either/any test, then you must ignore it in B's case."

(2) Art. 9(2) of the Criminal Attempts and Conspiracy (NI) Order 1983 provides that "Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of paragraph (1) unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place."

If Art.9(2) is relied upon the defendant "must intend or know" that the relevant fact "shall or will exist", lesser states of mind such as recklessness or suspicion will not suffice. See Lord Nicholls in R v Saik [2006] 2 Cr. App. R. 26; [2006] 4 All ER 866, at [32] and [33]. In such cases the direction above must be amended and the jury directed accordingly.

ARCHBOLD 2010: 33-4 et seq

BLACKSTONE 2010: A6.41 et seq.

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UPDATED 11 MARCH 2009

2.13 INTENTION

"You must be satisfied beyond reasonable doubt that, when the defendant did the act, he intended (X)"

NOTE:

(1) It is generally unwise to elaborate on a simple direction on intent.

(2) However, if you do consider it necessary, it could be along the following lines:

"You can decide intent by deciding what the defendant did or did not do and by what he said or did not say. You should look at his actions before, at the time of and after (the alleged offence). All these things may shed light on his intention at the critical time."

(3) Where the charge is murder, and the defendant's foresight of death or serious bodily harm is in issue, the following may be appropriate. See R v Woolin [1999] 1 Cr. App. R. 8.

"You are not entitled to find that the defendant had the necessary intent to commit murder unless you are satisfied beyond reasonable doubt that death or serious bodily harm was a virtual certainty (barring some un-foreseen intervention) as result of the defendant's actions, and that the defendant appreciated that such was the case.

(4) The following example might prove helpful in certain circumstances

"If I throw a large stone at point blank range at a plate glass window, it is only too easy and you may think that it will almost invariably be correct to infer that I intend to break the window. The lawyer's way of expressing this rather obvious proposition is to say that a man is presumed to intend the natural and probable consequences of his acts. But while the quest for truth will take account of this presumption it does not end there. You are looking for the actual intention and the actual state of knowledge and in order to discover them it is right to consider all the available evidence."

(5) If the evidence is that the defendant's wish may have been something other than to cause the result in question, see Nedrick 83 Cr.App.R. 267 and Walker and Halyes 90 Cr.App.R. 226.

(6) It may be necessary to tell the jury that the prosecution only has to prove that the defendant had the necessary intention at the time of the alleged offence, that it need not have been a long-standing intent and that it is sufficient for it to have been formed in a matter of seconds, say in a sudden flash of temper.

ARCHBOLD 2010: 17-34 et seq.

BLACKSTONE 2010: A 2.2

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UPDATED 11 MARCH 2009

2.13A INTENT/INTENTION - THE RELEVANCE OF DRINK/DRUGS

1. WHEN VOLUNTARILY (KNOWINGLY) CONSUMED

If, in order to establish the defendant's guilt, the prosecution has to prove he had a particular intention (for example to cause grievous bodily harm) at the time of the relevant conduct, and there is evidence that the defendant had been consuming alcohol at or about the material time, that is a factor to which the jury must have regard when considering whether the prosecution has proved the necessary intent. The classic statement of the principle is to be found in Lord Lane's judgment in R v Sheehan and Moore 60 Cr.App.R. 308 at 312. The relevant passage from the judgment serves as an excellent basis for a direction upon this topic:

"... in cases where drunkenness and its possible effect on the defendant's mens rea is in issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent. Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel satisfied beyond reasonable doubt that at the material time the defendant had the requisite intent."

2. WHEN INVOLUNTARILY (UNWITTINGLY) CONSUMED

See R v Kingston 97 Cr.App.R.401, HL

1. Involuntary intoxication (or a drugged state resulting from the involuntary ingestion of drugs), is not a defence to a criminal charge if the prosecution proves that the defendant had the necessary intent albeit that intention arose as a result of circumstances for which the defendant was not responsible.

2. The decision in Kingston (a case of indecent assault requiring a direction upon intention) proceeded on that basis that "the ingestion of the drug ... brought about a temporary change in the mentality or personality of the respondent which lowered his ability to resist temptation so far that his desires overrode his ability to control them. Thus we are concerned here with a case of disinhibition. The drug is not alleged to have created the desire to which the respondent gave way but rather to have enabled it to be released."

ARCHBOLD 2010: 17-106

BLACKSTONE 2010: A 3.8 to 12

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REVISED 20 APRIL 2009

3.1 RECKLESSNESS - CRIMINAL DAMAGE

This direction has been re-drafted in the light of the decision of the House of Lords in R v G [2004] 1 Cr. App. R. 21. Direction 1 relates to the basic offence of criminal damage. Direction 2 concerns the question of recklessness as to whether the life of another would be endangered.

1. Criminal Damage (NI) Order 1977, Article 3(1):

The prosecution will have proved that the defendant was reckless if, having regard to all the available evidence, you are satisfied beyond reasonable doubt:

(i) that he was aware of a risk that property would be [destroyed][damaged]; and
(ii) that in the circumstances which were known to him it was unreasonable for him to take that risk.

2. Criminal Damage (NI) Order 1977, Article 3 (2):

The prosecution will have proved that the defendant was reckless as to whether the life of [insert name] would be endangered if, having regard to all the evidence, you are satisfied beyond reasonable doubt:

(i) that he was aware of a risk that the [destruction][damage] would endanger the life of [insert name]; and
(ii) that in the circumstances that were known to him it was unreasonable to take that risk.

3. If it is alleged that the defendant knowingly disregarded, or deliberately closed his mind to, an appreciated and unacceptable risk of causing an injurious result, (1) then it may be appropriate to add:

(iii) if the defendant knowingly disregarded, or closed his mind to, that risk, then you may decide that he was aware of that risk. If, on the other hand, you decided that he was not, or may not have been, aware of that risk because he was stupid, or lacking in imagination, then you should find him not guilty. (1).

4. If the defendant's awareness of risk may have been affected by the voluntary consumption of drink or drugs, then it may be appropriate to add:

(iv) The defendant says that he was unaware of the risk because of the drink (or drugs) that he had consumed. If you are satisfied beyond reasonable doubt that he would have been aware of the risk if he had not consumed drink (or drugs), then it is not a defence for him to say he was not aware of the risk. (1)

NOTE.

(1) See Lord Bingham in R v G at [32].

ARCHBOLD 2010: 23-9 and 10
BLACKSTONE 2010: B8.

3.1A CRIMINAL DAMAGE (NI) ORDER 1977, Article 3(2)

(Allegation upon which the following direction is based: '... intending or being reckless as to the destruction/damage of the property **and being reckless as to whether the life of ... would thereby be endangered'.)**

(a) As to the direction for recklessness in relation to the destruction/damage of the property see the direction under Criminal Damage (NI) Order 1977, Article 3(1) above. As to 'intention' see the Direction on 'INTENTION' ante;

(b) As to the direction relating to the **endangering life** element of the offence, this may be as follows:

"The prosecution will have proved that the defendant was reckless as to whether the life (of another) would be endangered if having regard to all the circumstances you are satisfied beyond reasonable doubt:

(1) That the destruction of/damage to the property thereby created a serious risk that the life of (another) would be endangered;

(See *R v Steer* 85 Cr.App.R.352, HL; *R v Dudley* [1989] Crim.LR.57, CA)

and

(2) That the risk so created would have been an obvious risk to any reasonably prudent person;

(See *R v Sangha* 87 Cr.App.R.88)

and

(3) That the defendant when doing what he did:

either had not given any thought to the possibility of there being any such risk;

or having recognised that there was some risk of that nature nonetheless went on and did the act."

3.1A
*** Alcohol/Drugs**

NOTE: (1) Self-induced intoxication is no answer to an allegation of criminal damage whether simple, aggravated or by fire if the mental element relied upon is recklessness: See *R v Caldwell* 73 Cr.App.R.13 at 26. In other words, if due to self-induced intoxication the defendant was or may have been unaware of a risk which would have been obvious to a sober and reasonable person in the defendant's position that constitutes no defence. The position is the same if the defendant voluntarily consumed

dangerous drugs: See *R v Majewski* 62 Cr.App.R.262 HL. Aliter where the drug does not fall into that class: See *R v Hardie* 80 Cr.App.R.15. (In relation to involuntary intoxication, see *R v Kingston* 97 Cr.App.R.401, HL.

(2) As to the position when the mental element relied upon is 'intention', see the Direction on 'INTENTION' ante.

ARCHBOLD: 17-105 et seq; 23-19/21

BLACKSTONE: A 1.6; A 3.8/11

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UPDATED 25 MARCH 2010

3.2 CAUSING DEATH BY DANGEROUS DRIVING/DANGEROUS DRIVING

"The prosecution has to prove a number of matters.

The first is that the defendant was driving the car.

The second is that the defendant's driving caused the death of X. Any contribution to X's death by the way the car was driven, other than a very trivial contribution, is sufficient because the defendant's driving does not have to have been a substantial or major cause of X's death.

The third is that the way the defendant drove fell far below and not just below what would be expected of a competent and careful driver. It is for you to decide what was the standard to be expected of a competent and careful driver in all of the circumstances.

(If you consider that the defendant's driving did fall below the standard to be expected of a competent and careful driver, but did not fall far below that standard, that is not necessarily the end of the matter. If you consider that he drove either without due care and attention or without reasonable consideration for other people using the road, then you may find the defendant not guilty of dangerous driving but guilty of careless driving or inconsiderate driving.(1))

The fourth is that it would be obvious to a competent and careful driver that it would be dangerous to drive in the way the defendant did. "Dangerous" means that there was danger either of any injury to any person whether on or off the road or in the defendant's car, or of serious damage to property. In deciding what would have been expected of or obvious to a competent or careful driver in the circumstances that existed at that time, you must have regard to those circumstances of which a competent and careful driver could be expected to be aware (e.g.) and to those circumstances which it has been proved were in the knowledge of the defendant (e.g.)"

("The prosecution case is that the state of the vehicle was such that because of (whatever the defect etc.) it would be obvious to a competent and careful driver that driving the vehicle in that state would be dangerous. The defendant has said that he was not/could not have been aware of (the defect(s) etc) because it was not something that could be (seen or realised at first glance/evident to him). Unless you are satisfied beyond reasonable doubt that the (defect etc.) was something which would have been obvious to a competent and careful driver in those circumstances you should find the defendant not guilty."(2))

("Finally, if, having considered all of the evidence, you are satisfied beyond reasonable doubt that the defendant drove dangerously on this occasion then you should find him guilty as charged because it does not matter whether he deliberately drove dangerously, was careless, momentarily inattentive or even doing his incompetent best."(3))

NOTE: (1) Unless the defendant has pleaded guilty to an alternative count of careless driving, if you are minded to leave careless driving to the

jury as an alternative even though the defence may not have suggested this, discuss this with counsel in the absence of the jury before the closing speeches. R v Hazell [1985] RTR 369.

(2) Where Article 11(2) of the Road Traffic (NI) Order 1995 is relevant, see R v Strong [1995] Crim.L.R. 428.

(3) R v Evans 47 Cr.App.R.63. This may not always be relevant.

ARCHBOLD 2010: 32-11 to 18

BLACKSTONE 2010: C3.9 to 14.

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UPDATED 25 MARCH 2010

3.2A CAUSING DEATH BY CARELESS DRIVING, and CAUSING DEATH WHEN UNDER THE INFLUENCE OF ALCOHOL etc (1)

"The prosecution has to prove a number of matters.

The first is that the defendant was driving the car.

The second is that the defendant's driving caused the death of X. Any contribution to X's death by the way the car was driven, other than a very trivial contribution, is sufficient because the defendant's driving does not have to have been the principal or a substantial cause of X's death.

The third is that the defendant drove carelessly, that is without due care and attention because his/her driving fell below what would be expected of a competent and careful driver. When deciding that you should have regard not only to those circumstances of which he/she could be expected to be aware, but also to any circumstances proved to have been within his/her knowledge.

CAUSING DEATH WHEN UNDER THE INFLUENCE OF ALCOHOL etc

The fourth is that at the time (the amount of alcohol consumed by the defendant exceeded the prescribed limit) (the defendant was unfit to drive through drink or drugs). I must point out that in order to commit this offence it is not necessary that the alcohol played any part in the death of X. It is enough if the defendant (was over the prescribed limit) (was unfit to drive though drink or drugs) and committed the remaining elements of the offence. (2)

NOTE.

(1) The definition of careless driving only applies to offences after 16/7/2008, see Art 12A of the Road Traffic (NI) Order 1995 as inserted by Article 62 of the Criminal Justice (NI) Order 2008. There are other ways in which the offence can be committed and this direction can be adapted accordingly.

(2) *Shepherd* [1994] 2 AER 242 at p. 244g/h.

ARCHBOLD 2010: 32-55 to 63.

BLACKSTONE 2010: C6.3 and 4.

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UPDATED 20 APRIL 2009

3.3 ASSAULT (WHERE IT INCLUDES A BATTERY)

"An assault is an act by which a person intentionally or recklessly applies unlawful force to another. Provided that these elements are proved the offence will be completed however slight the force. The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. The mental element is also satisfied if the defendant was reckless as to whether unlawful force is applied to the person attacked."

ASSAULT OCCASIONING ACTUAL BODILY HARM

"Actual bodily harm" means exactly that, some actual or bodily injury (recognisable psychiatric illness (1)), it need not be an injury of a serious nature nor of a permanent nature."

Where recklessness is an issue, or where it is alleged that there is a non-physical assault, such as stalking, see 3.3A

NOTE.

(1) In R v Ireland [1998] 1 Cr. App. R. 177, the House of Lords held that 'bodily injury' in s. 18, 20 and 47 of the Offences against the Person Act, 1861 must be interpreted so as to include recognisable psychiatric illness, and approved the caveat of Hobhouse LJ in R v Chan-Fook 99 Cr. App. R. 147 that psychiatric illness "does not include mere emotions such as fear or distress or panic nor does it include, as such, states of mind that are not themselves evidence of some identifiable clinical condition."

(2) The test of recklessness in assault and battery is that defined in R v Cunningham, see R v Savage and Parmenter 94 Cr. App. R.193

ARCHBOLD 2010: 19-166 to 167 and 197

BLACKSTONE 2010: B 2.5 to 16

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UPDATED 5 MAY 2009

3.3A RECKLESSNESS - ASSAULT/Offences Against the Person Act, 1861

NOTE:

In most cases of assault it will **NOT** be necessary to leave the issue of recklessness to the jury. This should normally be done only when the word appears in the count or the circumstances of the particular case plainly call for such a direction. In many cases a direction on recklessness will only serve to confuse the jury, and in the event of a conviction will create a potential for difficulty in sentencing. Naturally, it is preferable that the position be clear before the case is opened to the jury; but in any event if the judge is of the view that such a direction is appropriate, or in case of any doubt, it is desirable that the matter be broached with counsel before closing speeches.

COMMON ASSAULT; ASSAULT OCCASIONING ACTUAL BODILY HARM

(a) In the (unusual) case where no physical force is actually applied.

NOTE:

The mental element in the offence of assault is established where it is proved that the defendant intentionally or recklessly caused another to **fear** that he would be subjected to immediate and unlawful violence. It is therefore sufficient to prove that the defendant was reckless as to whether the complainant might fear that he was to be subjected to immediate and unlawful violence. R v Ireland [1998] 1 Cr. App. R. 177.

"Before the ingredient of recklessness can be said to have been proved you must be satisfied beyond reasonable doubt, having regard to all the evidence, that the defendant foreseeing, that is realising, that X might **fear** the possibility of immediate personal violence, nonetheless went on and ignored the risk that such a **fear** might arise. The prosecution say that if that was not the case, what was X terrified about? It is for you, taking a commonsense view of all of the evidence, to decide whether that was the case." (1).

(1) In R v Ireland the House of Lords accepted that whilst the maker of silent telephone calls may be guilty of an assault, this all depends upon the facts, and in particular on the impact of the caller's potentially menacing call or calls on the victim.

(b) In the case where physical force is actually applied.

NOTE.

The mental element in the offence of common assault is established where it is proved that the defendant intentionally or recklessly applied unlawful force to another person. The mental element in the offence of assault occasioning actual bodily harm is precisely the same. Whether actual bodily harm was 'occasioned' (caused) is simply a question of causation and does not involve any consideration of recklessness, see R v Savage and DPP v Parmenter 94 Cr. App. R. 627.

"Before the ingredient of recklessness can be said to have been proved you must be satisfied beyond reasonable doubt, having regard to all the evidence, that the defendant foresaw, that is realised, that X might be subjected to unlawful force (however slight) in consequence of what he was about to do and yet he went on and ignored the risk that that might happen."

ARCHBOLD 2010: 19-167, 19-211 and 17-50 et seq.

BLACKSTONE 2010: B 2.5 to 16

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UPDATED 5 MAY 2009

3.4 MALICIOUS WOUNDING contrary to S.20 of the Offences against the Person Act, 1861

"The prosecution has to prove a number of matters beyond reasonable doubt.

First of all, that the defendant "wounded" X, which means that there was a break in the continuity of the (outer/inner) skin of the body, and secondly, that the defendant acted deliberately and he either intended or foresaw that his act might cause physical harm to someone, even if only harm of a minor character."

INFLICTING GRIEVOUS BODILY HARM contrary to s.20 of the Offences against the Person Act, 1861.

"The prosecution has to prove a number of matters beyond reasonable doubt.

First of all, that the defendant assaulted X

or

That the defendant did something intentionally which, though it was not itself a direct application of force to the body of X, did directly result in force being applied violently to the body of X.

and secondly, that X suffered grievous bodily harm, meaning really serious bodily harm."

NOTE.

(1) R v Wilson; R v Jenkins 77 Cr. App. R. 319 at p. 327.

(2) Where "malicious" or "recklessly" is an issue, see 3.4A.

ARCHBOLD 2010: 19-206 to 208

BLACKSTONE 2010: B2.47 to 49

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UPDATED 5 MAY 2009

3.4A THE MEANING OF "MALICIOUS" IN S. 20 of the Offences Against the Person Act, 1861 (UNLAWFULLY AND MALICIOUSLY WOUNDING OR INFLICTING GRIEVOUS BODILY HARM)

(a) 'Malicious' in this Act means either intentionally or recklessly: see R v Cunningham 41 Cr. App. R.155; R v G [2004] 1 Cr. App. R. 21

(b) 'Recklessly' in this context means that the defendant foresaw the risk that some physical harm (however slight) to some person might result from what he was going to do and yet ignoring that risk he went on and did the act: see DPP v Parmenter 94 Cr. App. R. 627.

"Before it can be said that the defendant maliciously (in the sense of **recklessly)** wounded or inflicted grievous bodily harm upon X. the prosecution must make you satisfied beyond reasonable doubt having regard to all the evidence that the defendant foresaw, that is realised, that some injury to (some person or to) X. might result from his deliberate act and yet ignoring that risk he went on and did the act. The prosecution do not therefore have to prove that the defendant foresaw, that is anticipated, the extent of, or the gravity of, the injury which in fact resulted from his conduct."

THE RELEVANCE OF ALCOHOL/DANGEROUS DRUGS.

(a) The fact that the defendant's voluntary consumption of alcohol (or dangerous drugs) prevented him (or may have prevented him) from foreseeing (the relevant risk) is no sort of defence to a charge of assault (including battery), assault occasioning actual bodily harm or malicious wounding or inflicting grievous bodily harm. If the jury are satisfied beyond reasonable doubt that but for the drink/drugs he would have foreseen (the relevant risk) the ingredient of recklessness will have been established: R v Majewski 62 Cr. App. R. 262.

(b) As to the **involuntary** consumption of drink/drugs, R v Kingston 97 Cr. App. R. 401.

(c) As to the proof of 'recklessness' if the defendant had voluntarily taken a drug which is not well known for being liable to cause unpredictability or aggressiveness, see R v Hardie 80 Cr. App. R.157, CA;

ARCHBOLD 2010: 17-45; 19-210, 17-107 et seq.

BLACKSTONE 2010: B2.47 to 49

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UPDATED 5 MAY 2009

3.5 WOUNDING WITH INTENT TO DO GRIEVOUS BODILY HARM, contrary to S.18 of the Offences against the Person Act, 1861

"The prosecution has to prove a number of matters beyond reasonable doubt.

First of all;

that the defendant wounded X, which means that there was a break in the continuity of the (outer/inner) skin.

or

that the defendant caused grievous bodily harm to X, meaning really serious bodily harm.

Secondly;

that the defendant intended to wound/cause really serious bodily harm to X. You can only decide what his intention was by considering all the relevant circumstances and in particular what he did and what he said about it. (1)

or

that when the defendant did the act he foresaw that some physical harm to X (some person) might result and yet went on to take the risk. (2)

or

That the defendant intended to resist the lawful apprehension (or detention) of himself (of X). You can only decide what his intention was by considering all the relevant circumstances and in particular what he did and said about it. (1)"

NOTE.

(1) R v Purcell 83 Cr. App. R. 45.

(2) Where recklessness is an issue, see R v Cunningham 41 Cr. App. R. 155 and R v Parmenter 94 Cr. App. R. 267.

ARCHBOLD 2010: 19-210 to 214

BLACKSTONE 2010: B2.60

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3.6 INDECENT ASSAULT

"In order that the defendant can be convicted of indecent assault a number of matters have each to be proved beyond reasonable doubt.

The first is that the defendant intentionally applied unlawful force to the body of X. If the force is deliberately applied then the offence is committed, however slight the force.

The second is that the touching of X by the defendant (and the circumstances accompanying it) is/are capable of being considered by right-minded persons as being indecent, and for the purposes of this case your views represent the views of right-minded people.

The third is that the defendant intended to touch X in a way that was capable of being considered by right-minded people as indecent.

(As X was under seventeen at the time, if (even if) he/she consented to the defendant touching him/her in this way, that would not provide the defendant with a defence because the law is that a boy or a girl under the age of seventeen cannot consent to being indecently assaulted.(1))"

NOTE: R v Court 87 Cr.App.R.144.

(1) If relevant; see S.1 of the Criminal Law Amendment Act (NI) 1923.
(2) This may still be relevant in historic cases.

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NEW 27 SEPTEMBER 2010

3.6A ASSAULT BY PENETRATION

[For offences alleged to have occurred on or after 2nd February 2009. The transitional provisions contained in Paragraph 1 of Schedule 2 to the Sexual Offences (NI) Order 2008 apply to indecent assault/assault by penetration]

In order that the defendant can be found guilty of assault by penetration a number of matters have to be proved –

1. First of all, that the defendant intentionally used [his finger] [his tongue] [a *state object*] to penetrate X's [vagina (1)] [anus]. You do not have to be satisfied that the penetration was complete. The slightest penetration is sufficient.
2. Secondly, that the penetration was sexual (2). Whether it is sexual is a matter for you, as 12 reasonable people, to determine. You can be satisfied that it is sexual in one of two ways –
    - You may conclude that it is, because of its nature, unambiguously sexual;
    - Alternatively, you may conclude that because of its nature the penetration may have been sexual. When deciding whether the penetration was "sexual" you should consider this in two stages. First of all, because of its nature may it be sexual? In deciding this you must only consider the nature of the penetration, you are not concerned at this stage with what happened, or with what the defendant said before or after the penetration took place. If you are not satisfied that the penetration may be sexual in nature then that is the end of the matter and you should find the defendant not guilty. If you are satisfied that the penetration may be sexual in nature, then you must go on to consider a second question, namely whether the penetration was in fact sexual, and at that stage you should consider all of the circumstances and what the defendant said was his purpose."
3. Thirdly, X did not consent to the penetration.
4. Fourthly, the defendant did not reasonably believe that X was consenting. [The defendant has said that he did believe that X was consenting. Whether that belief was a reasonable one, is a matter for you to determine having regard to all the circumstances, including any steps that the defendant took to ascertain whether X consented.(3)]

[It may be necessary to expand on the meaning of 'consent'. Please refer to 3.8B.]

In the case of an offence under Article 13, involving a child under 13, delete (3) and (4) and use –

3. That X was under 13 at the time. The law is that a child under the age of 13 is not capable of consenting to the penetration, so even if he/she consented to the penetration it does not provide a defence to the defendant.

NOTES: **(1)** Vagina includes vulva (Article 2 (12))

(2) See the definition of 'sexual' in Article 4 and comments of Lord Woolf CJ in **R –v- H [2005] 2 Cr. App. R 9 at [12] – [14].** In a case involving penetration, except in the case of an intimate medical examination, this issue is unlikely to be a substantial one, and a simplified version may be adequate.

(3) Article 6(2).

ARCHBOLD 2010: 20-28 to 20-36.
BLACKSTONE 2010: B 3.24 to B3.29.

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NEW 27 SEPTEMBER 2010

3.6AA TRANSITIONAL DIRECTION

[Background:

1. **If the conduct is alleged to have occurred on or after 2nd February 2009 the new offences contained in the Sexual Offences (NI) Order 2008 will apply.**
2. **If the conduct is alleged to have occurred on or before the 1st February 2009 the old offences under the common law and the then existing legislation will apply.**
3. **The transitional provisions are contained in Paragraph 1 of Schedule 2 to the Sexual Offences (NI) Order 2008. The list of pre-commencement offences is set out in Paragraph 1 (2). It does not include the common law offence of rape, but this is now provided for in the Sexual Offences (NI) Order 2008 (Transitional Provisions) Order 2009.**
4. **This direction is to be used if there is an issue as to the time and date of the alleged conduct.**
5. **Given the complicated nature of the direction, it is suggested that the matter is discussed with counsel, and consideration is given to the use of a written flow chart direction.**

1. Counts [X & Y] in the indictment allege that the defendant committed offences on an unknown date sometime between the [*e.g. 1st September 2008 and the 31st July 2009*]. It is important to realise that these are alternative counts and they relate to the same conduct.
2. The offence of [*e.g. assault by penetration*] could only have been committed on or after the 2nd February 2009. Before that date it was an offence of [*e.g. indecent assault*].
3. Because the conduct alleged against the defendant may have occurred before or after that date, it is important that you approach your deliberations in respect of this pair of Counts as follows –

- Firstly, you should consider if the alleged conduct occurred at all. If you are not satisfied beyond a reasonable doubt that it did, then you should acquit the defendant of both Counts;
- If you are satisfied that the conduct did occur, then you have to consider when it occurred. If you are satisfied beyond a reasonable doubt that it occurred on or after the 2nd February 2009, then you should consider whether the conduct constituents an offence of [*e.g. assault by penetration*] If you are satisfied beyond a reasonable doubt that it occurred on or before the 1st February 2009, then you should consider whether the conduct constitutes an offence of [*e.g. indecent assault*].
- If you are satisfied that the conduct did occur, but cannot be sure when it occurred, then the legislation provides, in this case, that there is a presumption that it occurred on or before the 1st February, and you should consider whether the conduct constitutes an offence of [*e.g. indecent assault*] **[Note 1]**

4. [Set out the constitute elements of the pre-commencement and the post-commencement offences.]
5. Finally, as these are alternative counts, you cannot find the defendant guilty of both counts. Having found him guilty of one count, you do not need to return a verdict in respect of the alternative **[Note 2]**

Note: **(1)** The conclusive presumption is set out in Paragraph 1(3) of Schedule 2 to the Sexual Offences (NI) Order 2008, and provides that if the maximum penalty for the pre-commencement offence is less than the maximum penalty for the post-commencement offence, the conduct is presumed to have occurred before commencement. In all other cases, it is presumed to have occurred after commencement.

(2) If the jury return a not guilty verdict on the rejected alternative count, this may create a problem in the event of a re-trial. It is suggested that in the event of a guilty verdict in relation to one alternative count, they are discharged from returning a verdict on the remaining alternative, with that count being left on the books of the court and not to be proceeded with without leave of the Crown Court, or the Court of Appeal.

(3) In the event of the conduct commencing on 1st February 2009, and continuing after midnight into the 2nd February 2009, then provided the jury are satisfied beyond a reasonable doubt that it continued into the 2nd February 2009, a similar direction may be necessary although it will not be based on the statutory presumption. There would, in any event, be both a pre-commencement and a post-commencement offence

ARCHBOLD 2010: 20-16.

BLACKSTONE 2010: B 3.1.

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NEW 27 SEPTEMBER 2010

3.6B SEXUAL ASSAULT

[For offences alleged to have occurred on or after 2nd February 2009. The transitional provisions contained in Paragraph 1 of Schedule 2 to the Sexual Offences (NI) Order 2008 apply to indecent assault/sexual assault.]

In order that the defendant can be found guilty of sexual assault a number of matters have to be proved –

1. First of all, that the defendant intentionally touched X (1).
3. Secondly, that the touching was sexual (2). Whether it is sexual is a matter for you, as 12 reasonable people, to determine. You can be satisfied that it is sexual in one of two ways –
   - You may conclude that it is, because of its nature, unambiguously sexual;
   - Alternatively, you may conclude that because of its nature the touching may have been sexual. When deciding whether the touching was "sexual" you should consider this in two stages. First of all, because of its nature may it be sexual? In deciding this you must only consider the nature of the touching, you are not concerned at this stage with what happened, or with what the defendant said before or after the touching took place. If you are not satisfied that the touching may be sexual in nature then that is the end of the matter and you should find the defendant not guilty. If you are satisfied that the touching may be sexual in nature, then you must go on to consider a second question, namely whether the touching was in fact sexual, and at that stage you should consider all of the circumstances and what the defendant said was his purpose."
4. Thirdly, X did not consent to the touching.
5. Fourthly, the defendant did not reasonably believe that X was consenting. [The defendant has said that he did believe that X was consenting. Whether that belief was a reasonable one, is a matter for you to determine having regard to all the circumstances, including any steps that the defendant took to ascertain whether X consented.(3)]

[It may be necessary to expand on the meaning of 'consent'. Please refer to 3.8B]

In the case of an offence under Article 14, involving a child under 13, delete (3) and (4) and use –

3. That X was under 13 at the time. The law is that a child under the age of 13 is not capable of consenting to the touching, so even if he/she consented to the touching, it does not provide a defence to the defendant.

NOTES: **(1)** Touching can include touching with any part of the body, with anything else, or through anything (Article 3(11)). It can also include touching of clothing (per Lord Woolf CJ in **R –v- H [2005] 2 Cr. App. R 9 at [26]**). The touching must be deliberate and not reckless. R v Heard [2007] 1 Cr App R 37.

(2) See the definition of 'sexual' in Article 4 and comments of Lord Woolf CJ in **R –v- H [2005] 2 Cr. App. R 9 at [12] – [14].**

(3) Article 7(2).

ARCHBOLD 2010: 20-29 to 20-39.

BLACKSTONE 2010: B 3.30 to 3.36.

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NEW 27 SEPTEMBER 2010

3.7 RAPE

[For offences alleged to have occurred on or after 2nd February 2009. The transitional provisions similar to those contained in Paragraph 1 of Schedule 2 to the Sexual Offences (NI) Order 2008 apply to Rape by virtue of the Sexual Offences (NI) Order 2008 (Transitional Provisions) Order 2009]

In order that the defendant can be found guilty of rape a number of matters have to be proved –

5. First of all, that the defendant intentionally used his penis to penetrate X's [vagina (1)] [mouth] [anus]. It is not necessary that the penetration should be complete, or that there was any ejaculation, or emission of semen. The slightest penetration is sufficient.
6. Secondly, X did not consent to the penetration.
7. Thirdly, the defendant did not reasonably believe that X was consenting. [The defendant has said that he did believe that X was consenting. Whether that belief was a reasonable one, is a matter for you to determine having regard to all the circumstances, including any steps that the defendant took to ascertain whether X consented.(2)]

[If it is necessary to expand on the meaning of 'consent', please refer to 3.8B]

In the case of an offence under Article 12, involving a child under 13, delete (2) and (3) and use –

2. That X was under 13 at the time. The law is that a child under the age of 13 is not capable of consenting to the touching, so even if he/she consented to the touching, it does not provide a defence to the defendant.

NOTES: **(1)** The vagina includes the vulva (Article 2(12)).

(2) Article 5 (2).

ARCHBOLD 2010: 20-19 TO 20-27a

BLACKSTONE 2010: B3.4, 3.15 to 3.22

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3.8 GROSS INDECENCY WITH OR TOWARDS A CHILD

"The offence of gross indecency with a child is committed when someone touches the penis of a male child under the age of fourteen, or gets a child of either sex who is under the age of fourteen to touch the defendant's penis. (X is/was at the time under fourteen) and you have to be satisfied that the defendant (touched X on the penis/got X to touch the defendant upon the penis.)"

"The offence of committing an act of gross indecency towards a child is committed where the defendant handles his own penis in such a way as to involve a child under fourteen of either sex in his actions. It is not necessary that there should have been actual physical contact between the defendant and X, or that X should have understood or even been aware of what the defendant was doing, provided that in all of the circumstances of the case you are satisfied that the actions of the defendant involved X."

NOTE: See R v Ireland (Londonderry Crown Court, 15/3/1990 unreported), DPP v Burgess [1970] 3 AER 266 and R v Francis 88 Cr.App.R.127. This may still be relevant in historic cases.

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NEW 27 SEPTEMBER 2010

3.8A CAUSING A PERSON TO ENGAGE IN SEXUAL ACTIVITY (1)

[For offences alleged to have occurred on or after 2nd February 2009. The transitional provisions contained in Paragraph 1 of Schedule 2 to the Sexual Offences (NI) Order 2008 apply to gross indecency/causing a person to engage in sexual activity.]

In order that the defendant can be found guilty of causing a person to engage in sexual activity a number of matters have to be proved –

1. First of all, that the defendant intentionally caused x to engage in an activity. The prosecution's case is that the activity was [*state activity*]
2. Secondly, that the activity was sexual in nature (2). Whether it is sexual is a matter for you, as 12 reasonable people, to determine. You can be satisfied that it is sexual in one of two ways –
    - You may conclude that it is, because of its nature, unambiguously sexual;
    - Alternatively, you may conclude that because of its nature the activity may have been sexual. When deciding whether the activity was "sexual" you should consider this in two stages. First of all, because of its nature may it be sexual? In deciding this you must only consider the nature of the activity, you are not concerned at this stage with what happened, or with what the defendant said before or after the activity took place. If you are not satisfied that the activity may be sexual in nature then that is the end of the matter and you should find the defendant not guilty. If you are satisfied that the activity may be sexual in nature, then you must go on to consider a second question, namely whether the activity was in fact sexual, and at that stage you should consider all of the circumstances and what the defendant said was his purpose.
3. Thirdly, X did not consent to the activity.
4. Fourthly, the defendant did not reasonably believe that X was consenting. [The defendant has said that he did believe that X was consenting. Whether that belief was a reasonable one, is a matter for you to determine having regard to all the circumstances, including any steps that the defendant took to ascertain whether X consented.(3)]

[It may be necessary to expand on the meaning of 'consent'. Please refer to 3.8B]

In the case of an offence under Article 15, involving a child under 13, delete (3) and (4) and use –

3. That X was under 13 at the time. The law is that a child under the age of 13 is not capable of consenting to this type of activity, so even if he/she consented to the activity it does not provide a defence to the defendant.

NOTES: **(1)** This direction is designed to cover the more straightforward type of offending behaviour envisaged by this Article. Article 7 is drafted in a wide fashion, and can include a wide variety of conduct, and a more fact specific direction may be required in those circumstances.
(2) See the definition of 'sexual' in Article 4 and comments of Lord Woolf CJ in **R –v- H [2005] 2 Cr. App. R 9 at [12] – [14].**
(3) Article 8(2)

ARCHBOLD 2010: 20-40 to 20-48.

BLACKSTONE: 2010 B3.37 to B3.43.

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NEW 27 SEPTEMBER 2010

3.8B SEXUAL OFFENCES - CONSENT

NOTES: **(1)** Consent is defined in Article 3 of the 2008 Order as follows – "For the purposes of this Order, a person consents if he or she agrees by choice and has the freedom and capacity to make that choice."

(2) R –v- Hysa [2007] EWCA Crim 2056 per Hallett LJ at [34] "Issues of consent and capacity to consent to intercourse … should normally be left to the jury to decide."

(3) Articles 9 – 11 of the 2008 Order set out the circumstances in which an evidential presumption (both rebuttable and conclusive) of lack of consent may apply.

(4) A direction on absence of reasonable belief falls to be given only when there is material upon which a jury might come to a conclusion that (a) the complainant did not in fact consent, but (b) the defendant thought she was consenting. **R –v- Taran [2006] EWCA Crim 1498**

(5) A Judge must give a jury assistance about how properly to approach the meaning of "capacity" in circumstances where a complainant may have been affected by voluntarily induced intoxication and also whether, and to what extent, they can take it into account in deciding whether the complainant has consented. See **R –v- Bree [2007] 2 Cr App R 13.**

(6) Although suggested forms of words are set out below, it is essential that care is taken to amend them to the individual circumstances of the case, with prior discussion with counsel if necessary.

DOMESTIC CIRCUMSTANCES

In **R –v- Mohammad, June 18 1993 EWCA (No. 92/2762/W2)** the following summing up by Pill J was commended as a model for cases of this nature. It is suggested that this could also be used for incidents within any established relationship.

The learned judge commenced his summing-up with the words:

"Members of the jury, the defendant and X had a long standing relationship, they lived together in Cardiff, they had two children and they had many acts of sexual intercourse."

Later, he then went on to say:

"It is a relevant fact (you may think) that they lived together (the defendant and Miss X) in a long standing relationship, relevant that is to the charge. When sexual intercourse occurs between a man and a woman your approach to the questions of consent which

arise may well be different in a situation where the parties live together and have lived together for a long time from a situation where, for example, they have just met. The questions on the law of rape are the same in each case; but the answers will be given in the light of all the circumstances and all the evidence, including the fact that they have had a long standing relationship ..."

"In law a husband or a long-term or a short-term partner for that matter ... can be convicted of rape on his partner if the constituents of the offence are proved notwithstanding his relationship with the victim ..."

"In considering whether it is proved that the complainant Miss X did not consent, bear in mind when considering the evidence the relationship between them. When people enter into long-term relationships/marriage either within or outside marriage they usually contemplate regular sexual relations. In most partnerships, even not entirely happy ones, there is often give and take between the partners on sexual as on other matters. A female partner may not particularly want sexual intercourse on a particular occasion but because it is her husband or her partner who is asking for it she will consent to sexual intercourse. The fact that such consent is given reluctantly or out of a sense of duty to her partner, is still a consent."

"However, a woman is entitled to say 'no' and to refuse to consent even to her husband or long-term partner. There is a dividing line between a real consent on the one hand and a lack of consent or mere submission on the other. It is for you to decide whether the absence of consent is proved in this case applying your combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case."

COMPLAINANT'S VOLUNTARY INTOXICATION

The complainant had voluntarily consumed alcohol/ taken drugs during the evening in question. You will know from your own experience of life that alcohol/drugs can affect a person's ability to make decisions, and can make them act in a disinhibited manner and differently for their normal behaviour. If through the consumption of drink/drugs the complainant was so intoxicated that he/she did not have the capacity to agree by choice to sexual intercourse/sexual activity, then he/she did not consent.

If however, X was aware of what was happening, and he/she still consented, no matter whether he/she may not have consented had he/she been sober, or no matter how much he/she may have regretted his/her actions later, it was a consent. A drunken consent is still a consent, provided X had the capacity to make the decision to consent.

DEFENDANT'S INTOXICATION

NOTE – The 2008 Order provides for a more objective test. See, for example, Article 5(2) - "Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps [the defendant] has taken to ascertain whether [the victim] consents"

You have to satisfied that the Defendant did not reasonably believe that X was

consenting. The defendant has said that he did believe that X was consenting. Whether that belief was a reasonable one, is a matter for you to determine having regard to all the circumstances, including any steps that the defendant took to ascertain whether X consented. However, you must consider whether the belief would have been reasonable for a sober man/woman in all the circumstances. You have heard that the Defendant had consumed alcohol/drugs that evening. The fact that he may have been intoxicated, and that such intoxication may have affected his judgment as to whether X was consenting, is irrelevant when considering whether his belief may have been reasonable.

CHILD VICTIMS

NOTE - For victims aged 12 or under, it is likely that offences will be alleged which do not involve the issue of consent. The jury may require some assistance in cases involving children of 13 years or over.

At the time, X was [ ] years of age. X must have had the capacity to make the choice to agree. You should therefore take into account X's age, his/her maturity, his/her knowledge of sexual matters, and his/her ability to understand what was happening to him/her. If X did not understand what was happening, then he/she could not be said to have consented.

ARCHBOLD 2010: 20-10 to 20-15.
BLACKSTONE 2010: B 3.16 to B 3.22.

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3.9 BUGGERY

"The offence of buggery is committed by a male inserting his penis into the anus of another person, whether the other person is male or female. It is not necessary that penetration of the penis into the anus should be complete, provided that some penetration took place, however slight; nor is it necessary that there should be any emission of semen on the part of the defendant. It is no defence to the charge that the other person, whether male or female, consented to what occurred."

NOTE.

This may still be relevant in historic cases.

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UPDATED 6 MAY 2009

3.10 THEFT

"The offence of theft consists of four elements.

The first is that there has to be an "appropriation", this means that the defendant behaved towards the item which is the subject matter of the charge as if he was the owner of it.

The second is that the item belonged to someone else.

The third is that the defendant intended to permanently deprive the owner of the item.

The fourth is that the defendant acted dishonestly. Whilst you may feel that you know what dishonestly means, the law requires you to ask two questions. First, did the defendant act dishonestly by the standards of ordinary and decent people, and for the purposes of this case your standards are the standards of ordinary and decent people. If you answer that question Yes, then you must ask yourselves a second question, did the defendant himself realise that what he was doing was dishonest by the standards of ordinary and decent people."

ARCHBOLD 2010: 21-22 to 24

BLACKSTONE 2010: B4.25 to 46

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UPDATED 6 MAY 2009

3.11 HANDLING STOLEN PROPERTY

"The prosecution has to prove a number of elements.

The first is that the item was stolen.

The second is that after the item had been stolen, the defendant either received, or arranged to receive, the item or he undertook or assisted in retaining, receiving, disposing of or realising (that is turning the item into money) by or for the benefit of another person or arranged to do so.

The third is that the defendant knew or believed that the item was stolen when he did these things.

(The defendant has said he did not believe that the item was stolen. A man believes that something is stolen when he accepts that it is stolen. Suspicion that the item was stolen is not enough, even if the defendant shut his eyes to the circumstances in which he received/dealt with the item, although you may take those matters into account when deciding whether the prosecution has proved beyond reasonable doubt that the defendant knew or believed that the item was stolen. (1))

The fourth is that when the defendant did these things he acted dishonestly (defined as in theft)."

NOTE.

(1) In R v Forsyth [1997] 2 Cr. App. R. 299 the Court of Appeal disapproved of the direction suggested in R v Hall 81. Cr. App. R. 260, and approved the direction given by Lord Lane C.J. in R v Moys 79 Cr. App. R., upon which the above direction is based.

ARCHBOLD 2010: 21-294 to 312

BLACKSTONE 2010: B 4.137 to 143

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UPDATED 7 MAY 2009 (1)

3.12 OBTAINING PROPERTY BY DECEPTION

"This offence contains a number of elements.

First, that the defendant obtained property belonging to someone else.

Secondly, that the defendant intended to permanently deprive that person of his property.

Thirdly, that he obtained the property by the deception. Deception means any deception which is deliberate or reckless and may be by words or conduct (as to fact or law, and includes a deception as to the present intentions of the defendant or any other person).

Fourthly, that the defendant acted dishonestly (defined as in theft).

Fifthly, that the deception operated on the mind of the person who parted with his property."

NOTE.

(1) This continues to apply if the offence was committed before 15 January 2007 when the Fraud Act, 2006 came into effect. For such cases see 3.12A.

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NEW 7 MAY 2009

3.12A FRAUD BY MAKING A FALSE REPRESENTATION (1)

"The prosecution has to prove that

(1) the defendant's representation that (state allegation) was untrue or misleading; and

(2) the defendant knew that the representation was untrue or misleading when he made it (2); and

(3) by making the representation he intended to (make a gain for himself) (cause a loss to X) (expose X to a risk of a loss); and

(4) he acted dishonestly. Whilst you may feel that you know what dishonestly means, the law requires you to ask two questions. First, did the defendant act dishonestly by the standards of ordinary and decent people, and for the purposes of this case your standards are the standards of ordinary and decent people. If you answer that question Yes, then you must ask yourselves a second question, did the defendant himself realise that what he was doing was dishonest by the standards of ordinary and decent people."(3)

NOTE.

(1) This is a new offence under s. 2 of the Fraud Act 2006 which came into force on 15 January 2007.

(2) The offence is committed when the representation is made, and does not depend upon a result being achieved. See Archbold 2010 21-372.

(3) The Fraud Act does not define dishonesty, but the assumption is that the test in Ghosh applies (see 3.10).

ARCHBOLD 2010: 21-356 to 358 and 414.

BLACKSTONE 2010: B5.8 to 14.

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UPDATED 6 MAY 2009

3.13 BURGLARY and AGGRAVATED BURGLARY

"This offence contains a number of elements.

First, that the defendant entered the building.

Secondly, that the defendant entered the building as a trespasser, which means that he entered without the permission of the occupier of the building.

Thirdly, at the time the defendant entered the building he intended to steal (to inflict grievous bodily harm on any person therein/to do unlawful damage to the building or anything in the building) (and had with him a firearm/imitation firearm/a weapon of offence/any explosive (1)).

Or

Thirdly, having entered the building as a trespasser, the defendant stole anything in the building (attempted to steal anything in the building/inflicted grievous bodily harm on any person therein/attempted to inflict grievous bodily harm on any person therein) (and had with him a firearm/imitation firearm/a weapon of offence/any explosive (1))."

NOTE.

(1) Add in the case of aggravated burglary.

ARCHBOLD 2010: 21-109 to 135.

BLACKSTONE 2010: B54 to 82

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UPDATED 6 MAY 2009

3.14 ROBBERY and ASSAULT WITH INTENT TO ROB

(a) "Robbery consists of a number of elements.

First of all, that the defendant stole something from X.

Secondly, that immediately before the defendant stole from X or at the time he stole from X, he used force against X or sought to put X in fear of being there and then subjected to force, and the force was used or threatened for the purpose of stealing."

(b) "Assault with intent to rob consists of a number of elements.

First of all, that the defendant unlawfully applied force to X, (or led X to believe that he was going to have unlawful force applied to him immediately).

Secondly, this was because the defendant intended to steal the defendant's property. (The defendant says that he did not intend to steal from X. You must consider everything that the defendant did or said at the time, together with his explanation for his conduct, in deciding whether the offence has been proved. In particular, the defendant says that he did not demand money from X, but an actual demand of money is not necessary if you are satisfied that the defendant intended to steal from X)."

ARCHBOLD 2010: 21-97 to 107

BLACKSTONE 2010: B4.53 to 54

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UPDATED 7 MAY 2009

3.15 EFFECT OF PREVIOUS CONVICTION FOR THEFT OR HANDLING - S.26 (4) (a) of the Theft Act (NI) 1969

"You have heard that the defendant was convicted of theft/handling at (court) on (date). You have heard that to help you to decide whether you are satisfied beyond reasonable doubt that the defendant acted dishonestly and knew or believed that the goods which are the subject of the present charge were stolen at the time of the offence with which the defendant is charged. That is its only relevance to this case. It is relevant because it tends to show in the defendant a disposition to commit the type of offence with which he is now charged, namely to dishonestly have property in his possession which he knows or believes to have been stolen. You must also consider whether it really does help you or may be consistent with him being the victim of an unfortunate coincidence. You must avoid deciding he is guilty solely because he was convicted of theft/handling before these events happened."

NOTE.

See R v Perry [1984] Crim. L. R. 680., R v Wilkins 60 Cr. App. R. 302, R v Fowler 86 Cr. App. R. 219 (and the commentary at [1987] Crim. L. R. at 771.).

ARCHBOLD 2010: 21-313

BLACKSTONE 2010: F12.48 to 50.

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REVISED 28 MAY 2009

3.16 POSSESSION OF DRUGS

"The defendant is charged with possession of a Class A/B/C drug. There is no doubt that the substance in question was a Class A/B/C drug and therefore you have to be satisfied beyond reasonable doubt that the defendant had possession of the drug.

What does "possession" mean? First of all, it means that the prosecution must prove that the defendant exercised physical control over the drug. A person can exercise control over something, as when he has it in his pocket, or when he has the capacity to exercise control, as for example where he leaves an item in his car or house. Secondly, the prosecution must prove that the defendant knew that he had the drugs. The defendant says that he did not know that the drugs were there. If you believe him or have a reasonable doubt about whether he knew the drugs were there then you should find him not guilty.

(The defendant says that he thought that the drug was cannabis and not heroin. A mistake as to the type of drug does not provide the defendant with a defence. (1))

(The defendant admits that he had control of the (container) in which this drug was found, but says that he had no idea that it contained drugs, he thought that it contained (e.g. pirated video tapes.) In this case the defence submit that there is evidence to lead you to conclude that there must be a reasonable doubt as to whether the defendant knew or suspected or had reason to suspect that there were drugs (in the container).
If you conclude that there is such evidence then it is for the prosecution to prove beyond reasonable doubt that the defendant did not, in fact, know or suspect or had reason to suspect that the (container) contained controlled drugs. (2)

NOTE.

(1) S. 28(3) of the Misuse of Drugs Act, 1971.

(2) S. 28(2) of the Misuse of Drugs Act, 1971 as explained by the House of Lords in R v Lambert [2001] 2 Cr.App.R. 28 at p. 511, in which the majority held that s. 28(2) should be read so as to place only an evidential burden upon the defendant.

(3) If it is necessary to direct the jury as to the meaning of "suspect", see 3.11, handling stolen property.

ARCHBOLD 2010: 27-54 to 70.

BLACKSTONE 2010: B19.15 to 22

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UPDATED 11 MAY 2009

3.17 POSSESSION WITH INTENT TO SUPPLY/SUPPLYING DRUGS TO ANOTHER

"First of all, the prosecution has to prove that the drug in question was a Class A/B/C drug. That is not disputed.

Secondly, the prosecution has to prove that the defendant had the drug in his possession. (Define possession as in 3.16(1))

(In cases of possession with intent to supply)

Thirdly, the prosecution has to prove that the defendant intended to supply the drug in question to X. If the defendant intended to physically transfer the drug to X in some way, whether by handing it to X or posting it or in some other way, so that X could use the drug for his own purposes, then you should find the defendant guilty. (The defendant says that he was merely looking after the drugs for X for a short time, that does not provide him with a defence because by returning the drugs to X he would be supplying them to X (1))"

(In cases of supply)

"Thirdly, the prosecution has to prove that the defendant supplied the drug in question to X. A person supplies a drug to someone else when the drug is physically transferred to that other person, whether by handing it over or sending it through the post or transferring the drug in some other way, so that the other person could use it for his own purposes (even if that purpose was simply to pass the drug on to another person). (It is not necessary that any money should change hands, and thus to give a single ecstasy tablet to someone else or pass someone a cannabis joint is to supply that person with a controlled drug.(2))"

NOTE.

(1) R v Magennis 85 Cr.App.R.127.

(2) R v Moore [1979] Crim.L.R. 789.

ARCHBOLD 2010: 27-54 to 70.

BLACKSTONE 2010: B19.29 to 32.

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UPDATED 11 MAY 2009

3.17A DRUGS-ALLEGATION OF SUPPLY-MONEY FOUND IN POSSESSION OF DEFENDANT-EVIDENCE OF EXTRAVAGANT LIFESTYLE etc.

"The prosecution has called evidence that the defendant (e.g. was found to be in possession of £… and/or to the effect that he was living to a much higher standard than that which might have been expected of a man with his means).

By itself this evidence does not prove anything against the defendant, and certainly not that he was in possession of drugs. But you may take that evidence into account, if you think that it is right to do so, when deciding whether he was (unlawfully in possession of drugs/in possession of drugs with intent to supply/supplying these drugs to another person).

You may only take this evidence into account in this way if you are satisfied beyond reasonable doubt:-

that the defendant was (in possession of this money/was living to a much higher standard than might have been expected); and

that his explanation for his possession of the money/standard of living is untrue; and

that his possession of the money/standard of living can only be explained by his connexion with drugs as alleged in this case, (in a supply or intent to supply case-"and which indicates not merely past dealing, but continuing dealing in drugs/ an intention to supply drugs in the future.")

NOTE.

(1) See R v Gordon [1995] 2 Cr. App. R. 61, R v Diane Morris [1995] 2 Cr. App. R. 69, R v Grant [1996] 1 Cr. App. R. 73, R v Malik [2000] Crim. L.R. 197 and R v Scott [1996] Crim. L.R. 652.

(2) In R v Guney [1998] 2 Cr. App. R. 242 the Court of Appeal held that it is for the trial judge to determine whether cash and standard of living/lifestyle may be relevant and admissible to any issue in the case. The court decided that in limited circumstances this kind of evidence might be relevant to the issue of possession only. The admissibility of such evidence depends upon the particular circumstances of the case, and the issue raised, (for example, the defendant as not 'knowingly' in possession). Such evidence is more likely to be relevant where the issue is possession with intent to supply. See also R v Griffiths [1998] Crim. LR., CA.

(3) A similar direction should be given where the issue is intent to supply and documents such as notes and jottings are admitted in evidence. See R v Lovelock [1997] 2 Crim. L. R. 821.

ARCHBOLD 2010: 2.71 to 76.

BLACKSTONE 2010: F1.13.

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UPDATED 11 MAY 2009

3.18 AFFRAY (1)

"The defendant is charged with 'affray', which means that he engaged in violent behaviour in circumstances that caused terror to one or more people of reasonable firmness. (It is not necessary that this should have occurred in a public place (2)). In order for the defendant to be convicted of this offence, the prosecution have to prove the following matters beyond reasonable doubt.

Firstly, that there was unlawful fighting or violence used by one, or more than one, person against others (3) (or that there was an unlawful display of force by more than one person, even though there was no actual violence (4)).

Secondly, that the unlawful and violent behaviour (or unlawful display of force) was such that a bystander of reasonable firmness and courage might reasonably be expected to be terrified."(5)

NOTE.

(1) In England and Wales the common law offence of affray has been replaced with a statutory offence of affray by s.3 of the Public Order Act, 1986. The above definition and the following notes are based on the discussion of the pre-1986 common law position in the 42nd (1985) edition of Archbold, and the authorities cited below, to which reference should be made for a fuller discussion of this topic.
(2) An affray need not occur in a public place to be an offence. See Button v DPP (1966) 50 Cr.App.R. 36. Depending upon the circumstances of the case it may not be necessary to refer to this.
(3) Whilst the most common forms of affray are where two men, or two groups of men, fight each other in circumstances which terrify one or more bystanders, one person can be guilty of affray if he attacks someone who either does not retaliate, or merely retaliates in self-defence. Taylor v DPP (1973) 57 Cr.App.R. 915.
(4) A display of force by one or more persons without actual violence may be an affray. R v Summers (1972) 56 Cr.App.R. 604; Taylor v DPP. However, in Taylor v DPP at p. 923 Lord Hailsham LC observed that "..the extent to which 'the display of force ..without actual violence' constitutes the offence of affray even where the element of terror is present is still not wholly clear".
(5) Where bystanders are present it is not necessary to prove by their evidence that they were terrified. It is enough if the circumstances are such that ordinary people would (not 'might') have been terrified, per Lord Reid in Taylor v DPP at p. 928.
(6) "Affray" is derived from the French "affrayer", to put in terror. Button v DPP. In Taylor v DPP Lord Hailsham LC stated at p. 924

> "To my mind, it is essential that the degree of violence required to constitute the offence of affray must be such as to be calculated to terrify a person of reasonably firm character. This should not be watered down."

Thus, it is arguable that the phrase '*might* be frightened or intimidated' may be too weak. The violence must be such as to be *calculated* to terrify (that is, might reasonably be expected to terrify), not simply such as *might* terrify a person of the requisite degree of firmness".

ARCHBOLD: 42nd (1985) edition, 25-20 to 24.

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UPDATED 21 MAY 2009

4.1 CIRCUMSTANTIAL EVIDENCE

"The prosecution case depends (to a great extent) on circumstantial evidence rather than direct evidence. Direct evidence can take many forms, for example if there was a video recording of the defendant committing the crime, that would be direct evidence. Circumstantial evidence on the other hand simply means that the prosecution relies upon evidence of various circumstances relating to the crime which, when taken together, establish the guilt of the defendant because the only conclusion to be drawn from that evidence is that it was the defendant who committed the crime.

It is not necessary for the evidence to provide an answer to all of the questions raised in a case. You may think that it would be an unusual case indeed in which a jury can say "We now know everything there is to know about this case", nor is it necessary that each fact upon which the prosecution relies, taken individually, prove that the defendant is guilty. You must decide whether all of the evidence has proved the case against him. A very distinguished judge expressed the test in this way over one hundred years ago.(1)

> "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence- there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of."

However, circumstantial evidence must be examined with great care for a number of reasons. First of all, such evidence could be fabricated. Secondly, to see whether or not there exists one or more circumstances which are not merely neutral in character but are inconsistent with any other conclusion than that the defendant is guilty. This is particularly important because of the tendency of the human mind to look for (and often to slightly distort) facts in order to establish a proposition, whereas a single circumstance which is inconsistent with the defendant's guilt is more important than all the others because it destroys the conclusion of guilt on the part of the defendant."(2)

NOTE.
(1) Pollock CB in R v Exall [1866] 4 F & F 922 at 929.
(2) See R v McGreevy [1972] NI 125 where the leading authorities on circumstantial evidence are reviewed by Lowry LCJ and Lord Morris of Borth-y-Gest. Where there are circumstances which could be inconsistent with the guilt of the defendant, the trial judge must be careful to sum up the evidence in such a way as to bring this home to the jury with sufficient emphasis. See Hutton LCJ in R v Anderson pp 36-37 (NICA 21/9/1995 unreported).

ARCHBOLD 2010: 10-3.

BLACKSTONE 2010: F1.16

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NEW 7 JANUARY 2009

4.7 BAD CHARACTER (1)

"Members of the jury. In the old days juries were usually not told about a defendant's previous convictions. This was because of the fear that such information would prejudice the jury against the defendant and that they would give it more weight than it deserved. Today such evidence is often admitted because a jury understandably want to know whether what the defendant is alleged to have done is out of character, or whether he has behaved in a similar way before. Of course a defendant's previous convictions are only background. They do not tell you whether he has committed the offence with which he is charged in this case. What really matters is the evidence that you have heard in relation to that offence. So be careful not to be unfairly prejudiced against the defendant by what you have heard about his previous convictions"

The allegation against the defendant is that (summarise the allegations against the defendant). (2)

The defendant says that (summarise the defendant's response).

In order to convict the defendant you must be satisfied beyond reasonable doubt that he (allegation). When considering that you may consider it relevant that the defendant has been convicted of (e.g. using violence on previous occasions) in the manner that you have heard. The prosecution say that the defendant has a tendency to (e.g. use violence) and that this supports the prosecution case that he (used violence) on this occasion. The defendant says that whatever he did in the past, these allegations are untrue.

It is for you to decide the extent to which, if at all, the defendant's previous convictions assist you in deciding whether the defendant committed this offence."

NOTE.

(1) In R v Campbell [2007] 2 Cr. App. R. 28 Lord Phillips CJ questioned the relevance of much of the guidance contained in the previous specimen direction on bad character formulated by the English JSB. The first paragraph of this direction reproduces the direction suggested in Campbell at [44] although Lord Philips emphasised this was not an attempt to provide a specimen direction to be used in future cases. Nevertheless it has the virtue of providing a useful starting point for a direction to the jury as it contains a concise yet comprehensive statement of the relevant directions.

(2) "In the rare case where evidence of bad character has been admitted because the question of whether the defendant has a propensity to be untruthful is an important matter in issue between the defendant and the prosecution, the direction should always explain the relevance of the evidence with reference to the particular facts which make that matter important." Lord Phillips in Campbell at [39].

ARCHBOLD 2010: 13-68.
BLACKSTONE 2010: F12.14

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NEW 17 OCTOBER 2011

4.7A BAD CHARACTER - EVIDENCE ADMITTED TO CORRECT A FALSE IMPRESSION.

In the old days juries were usually not told about a defendant's previous convictions. This was because of the fear that such information would prejudice the jury against the defendant and that they would give it more weight than it deserved. Today such evidence is often admitted because a jury understandably want to know whether what the defendant is alleged to have done is out of character.

You have heard that the defendant has previous convictions for (specify the nature of the convictions). You have only heard about them because when giving evidence the defendant said that he was not the sort of person who would commit the (offence(s)) with which he is charged. If that assertion had not been challenged you might have been left with a false or misleading impression about his character, and that is why you have heard about his previous convictions. When he was asked to explain his evidence the defendant said he was not trying to mislead you (and repeated that he was not the sort of person who would commit the offence(s)). You must consider whether the defendant was trying to give you a false impression about his character in order to present himself in a better light than he deserved.

If you consider that he did not attempt, or may not have attempted, to present himself in a better light, then those convictions are irrelevant and you should ignore them completely. On the other hand, if you are satisfied beyond reasonable doubt that the defendant did attempt to present himself in a better light, then you are entitled to bear that attempt in mind when considering the evidence about (the offence(s)) with which he is charged. What you should not do is to approach the evidence on the basis that the previous conviction(s) make it more likely that the defendant committed the offence(s) with which he is now charged, because they are only relevant to whether or not he tried to give a false impression of himself. (1)

(1) See Girvan LJ in R v Hamilton [2011] NICA 56 at [24]; R v Renda [2006] 2 All ER 552, and R v D, P & U [2011] EWCA Crim 1474 at [3] per Hughes LJ.

ARCHBOLD 2011: 13-74

BLACKSTONE 2012: F12.40

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NEW 12 JANUARY 2015

4.7B CROSS-ADMISSIBILITY OF BAD CHARACTER EVIDENCE

[It is essential that proper consideration is given to this issue at an early stage in the trial. The judge, in any event, will need to address, during the admissibility of bad character evidence application, whether a direction of this type would be sufficient to reduce or eliminate any adverse effect on the fairness of the proceedings (see Article 6(3) of the Criminal Justice (Evidence) (NI) Order 2004).

Care should be taken to distinguish, if necessary, the use of bad character evidence to establish propensity and its use to negative coincidence or to rebut a defence. To prove a propensity, a jury would have to be sure of the evidence of one complainant before they can conclude that the defendant had a propensity to commit the kind of offence alleged by another complainant. It is therefore going to be a rare case when a propensity direction will be used in a case when a jury is faced with the allegations of two or more complainants of equal merit. Although it would not be wrong to mix a propensity direction with the direction below, it could very well lead to confusion, and would not be recommended. This could arise if one complainant is supported by strong independent corroborative evidence, in which case the jury could be invited to consider this complaint first, and if sure of the defendant's guilt, then the usual direction as to propensity to support the prosecution's case in relation to the second complaint could be given.

Although this direction deals with a case involving sexual offences, the same principles will apply to other criminal activity which involves similar or identical conduct against multiple victims, eg robbery.] **(1)**

"I now want to speak to you about how the evidence given by one of the children can be capable of supporting the prosecution's case on the other.

As you know the defendant denies any sexual impropriety towards both of the children. He says his contact with each child was normal and entirely innocent.

The prosecution has pointed out, on the other hand, that there are similarities in the defendant's behaviour as described by both of them. The similarities are [*set out the similarities*] and the prosecution suggests to you that that is no coincidence. The fact that two children have made similar complaints about the defendant's behaviour makes it more likely that each of those complaints is true. In that sense the evidence of each of the two complainants is capable of lending support to the other. But that argument only stands if the complaints are independent of each other. So you must consider if they are independent of each other.

Are the complaints independent of one another?

The first point to note is that the prosecution's case only has force if the complaints made are truly independent of one another.

If one complainant has influenced the other, or [*a named third party*] has influenced one or both, either deliberately or unconsciously, to make complaints about the

defendant, then it would not be surprising that they went on to make those complaints. In that event not only would the prosecution argument fall away but it might also cast doubt upon the reliability of the accusations that are made as a whole.

You must consider the evidence concerning the independence of the complaints carefully. The history would appear to include – [*set out the evidence relating to contact between the complainants and relevant third parties, and the history of the complaints*]

[S*ome comment should be made about the apparent independence, or lack of independence of the complaints, together with prosecution counsel's and defence counsel's arguments on the issue, then add* - No doubt you will consider those submissions carefully. You must consider all the evidence on this issue and make your own decision. Only if you are sure that a realistic possibility of influence of contamination, conscious or unconscious, by one child of the other, [or by *a named third party*] has/have been excluded, can you treat the evidence of one complaint as supportive of the other in the sense I have described.

To what extent may one complainant support the other?

You need to assess the value of the evidence. If you have decided they are independent, it follows that the closer the similarities between the complaints the less likely it is that they can be explained away as coincidence. It is for you to decide the degree to which the evidence of one child assists you to assess the evidence of the others. It may lend powerful support or it may not. You must make that judgment.

In the final analysis whether or not the defendant abused one child will largely depend on the reliability of the evidence of that child, and whether that child can be believed. The evidence from the other complainant can only be used to support the evidence of that child and cannot be conclusive as to guilt.

Note:
(1) See R –v- Hutchinson [2014] NICA 75

ARCHBOLD (2015) 13.63a

BLACKSTONE (2015) F12.58

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REVISED 7 JANUARY 2009

4.8 DEFENDANT'S CHARACTER – GOOD (1)

"You have heard that the defendant is a man/young man of good character [not just in the sense that he has no convictions recorded against him, but witnesses have spoken of his positive qualities.] Of course, good character cannot by itself provide a defence to a criminal charge; but when deciding whether the prosecution has proved the charge(s) against him beyond reasonable doubt you should take it into account in his favour in the following way/s:" (2)

(If a defendant does not give evidence **and** he has not made any statement to the police, or other authority or person which is admitted in evidence, ignore (A) below)

First Limb

(A) (If a defendant has given evidence). "In the first place, the defendant has given evidence, and as with any man of good character it supports his credibility. This means that it is a factor which you should take into account when deciding whether you believe his evidence."

(If a defendant has not given evidence, but has e.g. made a statement to the police, or has answered questions in interview (3)). "In the first place, although the defendant has chosen not to give evidence before you, he did, as you know give (an explanation to the police). In considering (that explanation) and what weight you should attach to it you should bear in mind that it was made by a person of good character, and take that into account when deciding whether you can believe it."

Second Limb

(B) "In the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit this crime now."

"I have said that these are matters to which you should have regard in the defendant's favour. It is for you to decide what weight you should give to them in this case. In doing this you are entitled to take into account everything you have heard about the defendant, including his age, (...) and (...)." (Obviously the importance of good character will vary from case to case, and becomes stronger if the defendant is a person of unblemished character of mature years, or has a positively good character. At this stage it may be appropriate to point out to the jury the benefit of this to a defendant, with words such as:) "Having regard to what you know about this defendant you may think that he is entitled to ask you to give (considerable) weight to his good character when deciding whether the prosecution has proved his guilt beyond reasonable doubt."(4)

(C) "Although the defendant has no previous convictions and might therefore be thought to be a person of good character for the reasons I have just explained, the defendant has admitted that he has (you have heard that the defendant) has been guilty of serious criminal behaviour similar to the offence(s) with which he is now charged. You must not assume that the defendant is guilty of the offences

with which he is now charged because he has admitted (you have heard that) he has been guilty of that serious criminal behaviour. That serious criminal behaviour is not relevant at all to the likelihood of his having committed the offences with which he is now charged, it is relevant only as to whether you can believe him. It is for you to decide the extent to which, if at all, his serious criminal behaviour helps you about that."(5)

NOTE.

(1) The primary rule is that a person of previous good character must be given a full direction covering both credibility and propensity. Where there are no further facts to complicate the position, such a direction is mandatory and should be unqualified. R v Gray [2004] 2 Cr. App. R. at 515 [56] where the principles governing when, and in what terms, a good character direction should be given are restated.

(2) Wherever there is any doubt as to whether both limbs of the character direction apply, or wherever it is thought that it may be necessary in the particular circumstances to modify a 'character direction', it is desirable to discuss the matter with counsel before their closing speeches. See R v Durbin [1995] 2 Cr. App. R. 84 where guidelines were laid down for a number of situations in which a modified direction should be given.

(3) The defendant is entitled to such a direction only where the out of court statement is a mixed' statement, that is it contains an admission of fact which is capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt. R v Aziz [1995] 2 Cr. App. R .478, R v Garrod 1997] Crim. L. R. 445.

(4) R v Vye, Wyse and Stephenson 97 Cr.App.R.134.

(5) If the defendant has admitted or such serious criminal behaviour has been proved, the judge may qualify or, if he considers that it would be an insult to commonsense to give direction in accordance with R v Vye, omit completely such directions. Lord Steyn in R v Aziz. If a Vye direction is to be qualified, the above adaptation of the bad character direction may be appropriate. When bad character evidence has been admitted it is no longer appropriate to give a good character direction.

ARCHBOLD 2010: 4-406 to 409.

BLACKSTONE 2010: F13.3 to 14.

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REVISED 21 MAY 2009

4.9 DEFENDANT'S CONFESSION (1)

EITHER:

1. The prosecution say that the defendant made a confession on which you may rely. The defendant says that he did not make the confession and that it has been fabricated. (*Summarise the parties' evidence and/or arguments on the matter.*) You must consider whether the defendant did in fact make the confession. If you are satisfied beyond reasonable doubt that he did make it and that it was true, you may take it into account when considering your verdict. If, however, you are not satisfied beyond reasonable doubt that he did, you must disregard it completely.

OR:

2. The prosecution say that the defendant made a confession on which you can rely. The defendant says that although he made the confession it was obtained by [oppression][something said or done which was likely to render it unreliable] [and that it is untrue]. (*Summarise the parties' evidence and/or arguments on the matter.*) If you are satisfied beyond reasonable doubt that the confession was not obtained in this way, and that it was true, you may take it into account when considering your verdict. If, however, you think that the confession was or might have been obtained by [something said or done which was likely to render it unreliable] you must disregard it completely. (2)

OR:

3. The prosecution say that the defendant made a confession on which you can rely. The defendant says that although he made the confession voluntarily, it was not true. (*Summarise the parties' evidence and/or arguments on the matter.*) If you are satisfied beyond reasonable doubt that it was true, you may take it into account when considering your verdict. If, however, you think that the confession was or may have been untrue, you must disregard it completely.

NOTE.

(1) This direction has been re-written in the light of R v Mushtaq [2005] 2 Cr. App.R. p. 485 HL.

(2) In R v Mushtaq at [55] Lord Rodger said: '…there is often no dispute that, if what the defendant said happened did indeed happen, the confession should be excluded under…[Art. 74(2)] of PACE…..In such a clear-cut case it may well be enough for the judge to indicate that, if the jury consider that the confession was, or may have been, obtained in the way described by the defendant, they must disregard it.' Lord Rodger also pointed out (at [58]) that in the instant case, where the officers denied any wrongdoing and the defendant did not give evidence, there was actually no evidence of oppression or of other improper means before the jury, so that no direction on the matter was necessary.

(3) As to the definition of 'confession', see Art. 70 of the Police and Criminal Evidence (NI) Order, 1989.

(4) Where the confession is by a **mentally handicapped defendant**, see Art. 75 of the 1989 Order and the test laid down in R v Campbell [1995] 1 Cr.App.R. 552 and R v Bailey [1995] 2 Cr.App.R. 262. See also R v Qayyum [2007] Crim. L. R. 160. In R v Bailey the court said: 'What is required of a judge in summing up in such cases…is a full and proper statement of the mentally handicapped defendant's case against the confessions being accepted by the jury as being accurate.' If the circumstances stated there apply, **add**:

'In this case you should approach the evidence of the defendant's confession with special caution before convicting him on it. I say this for three reasons. Firstly, because the case against him depends [wholly/substantially] on that confession. Secondly, because he is a mentally handicapped person. Thirdly, because no independent person was present when he made it – that is, someone other than the investigator or other person to whom it was made.'

(5) See R v O'Brien, Hall and Sherwood [2000] Crim. L.R. 676, in which the Court of Appeal considered the admissibility of expert evidence in relation to allegedly false confessions, and the appropriate direction to the jury where such evidence was admitted.

(6) For confessions said to have been made by a defendant's adoption of an accusation or statement made in his presence, and a suggested direction to the jury in such a case, see **Archbold 2010 15-409** *et seq***, Blackstone 2009 F17.49** *et seq*, the cases there cited, and R v Collins and Keep [2004] 2 Cr.App.R. p. 199 and R v Osborne [2005], *The Times*, 17 November.

ARCHBOLD 2010: 15-385

BLACKSTONE 2010: F.17.49.

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REVISED 21 MAY 2009

4.10 DEFENDANT'S EVIDENCE: EFFECT ON OTHER DEFENDANTS

Where a defendant gives evidence in his own defence which damages a co-defendant's case or tends to implicate a co-defendant in the commission of the offence(s) for which he is being tried, the jury should be warned about that evidence in some such terms as the following:

"The defendant Y has given evidence which (damaged X's case)(tended to show that the defendant X was involved in some way in the commission of the offence(s) which you are trying). Examine that evidence with particular care for Y, in saying what he did, may have been more concerned about protecting himself than about speaking the truth. Bear in mind that risk before deciding whether or not you feel able to accept what Y has told you about X."

NOTE.

(1) Even where it is obvious that the co-defendant is an accomplice there is no rule of practice and certainly none of law which obliges a judge to give the jury the warning about corroboration which must be given when an accomplice gives evidence for the prosecution. Such a warning may nevertheless be given at the discretion of the judge if he thinks it should be, having regard to the nature and severity of the attack made upon a co-defendant. R v Knowlden and Knowlden 77 Cr.App.R.94; R v Hare and Halliday (NICA 1/6/1995 (unreported)).

(2) Where co-defendants give evidence against each other, the jury should be warned to: (1) consider the case for and against each defendant separately; (2) decide the case of each on all the evidence including that of the co-defendant; (3) bear in mind when considering the evidence of each co-defendant that he may have an interest to serve; and (4) assess the evidence of the co-defendant in the same way as any other witness in the case. No principle can be derived from R v Burrow [2000] Crim.L.R. 48 that a warning should not be given where co-defendants give evidence against each other. That case turned on its own facts: R v WJ and MJ, unreported, CACD, 9 June 2003.

ARCHBOLD 2010: 4-404n

BLACKSTONE 2010: F5.11.

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UPDATED 21 MAY 2009

4.11 DEFENDANT'S LIES TO POLICE OR OTHERS

"The defendant has admitted that he lied to the police. You must consider why he lied." ("The prosecution has alleged that the defendant lied to the police. If you are satisfied beyond reasonable doubt that he did, you must consider why he lied.")

"The mere fact that a defendant tells a lie is not in itself evidence of guilt.

A defendant may lie for many reasons, for example: to bolster a true defence, to protect someone else, to conceal disgraceful conduct of his, short of the commission of the offence, or out of panic or confusion. If you think that there is, or may be, some innocent explanation for his lies then you should take no notice of them. But if you are satisfied beyond reasonable doubt that he did not lie for some such or other innocent reason, then his lie(s) can (be evidence going to prove guilt) (support the prosecution case)."(1)

NOTE.

(1) R v Lucas 73 Cr. App. R.159. Such directions need to be modified to fit the particular case. The point is that the jury should be alerted to the effect that, before they can treat lies as tending before the proof of guilt of the offence charged, they must be satisfied beyond reasonable doubt that there is not some possible explanation for the lies which destroys their potentially probative effect. R v Richens 98 Cr. App. R. 43.

(2) R v Burge and Pegg [1996] 1 Cr.App.R.163. A "Lucas" direction is not required in every case, even if the jury might conclude that the defendant has told lies. It may be more misleading than helpful to give it in every case and care and discrimination should be exercised in deciding whether to give one. R v McMoran [1999] NIJB 50. It is not, for example, required in the run of the mill case in which the defence case is contradicted by the evidence of prosecution witnesses in such a way as to make it necessary for the prosecution to say that in so far as the two sides are in conflict, the defendant's account is untrue and indeed deliberately and knowingly false. Such a warning should only be given where there was a danger that the jury might regard their conclusion that the defendant had lied as probative of his guilt. (Nevertheless, if the police or prosecuting counsel suggested to the defendant or implied that the lie was important, it may be safer to give this direction). It will usually be required in the following cases.

(a) Where the defence is one of alibi.

(b) Where the judge suggests that the jury should look for corroboration or support of one piece of evidence from other evidence, and draws attention to lies told or allegedly told by the defendant.

(c) Where the prosecution seeks to show that something said in or out of court in relation to a separate and distinct issue was a lie, and to rely upon that lie as evidence of the guilt of the defendant.

(d) Even though the prosecution has not adopted (c), the judge reasonably envisages that there is a real danger that the jury might do so. In this case in particular, it might be wise for the judge, before the closing speeches and summing up, to consider with counsel whether such a direction was required and if so how it should be formulated.

ARCHBOLD 2010: 4-402 to 4-402a

BLACKSTONE 2010: F1.18 to 1.20.

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UPDATED 21 MAY 2009

4.12 DEFENDANT' STATEMENT, PARTLY SELF-SERVING: DEFENDANT NOT GIVING EVIDENCE

This will only be relevant when Article 4.(1) of the Criminal Evidence (NI) Order 1988 (as amended) applies and the defendant need not give evidence. In such circumstances this direction should be preceded by Direction 4.23 B.

"The defendant's statement to the police contains both incriminating parts and (excuses) (explanations). You must consider the whole of the statement in deciding where the truth lies. You may feel that the incriminating parts are likely to be true - for why else would he have made them? You may feel that there is less weight to be attached to his (excuses) (explanations). They were not made on oath, have not been repeated on oath and have not been tested by cross-examination."

NOTE.

(1) See Duncan 73 Cr.App.R.359, approved by the House of Lords in Sharp 86 Cr.App.R.274.

(2) The direction "You may feel that the incriminating parts are likely to be true -for why else would he have made them?" should be modified if there is an issue as to whether the statement was made or made freely.

ARCHBOLD 2010:15-402

BLACKSTONE 2010: F17.61 to 66

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REVISED 26 MAY 2009

4.13 HOSTILE WITNESS

1. X was called by the [prosecution/defence] but gave evidence which did not support the [prosecution's/defence's] case. The [prosecution/defence] was therefore allowed to treat him as a 'hostile' witness – a witness who had in effect 'changed sides' – and to cross-examine him to show that he had given an account on a previous occasion which was inconsistent with the account which he gave in court. [*Identify the inconsistency.*]

2. You may take into account any inconsistency [and X's explanation for it] when considering X's reliability as a witness. It is for you to judge the extent and importance of any inconsistency. If you conclude that there is a serious conflict between the account he gave in court and his previous account, you may think that you should reject his evidence altogether and not rely on anything said by him either on the previous occasion or when giving evidence.(1-3)

3. However if, after careful consideration, you are sure that you can rely on [all or part of] what he said on the previous occasion or when giving evidence, you may take it into consideration in reaching your verdict[s].

NOTE.

1. Under Art. 23 of the Criminal Justice (NI) Order 2004, the previous inconsistent statement becomes evidence of the truth of its contents. If it was made in a document which becomes an exhibit, it must not accompany the jury when they retire to consider their verdict, unless the court considers it appropriate or all the parties agree that it should: see Art. 26.

2. The provisions of Art.25 (additional requirement for admissibility of multiple hearsay) and 27 (capability to make statement) may also have to be considered on the facts of an individual case.

3. If the jury is permitted to take a copy of a previous inconsistent statement with them when they retire, a further direction will be necessary.

"You will have with you in the jury room the written statement made by X because [either "the prosecution and defence have agreed that you should" or "because it may help you to place in context the inconsistencies between that statement and what X has said in court"] When considering whether you should reject X's evidence altogether or can rely upon it I must warn you not to give too much significance to the contents of that statement simply because you have it in front of you at the expense of considering what X said in evidence and his explanation for the inconsistencies."

See R v Hulme [2007] 1 Cr.App.R at p. 341.

ARCHBOLD 2010: 8-94 to 8-101.
BLACKSTONE 2010: F6.33 to 35.

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UPDATED 26 MAY 2009

4.14 IDENTIFICATION, APPROACH TO EVIDENCE OF

"This is a trial where the case against the defendant depends wholly or to a large extent on the correctness of one or more identifications of him which the defence allege to be mistaken. I must therefore warn you of the special need for caution before convicting the defendant in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification. There have been wrongful convictions (1) in the past as a result of such mistakes. An apparently convincing witness can be mistaken. So can a number of apparently convincing witnesses.

Examine carefully the circumstances in which the identification by each witness was made. How long did he have the person he says was the defendant under observation? At what distance? In what light? Did anything interfere with that observation? Had the witness ever seen the person he observed before? If so, how often? If only occasionally, had he any special reason for remembering him? How long was it between the original observation and the identification to the police? Is there any marked difference between the description given by the witness to the police when he was first seen by them and the appearance of the defendant?

I must remind you of the following specific weaknesses which appeared in the identification evidence ...".

See R v Turnbull 63 Cr.App.R.132.

NOTE.

(1) The importance of the rules laid down in R v Turnbull was emphasised by Lord Lane, CJ, in Clifton (14.1.86) [1986] Crim.L.R.399. As Lord Woolf CJ observed in Barry George v R [2002] EWCA Crim 1923 "We fully recognise the dangers involved of wrong convictions occurring in identification cases. This is the reason for the requirement that in all identification cases clear Turnbull directions must be given."

The basic principle is the special need for caution when the issue turns on evidence of visual identification. The summing-up in such cases must not only contain a warning but expose to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case. Turnbull is intended, primarily, to deal with the "ghastly risk" in cases of fleeting encounters; see per Lord Widgery CJ in R v Oakwell 66 Cr.App.R.174. The rule is equally applicable to police witnesses. R v Reid 90 Cr.App.R.121.

(2) When the quality of the identifying evidence is poor the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. The identification evidence can be poor, even though given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions. Where, however, the quality is such that the jury can safely be left to assess its value, even though there is no other evidence to support it, the trial judge is entitled (if so minded) to direct the jury that an identification by one witness

can constitute support for the identification by another, provided that he warns them in clear terms that even a number of honest witnesses can all be mistaken. R v Weeder 71 Cr.App.R.228 and R v Breslin 80 Cr.App.R.226. The judge should identify the evidence he regards as capable of supporting the evidence of identification.

(3) In R v Etienne (The Times 16.2.90) the Court was not at all sure that previous sightings of the suspect could render the identification more reliable if the identification was, on any view, an identification amounting to no more than a fleeting glimpse recognition. The Court was left with a lurking doubt as to the safety of the conviction.

(4) Such a direction is not required in every case eg where the identification is not challenged or where it is not regarded by the judge as requiring supportive evidence. See R v Deeble (unreported) (3.5.83; 6461B82) and R v Penman 82 Cr.App.R.44.

(5) Where identification involves recognition, remind the jury that mistakes in recognition, even of close friends and relatives, are sometimes made.

(6) Care should be taken in directing about support to be derived from the jury's rejection of an alibi. There may be many reasons for putting forward a false alibi. Alibi witnesses may be genuinely mistaken as to dates etc. Only if satisfied that the sole reason for the fabrication was to deceive them, may the jury find support for poor identification evidence. The mere fact that the defendant has lied about his whereabouts does not of itself prove that he was where the identifying witness said he was.

(7) R v Galbraith 73 Cr.App.R.124 was not intended to affect in any way the Turnbull guidelines as to the withdrawal of a case dependant upon poor identifying evidence. R v Fisher (unreported) (8.7.83; 5923C82).

(8) As to the obligation to hold an identity parade where a suspect has already been identified (for example, in the street) by the witness, but the suspect disputes the offence, see R v Forbes [2001] 1 Cr.App.R.31

ARCHBOLD 2010: 14-2 to 26

BLACKSTONE 2010: F.19 to 26

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UPDATED 26 MAY 2009

4.14A IDENTIFICATION BY DNA.

"Members of the jury, if you accept the scientific evidence called by the prosecution, this indicates that there are probably only (four or five) males in Northern Ireland from whom that semen stain could have come. The defendant is one of them. If that is the position, you have to consider whether, on all the evidence, you are satisfied beyond reasonable doubt that it was the defendant who left that semen stain, or whether it is possible that it was one of that other small group of men who share the same DNA characteristics."(1)

NOTE.

In R v Doheny and Adams [1997] 1 Cr.App.R. 369 at 375, Phillips LJ gave the following guidance on summing-up in a DNA case.

"The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict, and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and that which conflicts with the conclusion that the defendant was responsible for the crime stain. In so far as the random occurrence ratio is concerned, a direction along these lines may be appropriate, although any direction must always be tailored to the facts of the particular case."

The above specimen direction is based upon his suggested direction.

ARCHBOLD 2010: 14. 58

BLACKSTONE 2010: F18 31 to 32

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UPDATED 26 MAY 2009

4.14B IDENTIFICATION BY VOICE

In R v Hersey [1998] Crim L.R. 281 and R v Gummerson and Steadman [1999] Crim L.R. 680, The Court of Appeal held that in cases of identification by voice, the judge should direct the jury by the careful application of a suitably adapted Turnbull direction (see Direction 14). For an example of such a case see R v Mullan [1980] NI 212 at pp.213-214.

In R v Roberts [2000] Crim L.R. 183, the Court of Appeal referred to academic research indicating that voice identification was more difficult than visual identification, and concluding that the warning given to jurors should be even more stringent than that given in relation to visual identification.

It is clear from these authorities that it is not necessary to hold a voice identification parade to render admissible evidence of identification by voice.

In giving the judgment of the Court of Appeal in R v O'Doherty [2002] NI 263, [2003] 1 Cr.App.R.5 Nicholson LJ emphasised the need for a suitable warning to the jury in cases where evidence was given purporting to be identification of the voice of the defendant.

"We are satisfied that if the jury is entitled to engage in this exercise in identification on which expert evidence is admissible, as we have held, there should be a specific warning given to the jurors of the dangers of relying on their own untrained ears, when they do not have the training or equipment of an auditory phonetician or the training or equipment of an acoustic phonetician, in conditions which may be far from ideal, in circumstances in which they are asked to compare the voice of one person, the defendant, with the voice on tape, in conditions in which they may have been listening to the defendant giving his evidence and concentrating on what he was saying, not comparing it with the voice on the tape at that time and in circumstances in which they may have a subconscious bias because the defendant is in the dock. We do not seek to lay down precise guidelines as to the appropriate warning. Each case will be governed by its own set of circumstances. But the authorities to which we have referred emphasise the need to give a specific warning to the jurors themselves."

ARCHBOLD 2010:14.52 to 52c.

BLACKSTONE 2010: F 18.30

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UPDATED 26 MAY 2009

4. 14C IDENTIFICATION FROM A VIDEO RECORDING AND/OR A STILL PHOTOGRAPH

In R –v- Richard Kieran Stevens [2002] NI 361 the Court of Appeal reviewed the authorities relating to the need for a Turnbull direction in cases where the jury has before it a video tape and/or still photographs. The following propositions can be extracted from the judgment of Carswell LCJ.

1. In most, if not all, cases the judge should give the jury a warning on the dangers of identification from photographic evidence.

2. "… the type of direction to be given depends on the circumstances. The trial judge should ordinarily give a general warning that mistakes in identification are always possible, even with photographs available, because they are capable of giving a misleading impression. The better the photographs and the more opportunity the jury may have to view the perpetrator on a film, the less detailed and emphatic such a warning need be. If there are factors such as a change in appearance or the need to pick out a person from some feature other than facial appearance, as in the heli-tele pictures in R –v- Murphy and Maguire [1990] NI 306B, a more detailed warning on Turnbull lines would ordinarily be required. In the absence of such factors, we consider that in principle such a direction would be superfluous."

In R –v- Stevens the court considered R –v- Dodson and Williams (1984) 79 Cr.App. R. 220. In that case the following passage from the trial judge's summing up was described as "admirable" by the Court of Appeal, and may provide a useful example of how to direct the jury's attention to the sort of issues which may arise.

"Now considering those two issues, the same issue for each defendant, you are considering the question involving the identification of the human face. Now that is not a precise consideration. It is not like comparing, for instance, the index numbers of two cars or two sets of fingerprints or something of that sort. And there are dangers where witnesses have an opportunity of seeing, for instance, someone raiding a bank and they see a suspect some time later and they may genuinely think that that suspect is the same person. You are not here asked to assess the reliability of such a witness. You are making the identification in each case yourselves. You will bear in mind the dangers and difficulties of identification by one human being, in your case twelve human beings, of the features of another. Bear in mind that photographs may give different impressions of the same person. There are photographs that you may know really do not resemble the person that you know them to be of at all. You probably have all taken photographs or seen photographs of some member of your family and you say: "That does not look like him at all. What a rotten photograph." There are photographs that catch a characteristic, an attitude, a gesture, an expression absolutely right and you say: 'There is old so and so, I have often seen him looking like that'. It may not be a very good portrait of the man or the woman, but it catches something about the look of his or her face. Well, members of the jury, I cautioned you more than once at the outset of this case against jumping to conclusions, and you clearly have resisted that temptation, if temptation it ever was. You have the photographs of the two people who were undoubtedly in the bank – you may be

satisfied of that – and your concern is with the man who had the handgun, said to be Williams, and the man who had no gun at all, said to be Dodson. You also have some descriptions of those two characters given by the people inside the bank, and you should put those together with the photographs, because they relate to the two people in the bank, whoever they were, and I will remind you shortly of such evidence as there is about that."

ARCHBOLD 2010:14-45 to 50.

BLACKSTONE 2010: F18.29

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REVISED 26 MAY 2009

4.15 PREVIOUS CONSISTENT STATEMENT (1)

1. In this case you have heard both evidence from X, and a statement [said to have been] made by X on a previous occasion. [When appropriate "When considering what weight to give to the previous statement you should bear in mind that it comes from the same person who is making the allegation in the witness box and not from an independent source" (3)]

2.
(*Only when Art. 24(2) applies:*)
You have heard that X made a statement about this on a previous occasion because it had been suggested to X that his evidence in court had been made up. The previous statement is evidence you may take into account, if you think fit, when considering X's reliability as a witness, and when considering your verdict[s].

(*Only when Art. 24(3) applies:*)
You have heard that X made a statement about this on a previous occasion because X had used the previous statement to refresh his memory when giving evidence, and had then been asked questions about it in cross-examination. The previous statement is evidence you may take into account, if you think fit, when considering your verdict[s].

(*Only when Art. 24 (4) and (5) apply:*)
You have heard that X made a statement about this on a previous occasion because X said he believed that [he made] the previous statement [and that it] was true, and because it [identified/described] a [person/object/place]. If you accept X's evidence that he believed this, the previous statement is evidence you may take into account, if you think fit, when considering your verdict[s].

(*Only when Art. 24 (4) and (6) apply:*)
You have heard that X made a statement about this on a previous occasion because X said he believed that [he made] the previous statement [and that it] was true, and was made when matters which he did not now remember were fresh in his memory. If you accept X's evidence in this regard, the previous statement is evidence you may take into account, if you think fit, when considering your verdict[s]. (*If the issue arises:*) When deciding whether or not to take it into account, consider whether or not X could reasonably be expected to remember now the matters referred to in his previous statement.

(Only when Art. 24 (4) and (7) apply:)
You have heard that X made a statement about this on a previous occasion because X said he believed that [he made] the previous statement [and that it] was true, and because it consisted of a complaint of [part of] the offence now being tried, made by X [to Y] shortly afterwards. If you accept the evidence of X [and Y] about the complaint, the complaint itself is evidence you may take into account, if you think fit, when considering X's reliability as a witness and when considering your verdict[s]. (*If the issue(s) arise(s)*:) When deciding whether or not to take the complaint into account, consider whether or not it was [made as soon as could reasonably be

expected] [made as a result of a threat or promise] [drawn from X rather than being volunteered by him].

NOTE.

(1). These directions, which are based on Article 24 of the Criminal Justice (Evidence) (NI) Order 2004, supersede the previous direction which dealt only with recent complaints of sexual offences. Under Article. 24 a written or oral complaint of *any* offence is now admissible as evidence of the matters complained of if the conditions set out in Article 24(4) and (7) are met, this being a decision of law for the judge. The new provisions are not limited to sexual cases. Moreover, other kinds of previous consistent statements are also available as evidence of the truth of their contents if any of the conditions set out in Article 24(2), (3), (4) (5) or (6) are met. These provisions are free standing and provide their own criteria. A statement is now admitted to prove the truth of the matter stated therein. R v O [2006] 2 Cr.App.R. 27.

(2). If the previous statement was made in a document which becomes an exhibit it must not accompany the jury when they retire to consider their verdict unless the court considers it appropriate or all the parties agree that it should: see Article 26 and R v Hulme [2007] 1 Cr.App.R. at p. 341, and Specimen Direction 4.13.

(3). R v AA [2007] EWCA Crim at [16].

ARCHBOLD 2010:11-36 to 40.

BLACKSTONE 2010: F6.21.

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NEW 27 FEBRUARY 2013

4.16 INCONSISTENT STATEMENT

[X has admitted that he][You may be satisfied that X] made a previous statement which was inconsistent with the evidence he gave in court. [*Identify the evidence*]. **What he said previously is also evidence in this case. You will have to consider where the truth lies and you should do this by considering all the evidence that you have heard in this case.**

You may take into account any inconsistency [and X's explanation for it] when considering X's reliability as a witness. **[*At this point it may be helpful to set out briefly the respective cases of the prosecution and the defence in relation to the inconsistency*]** It is for you to judge the **degree of the inconsistency, and the** extent of the importance of any inconsistency. Is the inconsistency fundamental to the issue you are considering? If so is there an explanation for it (such as fading memory)? If not how does the inconsistency affect the reliability of either statement? (*If appropriate:*) If you conclude that **X** has been inconsistent on an important matter you should treat both his accounts with considerable care.

If however, you are sure that one of X's accounts is true [in whole or in part], then it is evidence you may consider when deciding upon your verdict[s]. **If you consider that X's [sworn evidence to you][previous statement] (*i.e. the evidence exculpatory of the defendant*) was true, or may have been true, then clearly this would raise a reasonable doubt in your minds about the defendant's guilt, and he/she would be entitled to a not guilty verdict on the count[s](*as appropriate)*.**

NOTE.

1. *Billingham* [2009] EWCA Crim 19; *Mawhinney* [2012] NICA 27 (paras. 25 & 26)

ARCHBOLD 2013:11-35.

BLACKSTONE 2013: F6.57.

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REVISED 28 MAY 2009

4.17 STATEMENT TO POLICE BY CO-DEFENDANT, NOT EVIDENCE AGAINST DEFENDANT

"A statement implicating defendant A made by defendant B (or by any other person) out of court and not in the presence of defendant A is not evidence against defendant A. Disregard it when you consider the case against defendant A. (However, what defendant B has told you from the witness box is evidence against defendant A.")

Where there is more than one defendant and each defendant has made a written statement, tell the jury when considering the evidence against each defendant, to consider only the statement made by that defendant.

NOTE.

(1) Even if A and B are together when co-defendant B makes a statement implicating A, B's statement may only be taken into account as evidence against A if A says or does something which constitutes a positive acceptance or acknowledgement of the truth of B's statement insofar as it affects A. The fact that A remains silent when confronted with that statement cannot be an acceptance by him of the truth of B's statement.

(2) In a joint trial in the rare circumstances where the prosecution has to prove A's guilt before the jury can convict B, and A has made an out of court confession of his guilt, the prosecution may rely upon A's confession as part of the case against B. R v Hayter [2005] 2 Cr.App.R. 3 per Lord Brown, p.68 at [86]. In such circumstances the following may provide a useful starting point.

"The prosecution concede that before you can convict B of (offence) you have to be satisfied beyond reasonable doubt that A was guilty of (offence). The prosecution case is that A confessed to that offence. If you are satisfied that A's confession is true and therefore that A committed that offence, then you may take A's guilt into account when deciding whether B is guilty. However, you may only take into account against B that A confessed to his own guilt. You cannot take into account, and so must completely disregard, (anything else that) A said which might be thought to incriminate B."

ARCHBOLD 2010: 9-85 and 15-388.

BLACKSTONE 2010: F17.50

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UPDATED 28 MAY 2009

4.18 EXPERT EVIDENCE

"In this case you have heard the evidence of (X), who has been called as an expert on behalf of the prosecution/defendant. Expert evidence is permitted in a criminal trial to provide you with scientific (or e.g. accountancy) information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to one particular aspect of the evidence, namely (...).

(In a case where e.g. handwriting (2) is in issue or there might otherwise be a danger of the jury coming to its own 'scientific' conclusions, add: "With regard to this particular aspect of the evidence you are not experts; and it would be quite wrong for you as Jurors to attempt to (compare specimens of handwriting/perform any tests/experiments of your own) and to come to any conclusions on the basis of your own observations. However you are entitled to come to a conclusion based on the whole of the evidence which you have heard, and that of course includes the expert evidence.")

A witness called as an expert is entitled to express an opinion in respect of his findings/the matters which are put to him; and you are entitled and would no doubt wish to have regard to this evidence and to the opinion(s) expressed by the expert(s) when coming to your own conclusions about this aspect of the case.

You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert(s), you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of an expert.

(In a case where two or more experts have given conflicting evidence: "It is for you to decide whose evidence, and whose opinions you accept, if any").

You should remember that this evidence relates only to part of the case, and that whilst it may be of assistance to you in reaching a verdict, you must reach your verdict having considered the whole of the evidence."

NOTE.

(1) In relation to a matter such as handwriting, it is desirable to give the jury (in addition to any directions in the summing up) an early direction when the matter arises in evidence that they should not embark upon a comparison exercise on their own. They may e.g. be told, if the issue is likely to be of importance, that they must decide it on the evidence only (which may legitimately take the form of agreed facts, the evidence of the maker or alleged maker of the document, the evidence of a person proved to be familiar with the maker's handwriting, expert evidence and circumstantial evidence); but they must not decide it on the basis of any comparison carried out privately by them.

(2) See R v Stockwell 97 Cr.App.R. 266, R v Fitzpatrick [1999] Crim. L.R. 832, R v O'Brien and others (2000) *The Times*, 16 February (in relation to confessions); R v

Buckley (1999) *The Times*, 12 May [1999] 6 *Archbold News* 4 (in relation to fingerprints), and R v Dallagher [2002] Crim. LR 821 (in relation to ear-prints, and the test of admissibility of expert evidence in a novel area).

ARCHBOLD 2010: 10-64 TO 68a.

BLACKSTONE 2010: F10.3 to 6.

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REVISED 15 DECEMBER 2008

4.19 DEFENDANT'S FAILURE TO MENTION FACTS WHEN QUESTIONED OR CHARGED

Article 3 Criminal Evidence (NI) Order 1988 (as amended)

(1) "When arrested, and at the beginning of each of his interview(s), the defendant was cautioned. He was told that he need not say anything, and it was therefore his right to remain silent. However, he was also told that it may harm his defence if he did not mention something when questioned which he later relied on in court; and that anything he did say may be given in evidence.

(2) As part of his defence the defendant has relied upon ... (specify precisely the fact(s) to which this direction applies). (The prosecution case is/he admits) that he did not mention the fact (s) when he was questioned under caution about the offence(s).

(3) The prosecution case is that, in the circumstances when he was questioned and having regard to the warning he had been given by the caution, he could reasonably have been expected to mention (it/them) at that stage, and so you may decide that the reason why it was not mentioned was because (e.g. it has since been invented/tailored to fit the prosecution case/he believed that it would not stand up to scrutiny at that time).

((If you are satisfied beyond reasonable doubt that the defendant did fail to mention (…) (when he was questioned), then it is for you to decide whether, in the circumstances, it was something which he could reasonably have been expected to mention at that time. If it was not, then that is the end of the matter and you should not hold the defendant's failure to mention the fact(s) against him in any way.

(4) If it was something which the defendant could reasonably have been expected to mention at that time, the law is that you may draw such inferences-that is conclusions-as appear proper from his failure to mention it at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so. Failure to mention (it/them) at that time cannot, on its own, prove the defendant's guilt, but depending upon the circumstances, you may hold that failure against him when deciding whether he is guilty. (Here set out any circumstances relevant to the particular case, for example the age of the defendant, the nature of and/or reasons for the advice given, and the complexity or otherwise of the facts upon which the defendant has relied at the trial(1)).

You should hold the defendant's failure to mention the fact(s) during interview against him only if you are satisfied beyond reasonable doubt that his failure could sensibly be attributed to his having no answer to the questions being put to him, or none that could stand up to questioning or investigation by the police at that time. (2) You must not find him guilty only, or mainly, because he failed to mention the fact(s) (3). But you may take it into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about (the/these) fact(s) is true.

(He has given no explanation for his failure, and none has been suggested for which there is any support in the evidence (4)

Consider (his explanation e.g. that), and consider what the prosecution say about that.

(5) (Where legal advice to remain silent is relied upon, substitute the following for paragraph (4))

"If it was something which the defendant could reasonably have been expected to mention at that time, the law is that you may draw such inferences-that is conclusions-as appear proper from his failure to mention it at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so.

The defendant says that the reason why he did answer (any/those) questions was because his solicitor advised him not to answer (any/those) questions and he followed that advice. This is obviously an important consideration, but it does not automatically prevent you from holding his silence against him, because the defendant had the choice whether to accept his solicitor's advice or to reject it, and he had been warned that any failure to mention facts which he relied upon at his trial might harm his defence.

You should also take into account (here set out any circumstances relevant to the particular case, for example the age of the defendant, the nature of and/or reasons for the advice given, and the complexity or otherwise of the facts upon which the defendant has relied at the trial (1)).

If he genuinely and reasonably relied on the legal advice to remain silent, you should not draw any conclusion against him.

If you are satisfied beyond reasonable doubt that the true explanation for the defendant's failure to mention the fact(s) is because he had no answer, or no satisfactory answer, (5) to the questions being put to him, and that the advice of the solicitor did no more than provide the defendant with a convenient shield behind which to hide, then, and only then, can you hold his failure to mention the fact(s) against him and draw such conclusions as you think proper from that failure. However, you must not find him guilty only, or mainly, because he failed to mention the fact(s). But you may take it into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about (the/these) facts is true."

NOTE.

1. See Lord Bingham C.J. in R v Argent [1997] 2 Cr. App. R. 27 as to examples of the types of circumstances that may be relevant.
2. The words "sensibly be attributed to" were used by Lord Taylor CJ in R v Cowan [1996] 1 Cr. App. R 1 and by the European Court of Human Rights at para. 61 of Condron v UK [2000] Crim. L.R. 676.
3. The words "only or mainly" are included to reflect the views of the European Court in Condron.
4. There must be evidence. In R v Cowan Lord Taylor CJ said "it cannot be

proper for a defence advocate to give the jury reasons for his client's silence at trial in the absence of evidence to support such reasons".

5. See Auld LJ in R v Hoare & Pierce [2005] 1 Cr. App. R.22 at pp.372-73.

ARCHBOLD 2010: 15-414 to 432.

BLACKSTONE 2010: F19.4 to 15

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4.20 DEFENDANT'S FAILURE OR REFUSAL TO ACCOUNT FOR OBJECTS, SUBSTANCES OR MARKS

Article 5 Criminal Evidence (NI) Order 1988 (as amended)

"The prosecution case is that:

(1) When the police officer arrested the defendant at ... the defendant had (on him/in or on his clothing or shoes/in his possession/at that place) a ….

(2) The officer reasonably believed that (e.g. he may have used it to commit the burglary for which he is now being tried).

(3) The officer told him of his belief, asked him to account for the presence of the object/substance/mark) and told him that if he failed or refused to account for (the object/substance/mark) then a court may treat his failure or refusal as supporting any relevant evidence against him.

(4) The defendant (did not answer him/refused to do so).

(5) If you find those facts to be proved beyond reasonable doubt, the law is that you may draw such inferences-that is conclusions- as appear proper from that failure/refusal to account for its presence at that time. You do not have to hold that against him. It is for you to decide whether it is proper to do so. That failure/refusal to account for the presence of (the object etc) cannot, on its own, prove the defendant's guilt, but, depending upon the circumstances, you may hold it against him when deciding whether he is guilty. You should hold that failure/refusal against him only if you are satisfied beyond reasonable doubt that it could be sensibly attributed to his having (no innocent account to give at that time/no account that he believed would stand up to scrutiny at that time/invented his account since that time (1) /tailored his account to fit the prosecution case). You must not find him guilty only, or mainly, because of his failure/refusal to account for the presence of the (object/substance/mark). But you may take that failure into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about the (object/substance/mark) is true.

(6) (He has given no explanation for his failure/refusal, and none has been suggested on his behalf for which there is any support in the evidence). (Consider his explanation (his counsel's submission based on the evidence of ...) for his failure/refusal, and consider what the prosecution say about that)."

(7) (Where legal advice not to give an account is relied upon, substitute the following for paragraph (6).

"If it was something for which the defendant could have been expected to give an account at that time, the law is that you may draw such inferences-that is conclusions- as appear proper from his failure to give that account at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so.

The defendant says that the reason why he did not give that account was because his solicitor advised him to remain silent and not give an account and he followed that

advice. This is obviously an important consideration, but it does not automatically prevent you from holding his failure to give an account against him, because the defendant had the choice whether to accept his solicitor's advice or to reject it, and he had been warned that any failure to give an account might harm his defence.

If you are satisfied beyond reasonable doubt that the true explanation for the defendant's failure to give an account is because he had no account, or no satisfactory account, to give at that time (no account that he believed would stand up to scrutiny at that time/invented his account/tailored his account to fit the prosecution case); and that the advice of the solicitor did no more than provide the defendant with a convenient shield behind which to hide, then, and only then, can you hold his failure to account for (the object) against him and draw such conclusions as you think proper from that failure. However, you must not find him guilty only, or mainly, because he failed to give an account. But you may take that failure into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about (the/these) facts is true."

NOTE:

This direction is modelled on Direction 4.19, many of the notes to which apply equally to this direction.

If it is decided that no direction under Article 5 is appropriate, an adapted version of Direction 4. 23 should be given. R v McGarry [1999] 1 Cr. App. R .377

(1) R v Campbell, NI Court of Appeal 29/3/1993 (unreported).

ARCHBOLD 2010: 15-433 to 34

BLACKSTONE 2010: F 19.16 to 18

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REVISED 15 DECEMBER 2008

4.21 DEFENDANT'S FAILURE OR REFUSAL TO ACCOUNT FOR PRESENCE AT A PARTICULAR PLACE

Article 6 Criminal Evidence (NI) Order 1988 (as amended)

"The prosecution case is that:

(1) The arresting police officer found the defendant (e.g. outside the warehouse while it was being burgled).

(2) The officer reasonably believed that the defendant was or might have been there at that time (e.g. as a lookout).

(3) The officer told the defendant of his belief, and asked him to account for his presence there.

(4) The defendant failed/refused to do so.

(5) If you find those facts to be proved beyond reasonable doubt, the law is that you may draw such inferences as appear proper from that failure/refusal to account for his presence at that time. You do not have to have to hold that against him. It is for you to decide whether it is proper to do so. That failure/refusal to account for his presence cannot, on its own, prove the defendant's guilt, but, depending upon the circumstances, you may hold it against him when deciding whether he is guilty. You should hold that failure/refusal against him only if you are satisfied beyond reasonable doubt that it could be sensibly attributed to his having (no innocent account to give at that time/no account that he believed would stand up to scrutiny at that time/invented his account since that time/tailored his account to fit the prosecution case). You must not find him guilty only, or mainly, because of his failure/refusal to account for his presence. But you may take it into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about his presence is true."

(6) (He has given no explanation for his failure/refusal, and none has been suggested on his behalf for which there is any support in the evidence)Consider his explanation/his counsel's submission based on the evidence of (…) for his failure/refusal, and consider what the prosecution say about that.

(7) (Where legal advice not to give an account is relied upon, substitute the following for paragraph (6).

"If it was an account for his presence which the defendant could have been expected to give at that time, the law is that you may draw such inferences-that is conclusions-as appear proper from his failure to give that account at that time. You do not have to hold it against him. It is for you to decide whether it is proper to do so.

The defendant says that the reason why he did not give that account was because his solicitor advised him to remain silent and not give an account and he followed that advice. This is obviously an important consideration, but it does not automatically

prevent you from holding his failure to give an account for his presence against him, because the defendant had the choice whether to accept his solicitor's advice or to reject it, and he had been warned that any failure to give an account for his presence might harm his defence.

If you are satisfied beyond reasonable doubt that the true explanation for the defendant's failure to give an account for his presence is because he had no account, or no satisfactory account, to give for his presence at that time (no account that he believed would stand up to scrutiny at that time/invented his account/tailored his account to fit the prosecution case); and that the advice of the solicitor did no more than provide the defendant with a convenient shield behind which to hide, then, and only then, can you hold his failure to account for his presence against him and draw such conclusions as you think proper from that failure. However, you must not find him guilty only, or mainly, because he failed to account for his presence. But you may take that failure into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about (the/these) facts is true."

NOTE.

This Direction is modelled on Direction 4.19, many of the notes to which apply equally to this Direction**.**

If it is decided that no Direction under Article 6 is appropriate, an adapted version of Direction 4.23 should be given. R v McGarry [1999] 1 Cr. App. R. 377.

ARCHBOLD 2010: 15-435 to 437.

BLACKSTONE 2010: F 19.16 to 18.

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REVISED 18 JANUARY 2010

4.22 DEFENDANT'S TOTAL OR PARTIAL SILENCE AT TRIAL

Article 4 Criminal Evidence (NI) Order 1988 (as amended)

Directions to jury where defendant has not given evidence or refused to answer questions when sworn.

(When the defendant was questioned by the police he admitted a number of matters which the prosecution say incriminate him in the charge(s). (Identify the relevant matters). (However, the defendant's explanation to the police about those matters was (specify his explanation), and he denied the offence(s)). Those explanations and denials are relied upon by him and you must consider the whole of what he said to the police in deciding where the truth lies.

You may feel that the incriminating parts of what he said are likely to be true because why else would he have said them? You may feel that less significance should be given to his explanations and denials because they were not made on oath, have not been repeated on oath and have not been tested by cross-examination, as they would have been had the defendant given evidence."(1))

"The defendant has not given evidence. That is his right. He is entitled not to give evidence, to remain silent and to make the prosecution prove his guilt beyond reasonable doubt. Two matters arise from his not giving evidence. The first is that you try this case according to the evidence, and you will appreciate that the defendant has not given evidence at this trial to undermine, contradict or explain the evidence put before you by the prosecution. The second is, as you heard him being told, the law is that you may draw such inferences as appear proper from his failure to do so. It is for you to decide whether it is proper to hold the defendant's failure to give evidence (to answer certain questions having decided to give evidence (2)) against him when deciding whether he is guilty.

(There is evidence before you on the basis of which the defendant's counsel invites you not to hold it against the defendant that he has not given evidence before you namely ...(3)

If you think that because of this evidence you should not hold it against the defendant that he has not given evidence, do not do so. But if you are satisfied beyond reasonable doubt that the evidence he relies on presents no adequate explanation for his absence from the witness box then you may hold his failure to give evidence against him.)

What proper inferences-in other words what conclusions-can you draw from the defendant's decision not to give evidence before you/refusal to answer certain questions when he was giving evidence? You may think that the defendant would have gone into the witness box to give you an explanation for or an answer to the case against him. However, you may draw such a conclusion against him only if you think it is a fair and proper conclusion, and you are satisfied about two things: first, that the prosecution's case is such that it clearly calls for an answer by him; and second, that the only sensible explanation for his silence is that he has no answer, or none that

would bear examination. (4) It is for you to decide whether it is fair to do so.

However, you should not find the defendant guilty only, or mainly, because he did not give evidence (answer those questions when he did give evidence.) But you may take it into account as some additional support for the prosecution's case and when deciding whether his (evidence/case) about the/these charge(s) is true.

(You may also treat his failure to give evidence as or as capable of amounting to corroboration).

NOTE:

(1) Where the defendant has said things, whether in interview to the police or elsewhere, which contain both incriminating and exculpatory material, it may be convenient to incorporate this passage in the directions to the jury at this stage.

(2) Where the defendant has been sworn and refuses to give evidence, or refuses to answer relevant questions having been sworn, then the jury should be directed that the defendant, having decided to give evidence, could not refuse to answer relevant questions. R v Bingham, R v Cooke [1999] NI 118.

(3) The words in brackets should only be used in cases where there is **evidence.**

(4) In R v Matthew O'Donnell [2010] NICA 1 the Court of Appeal directed judges in this jurisdiction to apply R v Cowan and others [1996] 1 Cr. App. R. 1. The judge should, if he considers it necessary, discuss with counsel the form of his direction in the absence of the jury.

(5) If it is contended that the physical or mental condition of the accused makes it undesirable for him to give evidence that question has to be decided by the court (see Article 4(1)(b) of the Order). If the court decides in his favour, then the jury must be directed not to draw any adverse inference.

ARCHBOLD 2010: 4-398 to 399.

BLACKSTONE 2010: F 19.23 to 26.

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UPDATED 28 MAY 2009

4.23 DEFENDANT'S RIGHT TO SILENCE WHERE JUDGE DIRECTS JURY THAT NO ADVERSE INFERENCE SHOULD BE DRAWN.

A. Failure to answer questions (1).

"The defendant said nothing when he was asked questions about these matters. I direct you that in this case you must not hold his silence/refusal to answer questions against him. This means that you cannot take this into account when considering whether the prosecution has proved the case against him."

B. Failure to give evidence.

"The defendant has not given evidence in this case. That means that there is no evidence from him to undermine, contradict or explain the prosecution case and that is something you are entitled to take into account when considering the prosecution evidence. However, in this case, I direct you not to hold his failure to give evidence against him. This means that when considering whether the prosecution has proved its case against him beyond reasonable doubt, his failure to give evidence cannot provide any additional support for the prosecution case."

NOTE:

(1) Where the trial judge decides that, as a matter of law, the requirements of Article 3 of the Criminal Evidence (NI) Order 1988 (as amended) have not been satisfied and it is not open to the jury to draw an adverse inference under Article 3(2)(c), the trial judge cannot merely remain silent, but must positively direct the jury not to draw an adverse inference. R v McGarry [1999] 1 Cr.App.R. 377.

ARCHBOLD 2010: 15-428.

BLACKSTONE 2010: F19.15.

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UPDATED 13 OCTOBER 2008

4.24: DEFENDANT'S EVIDENCE AT VARIANCE WITH HIS DEFENCE STATEMENT.

The defendant is obliged by law to furnish the prosecution and the court with a statement which sets out in general terms the nature of his defence, (1) indicating various (2) matters on which he takes issue with the prosecution, and why he does so. This has to be done after the prosecution has served on the defendant the statements of the witnesses upon which the prosecution relies as proving the charge(s) against the defendant.

Part of the prosecution case is that you should not believe the defendant's evidence because he has given evidence which is significantly different from the case set out in his defence statement (2) in the following respects (set out the difference(s).(3))

If you are satisfied beyond reasonable doubt that the defendant's evidence is significantly different from the case set out in his defence statement, (4) then you may draw from the difference(s) such conclusions as appear proper to you. You do not have to hold the difference(s) against him. It is entirely for you to decide whether or not you should so, and if you do decide to hold the difference(s) against him, what importance you attach to (it /them).

Making (an) inconsistent statement(s) in his Defence Statement cannot, on its own, prove the defendant's guilt, but, depending upon the circumstances, you may hold that inconsistency against him when deciding whether or not the prosecution have proved his guilt. However, you should not find the defendant guilty only, or mainly, because you are satisfied beyond reasonable doubt that he has now put forward a significantly different version. It is only one of the matters you can take into account when considering whether the prosecution has proved his guilt. But you may take it into account as some additional support for the prosecution's case and when deciding whether his evidence about these inconsistencies is true." (5)

NOTES.

(1) S. 6A of the Criminal Investigations and Procedure Act (as amended) only applies to investigations begun after 15 July 2005. If the investigation began on or after 1 January 1998 the original (and more limited) requirements of s. 6 applied. For these see McGrory & ors [2005] NICC 37; [2006] NIJB 219. Where the investigation began between 1 January 1998 and before 15 July 2005 reference should be made to the 2nd ed of Specimen Direction 4.24.

(2) The jury is only entitled to see the Defence Statement if it has been put in evidence. King & Foster [2005] NICA 20. If it has not been put in evidence and its contents referred to, the judge must ensure that the jury are given a complete picture of the case made by the Defendant in his Defence Statement. King & Foster at [24].

(3) Where the Defence Statement does not cover allegations made by a defendant the judge has a duty to draw attention to that. King & Foster at [24].

(4) The judge should be careful to identify those parts of the Defence Statement that are relevant, and explain why they are relevant, giving the jury a specific direction as to how they are to approach any inconsistency. Wheeler (2000) 164 JP 565.

(5) If the defendant has admitted lying in his Defence Statement, or it is alleged that he lied, a Lucas direction may be necessary, in which case this direction may require modification.

ARCHBOLD 2010: 12-57 to 12-62.

BLACKSTONE 2010: D9.18 to 24.

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NEW 13 OCTOBER 2008

4.25 DELAY (1)

"The charges in this case relate to matters that are alleged to have occurred a long time ago. It is essential when considering whether the prosecution has proved beyond a reasonable doubt that the defendant is guilty of (this/these) charge(s) you take into account that because of the passage of time the defendant may now be prejudiced in defending himself for a number of reasons.

1. Why did these matters not come to light sooner? You have heard the explanation given by the complainant why she/he did not tell anybody about these matters before. What do you think of that explanation? Is it one that you consider understandable (in the light of her/his age, family circumstances etc) at the time, or does it cause you to doubt the truthfulness or reliability of the complainant's explanation, and so of her/his evidence as a whole?

2. You should make due allowance for the way in which the passage of time may have created difficulties for the defendant in remembering things that may have been important when responding to the allegations. You will be aware from your own experience that memories can fade with the passage of time, and that recollections may change, or may become confused, as to what did or did not happen at a particular time.

3. You should also bear in mind that the passage of time since these events are alleged to have occurred may have created particular difficulty for the defendant because it is no longer possible for him to rely on evidence he says would have been available to disprove these allegations if they had been made sooner. (If there are allegations that particular witnesses, e.g. a colleague, a family doctor or a teacher has died, or the physical layout of premises has changed, these should be referred to.)

If you consider that some, or all, of these matters have placed the defendant at a real disadvantage in defending himself on (this/these) charge(s), then you should take them into account in his favour when deciding whether the prosecution had proved his guilt beyond reasonable doubt.

NOTE:

(1) Whilst the Court of Appeal in England has cautioned against prescribing a particular formula in which juries are to be directed on the importance of delay, it remains the position that in many such cases, and in particular cases where very old allegations of sexual abuse are made, it is necessary to point out to the jury the possible prejudice to the defendant brought about by the passage of time. In R v M [2000] 1 Cr. App. R. 49 Rose LJ said:

"It is apparent that the judgment in Percival was directed to the summing-up in that particular case. We find in the judgment no attempt by the Court to lay down principles of general application in relation to how judges should sum up in cases of delay and we accordingly would wish to discourage the attempts being made, with apparently increasing frequency, in applications and appeals to this Court to rely on

Percival as affording some sort of blueprint for summings-up in cases of delay. It affords no such blueprint. Indeed in this area, as in so many others, prescription by this Court as to the precise terms of a summing-up is best avoided. Trial judges should tailor their directions to the circumstances of the particular case. In a case where there have been many years of delay between the alleged offences and trial, a clear warning will usually be desirable as to the impact which this may have had on the memories of witnesses and as to the difficulties which may have resulted for the defence. The precise terms of that warning and its relationship to the burden and standard or proof can be left to the good sense of trial judges with appropriate help and guidance from the Judicial Studies Board."

ARCHBOLD 2010: 4-71 and 4-403a

BLACKSTONE 2010: D 3.61 to 62.

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UPDATED 28 MAY 2009

5.1 ALIBI

"The defence is one of alibi. The defendant says that he was not at the scene of the crime when it was committed. As the prosecution has to prove his guilt beyond reasonable doubt, he does not have to prove that he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. And even if you conclude that the alibi was false, that does not of itself entitle you to convict the defendant. The prosecution must still satisfy you beyond reasonable doubt of his guilt. An alibi is sometimes invented to bolster a genuine defence."(3)

NOTE.

(1) As to false alibis in identification cases see Specimen Direction 4.14 "Identification", note (6).

(2) Be sure to spell out, as in this Specimen Direction, that the prosecution must disprove the alibi. Do this, even in a short summing-up, in addition to the general direction on the burden of proof. R v Preece 96 Cr.App.R.264.

(3) R v Lesley [1996], Cr.App.R. 39.

ARCHBOLD 2010: 4-402 to 402a

BLACKSTONE 2010: F1.19.

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UPDATED 29 MAY 2009

5.2 AUTOMATISM

"If because of (the concussion) (the anaesthesia) (etc) the defendant's state of mind was such that, at the time of the (act in question), his ability to exercise voluntary control was totally destroyed, he is not guilty of the offence. The defence has raised this issue for you to consider, but the defendant does not have to prove that this was his condition, it is for the prosecution to prove beyond reasonable doubt that it was not."

NOTE.

(1) "…the defence of automatism requires that there was a total destruction of voluntary control on the defendant's part. Impaired, reduced or partial control is not enough." Attorney General's Reference (No 2 of 1992) 97 Cr. App. R .429 at 434.

(2) Malfunctioning of the mind caused by a disease cannot found a defence of automatism. Temporary impairment of the mind, resulting from an external factor, may found the defence e.g. concussion from a blow, therapeutic anaesthesia but not self-induced by consumption of alcohol/or drugs (see below). R v Sullivan 77 Cr.App.R.176.

(3) The evidential burden is on the defence and it is for the judge to decide whether the medical evidence supports a disease or an "external factor". (If the former, the jury may require a direction as to the defence of insanity).

(4) The prosecution must disprove automatism.

(5) Malfunctioning of the mind which does not amount in law to insanity or automatism and does not cause total loss of control is not a defence. R v Isitt [1977] 67 Cr.App.R.44.

(6) Automatism due to self-induced intoxication by alcohol and/or dangerous drugs:

- is not a defence to offences of basic intent, since the conduct of the defendant was reckless and recklessness constituted the necessary mens rea;
- may be raised where the offence is one of specific intent.

(7) Automatism not due to alcohol, but caused by the defendant's action or inaction in relation to drugs (eg failure by a diabetic to eat properly after insulin) may be a defence to offences of basic intent unless the prosecution prove that the defendant's conduct was reckless. For example, in assault cases the prosecution must prove that the defendant realised that his failure was likely to make him aggressive, unpredictable or uncontrolled. R v Bailey 77 Cr.App.R.76.

ARCHBOLD 2010: 17-84 to 96

BLACKSTONE 2010: A3.7

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REVISED 21 JULY 2009

5.3 DIMINISHED RESPONSIBILITY (MURDER)

It is difficult to devise a specimen direction suitable for all cases, but the following is an indication of the sort of direction which could be given, according to the circumstances.

"As I have said, the prosecution must prove to you, beyond reasonable doubt, all the facts which go to make up the defendant's guilt. But where this defence of diminished responsibility is raised, it is for the defence to prove it. However, the defence's task is not as heavy as that for the prosecution in proving guilt. It is enough if the defence satisfies you that its case is (more probable)(more likely than not to be true). If it does that you must find him not guilty of murder and guilty of manslaughter.

There are three elements which the defence must prove before this defence can be established. They must all be present.

(1) At the time of the killing the defendant suffered from an abnormality of mind. The word "mind" includes perception, understanding, judgement and will. An abnormality of mind means a state of mind so different from that of an ordinary human being that a reasonable person (in other words yourselves) would judge it to be abnormal.

(2) The abnormality of mind must arise from either a condition of arrested or retarded development of mind; or any inherent cause; or it must be induced by disease or injury.

So far as these first two elements are concerned, although the medical evidence which you have heard is important, you must consider not only that evidence, but the evidence relating to the killing and the circumstances in which it occurred. You must also consider the defendant's behaviour both before and after the killing, as well as taking into account his medical history.

(3) The abnormality of mind must have substantially impaired the defendant's mental responsibility for what he did, that is his acts (or omissions) which caused the death. Substantially impaired means just that. You must be satisfied that the defendant's abnormality of mind was a real cause of the defendant's conduct. He need not prove that his condition was the sole cause of his conduct, but he must show that it was more than a merely trivial cause, in other words more than something that did not make any real/appreciable difference to his ability to control himself.

You should approach all of these three questions in a broad, common sense way. If the defence has failed to prove anyone of these elements then, provided that the prosecution has proved the ingredients of murder to which I have referred beyond reasonable doubt, then your verdict must be Guilty of murder. If, on the other hand, the defence has satisfied you that it is more likely than not that all three elements of the defence of diminished responsibility were present when the defendant killed X, then your verdict must be, Not guilty of murder, but guilty of manslaughter on the grounds of diminished responsibility.

NOTE.

(1) Medical evidence should be carefully scrutinised in order to see how much of it depends upon hearsay or upon statements made to a doctor by the defendant himself, the truth of which is not admitted by the prosecution. (See R v Bradshaw 82 Cr.App.R.79).

(2) Where more than one basis for manslaughter has to be considered (such as lack of intent, provocation or diminished responsibility), the jury must be directed that in order to return a verdict of manslaughter they must agree (subject to the majority verdict rule) on which basis they arrive at that verdict. R v McCandless [2001] NI at 98, disapproving R v Jones (*Times* 12 February 1999) and R v Gribben [1999] NIJB 30.

(3) It is best to omit references to "insanity" in a direction on diminished responsibility. (R v Adams (unreported) 29.1.85).

(4) Where alcohol or drugs are factors to be considered by the jury, the best approach is that adopted by the judge and approved by the Court of Appeal in R v Fenton 61 Cr.App.R.261. The jury should be directed to disregard what, in their view, was the effect of alcohol or drugs upon the defendant, since abnormality of mind induced by alcohol or drugs is not (generally speaking) due to inherent causes and is not therefore within the section. Then, the jury should consider whether the combined effect of the other matters, which do fall within the section, amounted to such abnormality of mind as substantially impaired the defendant's responsibility within the meaning of "substantial" set out in R v Lloyd 50 Cr.App.R.61. (R v Gittens 79 Cr.App.R.272 and R v Dietschmann (HL [2002] 1 All ER 897). The jury should be directed, e.g.

"Assuming that the defence have established that the defendant was suffering from mental abnormality as described in section 2, the important question is: did that abnormality substantially impair his mental responsibility for his acts in doing the killing? You know that before he carried out the killing the defendant had had a lot to drink. Drink cannot be taken into account as something which contributed to his mental abnormality and to any impairment of mental responsibility arising from that abnormality. But you may take the view that both the defendant's mental abnormality and drink played a part in impairing his mental responsibility for the killing and that he might not have killed if he had not taken drink. If you take that view, then the question for you to decide is this: has the defendant satisfied you that, despite the drink, his mental abnormality substantially impaired his mental responsibility for his fatal acts, or has he failed to satisfy you of that? If he has satisfied you of that, you will find him not guilty of murder but you may find him guilty of manslaughter. If he has not satisfied you of that, the defence of diminished responsibility is not available to him."

(5) Where the defence allege that the defendant suffers from alcohol dependency syndrome, whether or not observable brain damage has occurred, the jury has to be directed to consider whether the defendant's mental responsibility for his actions was substantially impaired as a result of the syndrome. See Lord Judge CJ in R v Stewart *The Times* 19 July 2009, [2009] EWCA Crim 593. In such circumstances the direction will

have to be carefully tailored to the circumstances of the individual case, but the following is offered as a starting point.

“When considering whether the defendant’s mental responsibility for his actions was substantially impaired because of alcohol dependency syndrome you must take into account the amount of alcohol he consumed because of any irresistible craving for, or compulsion to consume, alcohol. You must take into account all the expert evidence, and the evidence about the amount that defendant drank beforehand, as well as the circumstances that led him to drink on that occasion. There are a number of questions you should ask when considering whether the defendant’s craving for alcohol was irresistible. (1) Was the defendant dependent upon alcohol, and if he was how seriously? (2) Was he capable of abstaining from alcohol? (3) If he was capable of abstaining, for how long could he abstain? (4) To what extent was his ability to control his drinking reduced? (5) On this occasion had he decided for some particular reason to get drunk or to drink more than usual?

Has the defendant satisfied you that the amount of alcohol he consumed to satisfy any irresistible craving for alcohol substantially impaired his mental responsibility for his actions in killing the deceased? If he has satisfied you of that, you will find him not guilty of murder but you may find him guilty of manslaughter. If he has not satisfied you of that, the defence of diminished responsibility is not available to him."

ARCHBOLD 2010: 19-66 to 80.

BLACKSTONE 2010: B1.15-22.

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UPDATED 2 MAY 2009

5.4 Duress by Threats or Circumstances

(a) Both forms of the defence arise out of the exertion of force on D to commit the crime concerned – by human threats in the former (R v Hasan [2005] 2 Cr.App.R. 22 (314)), and by extraneous circumstances in the latter form (R v Martin (1989) 88 Cr.App.R. 343). (There is a debate - which we do not attempt to join - as to whether 'duress of circumstances' is a form of, or is to be equated with, necessity. See, e.g., the commentary to R v Quayle and Ors. [2006] Crim. L.R. at p151.)

(b) Although both forms of the defence share some characteristics, there are two limitations which apply only to duress by threats. Briefly, these arise when D: (i) failed to escape from the threats when he could and should have done so; and/or (ii) put himself in a position in which he was likely to be subjected to threats.

(c) In a case of duress by threats in which neither of these limitations is in issue, or in a case of duress of circumstances, only paras 1 to 5(a) of the following direction are relevant. In a case of duress by threats in which either or both of these limitations is in issue, the relevant paras are 1 to 4, 5(b), 6 and/or 7.

(d) This direction has been re-written in the light of R v Hasan (supra) and R v Safi and Ors. [2004] 1 Cr.App.R.14 (157). It does not seek to encompass recent case law rejecting a defence of necessity, e.g., in relation to drug offences – R v Quayle and Ors. [2005] 2 Cr.App.R. 34 (519).

(e) Given the complexity of the law on duress, some judges find it helpful to give the jury a series of written questions, and expand upon this when giving directions.

"1. D raises the defence of duress. He says that he was driven to do what he did by [threats, namely…][the circumstances in which he found himself, namely…]

2. Because it is for the prosecution to prove D's guilt, it is for them to prove that the defence of duress does not apply in this case. It is not for D to prove that it does apply.

3. Firstly, you must ask whether D was driven (*see Note 1*) to act as he did because he genuinely and reasonably (*see Note 2*) believed that if he did not do so [he][a member of his immediate family][a person for whose safety he would reasonably regard himself as responsible] (*see Note 3*) would be killed or seriously injured either immediately or almost immediately. If you are sure that this was not the case the defence of duress does not apply [and D is guilty].

4. However, if you think that this was or may have been the case you must next consider whether a reasonable person, in D's situation and believing what D did, would have been driven to do what D did. By 'a reasonable person' I mean a sober person of reasonable firmness and of D's age and sex (*here refer to any other relevant characteristics – see Note 4*). The reactions of a reasonable person may or may not be the same as those of D himself. If you are sure that a reasonable person would not have been driven to do what D did, the defence of duress does not arise [and D is guilty].

5. *Either*

a) However, if you think that a reasonable person would or might have been driven to do what D did, the defence of duress does apply, and you must find D not guilty.

Or

b) However, if you think that a reasonable person would or might have been driven to do what D did, you will have to consider [one][two] further question[s].

6. The [final][next] question is this: did D fail to take an opportunity to escape from the threats without injury to [himself][the person threatened] by (*here refer to any escape route canvassed during the trial, e.g., going to the police*), which a reasonable person in D's situation would have taken but which D did not take. If you are sure that he had such an opportunity, the defence of duress does not apply [and D is guilty]. However, if you are not sure of this [(*if this is the only limitation relied upon by the prosecution*) the defence of duress does apply and you must find D not guilty][(*or, if the prosecution rely upon both limitations*) there is a final question for you.]

7. Did D voluntarily put himself in a position in which he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence (*see Note 5*)? The prosecution say that he did, by [joining a criminal group the members of which might make such threats][getting involved with crime and thus with other criminals who might make such threats if he let them down or came to owe them money]. But it is for you to decide. If you are sure that D did voluntarily put himself in such a position, the defence of duress does not apply [and D is guilty]. However, if you are not sure that he did so, the defence of duress does apply and you must find D not guilty.

NOTE.

(1) The fact that D's will to resist had been affected by his **voluntary** consumption of drink and/or drugs is irrelevant.
(2) See R v Hasan, para 23.
(3) See R v Hasan, para 21(3).
(4) See R v Bowen [1996] 2 Cr App R 157; also R v Rogers [1999] 9 *Archbold News* 1 and R v Moseley [1999] 7 *Archbold News* 2; R v Sewell [2004] EWCA Crim 2322.
(5) See R v Hasan, paras 37 & 39, disapproving R v Baker [1999] 2 Cr App R 335. It is **not** necessary that D foresaw or ought reasonably to have foreseen that he might be the subject of compulsion **to commit any particular type of criminal offence, or indeed any criminal offence at all.**
(6) For the circumstances in which it is permissible to withdraw the defence of duress from the jury, see R v Harmer [2002] Crim. L.R. 401 and R v Bianco [2002] 1 *Archbold News* 2.

ARCHBOLD 2010: 17-119 to 126.

BLACKSTONE 2010: A3.20 to 29.

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UPDATED 2 JUNE 2009

5.6 INTOXICATION - SELF-INDUCED OR VOLUNTARY

OFFENCES REQUIRING A SPECIFIC INTENT

Refer to the specific intent and continue:

"You must not convict unless you are satisfied beyond reasonable doubt that the defendant, when he did the act, intended ...; in deciding whether he intended ... you must take into account the evidence that he was (drunk)(affected by drugs). If you think that, because he was so (drunk)(affected by drugs), he did not intend or may not have intended ... then you must acquit him. But if you are satisfied beyond reasonable doubt that, despite his (drunkenness)(the effect of the drugs), he intended ... then this part of the case is proved against him. A (drunken)(drugged) intent is still an intent." What is more, it is not a defence for the defendant to say that he would not have behaved in this way had he not been (drunk/affected by drugs) (1 and 2)

OFFENCES NOT REQUIRING SPECIFIC INTENT

Offences requiring "malice" (e.g. Sections 20 and 23 Offences Against the Person Act 1861)

"You must be satisfied beyond reasonable doubt that the defendant, when he did that act, either:

(1) realised that it might cause some injury (not necessarily serious injury or wounding), to some person or

(2) would have realised that that act might cause such injury had he not been (drinking)(taking drugs).

It is not a defence for the defendant to say that he would not have behaved in this way had he not been (drunk)(affected by drugs) or that he failed to foresee the consequences of his act because he was (drunk)(affected by drugs)."

OFFENCES OF BASIC INTENT.

"Caldwell recklessness" (e.g. criminal damage, manslaughter). (After directing the jury about "obvious" or "obvious and serious" risk):

"You must be satisfied beyond reasonable doubt that, when he did the act, either:

(1) he had given no thought to the possibility of there being any such risk (of damage to property)

or

(2) he realised that there was some risk (of damage to property) and still went on to

do the act.

It does not matter that the reason why he gave no thought to the possibility of there being a risk was that he was (drunk) (affected by drugs)"

Where the defendant alleges that he did give thought to the possibility of risk and decided there was none:

"The defendant says that he was not reckless in the sense I have described to you because he did think about the question whether there was any risk and decided there was none. If you think this may be so, it is a good answer to the charge and you must acquit him, unless you are satisfied beyond reasonable doubt that it was only because he was (drunk)(affected by drugs) that he was unaware of the risk. If you are satisfied beyond reasonable doubt that, but for his (drunkenness)(the effect of drugs), he would have been aware of this risk, he was reckless."

NOTE.

(1) For guidance on what to do in a specific intent case when the defendant says that he had consumed a lot of alcohol but knew what he was doing, see R v Groarke [1999] Crim. L. R.669.

(2) In R v McKnight (2000) *The Times* 5 May it was said that this direction need not be given in every specific intent case in which alcohol played a part. It need only be given where the evidence, taken at its highest, justified the conclusion that the defendant might not have been able to form the necessary intention because of drink.

(3) Self-induced intoxication by drink or drugs is no defence. Note R v Allen [1988] Crim L R 698- where the defendant knew that he was drinking alcohol, the drinking of it did not become involuntary merely because he did not know or may not have known the precise nature or strength of the alcohol.

(4) For self-induced intoxication and the defence of honest belief within Article 7(2) of the Criminal Damage (NI) Order 1977, see Jaggard v Dickinson 72 Cr.App.R.33.

(5) Concerning drugs see R v Bailey 77 Cr.App.R.76; R v Hardie 80 Cr.App.R.157. In Hardie the defendant had taken valium and it was stated: "It may well be that the taking of a sedative or soporific drug will, in certain circumstances, be no answer, for example in a case of reckless driving, but if the effect of a drug is merely soporific or sedative the taking of it, even in some excessive quantity, cannot in the ordinary way raise a *conclusive* presumption against the admission of proof of intoxication for the purpose of disproving *mens rea* in ordinary crimes, such as would be the case with alcoholic intoxication or incapacity or automatism resulting from the self-administration of dangerous drugs."

(6) In R v Heard [2007] 1 Cr.App.R. 37 the Court of Appeal held that sexual assault [under Art. 7 of the Sexual Offences (NI) Order 2008] is not a crime of specific intent, and so a drunken intent is still an intent, although a drunken accident is still an accident.

ARCHBOLD 2010: 17-104 to 116.

BLACKSTONE 2010: A3.8 to 12.

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UPDATED 4 JUNE 2009

5.7 PROVOCATION (1)

Before you can convict the defendant of murder the prosecution must satisfy you beyond reasonable doubt that he was not 'provoked' to do as he did. 'Provocation' has a special meaning in this context which I will explain to you in a moment. If the prosecution satisfy you beyond reasonable doubt that he was not provoked to do what he did, he will be guilty of murder. If, on the other hand, you consider either that he was, or may have been, provoked, then the defendant will be not guilty of murder, but guilty of the less serious offence of manslaughter. It is not for the defendant to prove that he was provoked, it is for the prosecution to prove beyond reasonable doubt that he was not provoked.

How then do you decide whether the defendant was, or may have been, provoked to do as he did? There are a number of questions you have to consider when deciding whether the defendant was, or may have been, provoked to kill the deceased.

The first question has two parts to it. The first is did the deceased's conduct, that is the things he did or said, (2) or both, provoke the defendant, or may they have provoked him? If they did, or may have done, then you must consider the second issue, which is did the provocation cause the defendant to suddenly and temporarily lose his self control?

When considering whether the defendant was provoked you must take the defendant as you find him, "warts and all".(3) For example, if the defendant was disabled in some way, to call him a cripple might be very much more hurtful than it would be to someone who is not disabled.

You will also note that it is necessary that the defendant must have been provoked to "suddenly and temporarily" lose his self-control. That is because the law only permits the defence of provocation where the defendant is for the moment not master of his mind. (4) If he had time to think about what has provoked him, to reflect on how he is going to react, and to decide how he is going to react, then the essential element of the defence of provocation of a sudden and temporary loss of self-control does not exist.

When considering whether the defendant's loss of self-control was sudden and temporary you must consider the length of time which had passed since the actions or words of the deceased that are relied upon as provocation took place, and whether the defendant had in fact regained his self-control before he killed the deceased.

If you are satisfied beyond reasonable doubt that the defendant was not provoked, or if he was, or may have been, provoked, that he had regained his self-control before he killed the deceased, then the defendant cannot rely on provocation to reduce his crime to manslaughter, and you should find him guilty of murder, and that is the end of the matter.

If, however, you accept that the defendant was, or may have been, provoked, and that his loss of self-control was, or may have been, sudden and temporary, then you must go on to consider a further question, which is whether everything done and said by the deceased was, or may have been, enough to make a reasonable person do what the

defendant did?

A "reasonable person" in this context means an ordinary person of the defendant's age and sex who is not exceptionally excitable or pugnacious, (5) but is possessed of such powers of self-control that everyone is entitled to expect that people will exercise in society as it is today. In other words a reasonable person is a person of ordinary self-control. (6)

You should bear in mind that society requires ordinary people to exercise reasonable control over their emotions and their tempers. Your views represent the views of society as to what control over their emotions and tempers is to be expected today of people of ordinary self-control.

If you are satisfied beyond reasonable doubt that the provocation was not enough to make a reasonable person do what the defendant did, then you should find him guilty of murder.

If you consider that the provocation was, or may have been, enough to cause a reasonable person to do what the defendant did, then you should find him not guilty of murder, but guilty of manslaughter.

NOTE

(1) The law is now as stated by the majority in the Privy Council in A.G. for Jersey v Holley [2005] 3 All ER 371, [2005] 2 Cr.App.R. 36, which now represents the law of England. See R v James [2006] 1 All ER 759, [2006] 1 Cr.App.R. 29. This specimen direction assumes that all the elements of provocation are in issue, but a direction on provocation requires to be carefully tailored to the circumstances of the individual case.

(2) Although in most cases the things will have been done or said by the deceased, they may also have been done or said by someone else, R v Davies [1975] 1 All ER 890, 60 Cr.App.R. 253, R v Doughty, 83 Cr.App.R. 319.

(3) Lord Nicholls in Holley at [18].

(4) R v Duffy [1949] 1 All ER 932, R v Whitfield 63 Cr.App.R. 39.

(5) Lord Diplock in DPP v Camplin, approved by Lord Nicholls in Holley at [8].

(6) Lord Nicholls in Holley at [7].

ARCHBOLD 2010: 19-50 to 65.

BLACKSTONE 2010: B1.22 to 29

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UPDATED 7 DECEMBER 2008

5.8 SELF-DEFENCE

"As you are aware the defence case is that the assault/killing which is the subject of this charge took place in circumstances in which it was necessary for the defendant to defend himself, that is it happened in **lawful self-defence.**

The law is that if a man assaults/kills another whilst acting in **lawful self-defence** against an attack (or threatened attack) he commits no criminal offence; and so if you find that were the case here the defendant would be entitled to a verdict of 'Not Guilty'. A man acts in lawful self-defence if it is **necessary** for him to defend himself, and the amount of force used in self defence is **reasonable**.

When considering this aspect of the case you must have in mind three important matters of law:

(1) This defence only comes into play when you have come to the conclusion that the defendant was in fact defending himself. That would only be the case if he was being attacked (or threatened with attack(1)) and it was in your judgment **necessary** for him to **defend** himself against that attack (or threatened attack). If the injuries etc inflicted upon B were not caused when the defendant was defending himself, but were caused, for example when he was himself the aggressor and attacking B or he was retaliating against B or acting in revenge against him, then he would not be acting in **self-defence**. (Even if the defendant was the initial aggressor, if the response by the victim was so out of proportion that it was necessary for the defendant to defend himself then the defendant may still be acting in self-defence. (2)

(Also there are circumstances in which a man may be attacked or threatened with attack, but it is not necessary for him to fend off his attacker with force because he could, for example, very easily get away from his attacker (3), or he is a much stronger person than his attacker and could quite easily deal with the situation without resort to violence).

You must therefore consider all the circumstances of this case and decide whether, at the time he inflicted injury on/killed B, it was or may have been **necessary** for him to use some force against him to **defend** himself (or he honestly believed that it was (4)).

(2) If you do decide that the defendant was in fact entitled to defend himself by using some force against B, you must bear in mind that the law provides that he is entitled to be found 'Not Guilty' only if the amount of force used in self-defence was **reasonable**. If the amount of force used was unreasonable it would not be lawful. Force used in self-defence would be unreasonable if it was out of proportion to the nature of the attack or if it was in excess of what was really required of the defendant to defend himself.

It is for you to decide whether this defendant was or may have been acting in lawful self-defence and your judgment about that must depend upon your view

of the facts of this case. In considering these matters you should have regard to all the circumstances of the case; but the sort of considerations which you may well have in mind are these: What was the nature of the attack (by B)? Was a weapon used by the attacker; if so what kind of weapon was it, and how was it used? Was the attacker on his own, or was the defendant being attacked, or in fear of, a concerted attack by two or more persons?

Every case which comes before the courts is different. There are so many possibilities that the law does not attempt to provide a scale of answers to juries. All of these matters
are left to your good sense, experience, knowledge of human nature and, of course, assessment of what actually happened in this case. Having said that when considering whether the defendant's conduct was reasonable do bear in mind that a person who is defending himself cannot be expected in the heat of the moment to weigh precisely (5) the exact amount of defensive action which is necessary; and in this regard the more serious the attack (or threatened attack) upon him the more difficult his situation will be. If, in your judgment the defendant was or may have been in a situation in which he found it necessary to defend himself and he did no more than what he honestly and instinctively thought was necessary to defend himself that would be very strong evidence that the amount of force used by him was reasonable. (5) and (6)

(3) Because the prosecution must prove that the defendant is guilty, it is not for him to prove that he was acting in lawful self-defence; it is **for the prosecution to satisfy you beyond reasonable doubt that he was not.** If you come to the conclusion that the defendant was or may have been acting in lawful self-defence (when he inflicted these injuries upon/killed B) you must find him 'Not Guilty'."

NOTE.

(1) A man is not obliged to wait until he is attacked before acting in self defence and he is entitled to get his blow in first if it is reasonably necessary to do so in self-defence. R v Deana 2 Cr. App. R. 75.

(2) R v Rashford [2006] Crim. L. R. 547.

(3) Failure to retreat when attacked and when it is possible and safe to do so, is not conclusive. It is simply a factor to be taken into account in deciding whether it was necessary for the defendant to use force and whether the force used was reasonable. It is not necessary that the defendant should demonstrate by his actions that he does not want to fight (see Bird 81 Cr.App.R.110). When necessary, an appropriate direction should be given.

(4) Whether the plea is self-defence or defence of another, if the defendant may have been honestly mistaken as to the facts, he must be judged according to his mistaken belief of the facts, whether the mistake was, on an objective view a reasonable mistake or not (Williams 78 Cr.App.R.276; Beckford 85 Cr.App.R.378 and Oatridge 94 Cr.App.R.367). This rule has now received statutory confirmation, see s. 76(4) of the Criminal Justice and Immigration Act, 2008 (CJIA 2008). In Oatridge the court

emphasised that in cases where a defendant was not under actual or threatened attack, but honestly believed that he was, then the jury should be directed to consider whether the degree of force used by the defendant was commensurate with the degree of risk which he believed to be created by the attack under which he believed himself to be.

(5) This rule has been confirmed by s. 76 (7) of CIJA 2008.

(6) A defendant is not entitled to rely, in a defence of self defence, upon a mistake of fact induced by voluntary intoxication, R v Hatton [2006] 1 Cr. App. R. 247. This rule has also been confirmed by s. 76 (5) of CJIA 2008)

ARCHBOLD 2010: 19-41 to 49.

BLACKSTONE 2010: A 3.31-38

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UPDATED 3 JUNE 2009

5.10 DEFENCE AVAILABLE BUT NOT RAISED, MUST BE PUT

Where there is evidence from which a jury could reasonably infer that a defence might be available which has not been relied upon by the defendant or his counsel it must be put before the jury. Sometimes a defence may not have been put by inadvertence; sometimes it may not have been put for tactical reasons, for instance that it would be inconsistent with, or weaken the force of, some other defence specifically and primarily relied upon. But there is no duty to leave to the jury defences which have not been put and which are fanciful or speculative. See, generally, R v Critchley [1982] Crim.L.R. 524, and R v Bonnick 66 Cr.App.R.266.

NOTE.

R v Conway 88 Cr.App.R.159, CA in which, on the facts, it was held that the judge was obliged to put a defence to the jury despite the defendant's counsel's submission to the contrary.

ARCHBOLD 2010: 4-378 to 379.

BLACKSTONE 2010: F3.28

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UPDATED 7 FEBRUARY 2014

6.1 INITIAL DIRECTION - UNANIMOUS VERDICT

Your first duty is to try to arrive at a unanimous verdict that is a verdict on which you all agree, whether the verdict is guilty or not guilty. (What I am saying applies separately to each count and each accused).

[Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but also collectively. That is the strength of the jury system. Each of you takes into the jury room with you your individual experience and wisdom. You do that by giving your views and listening to the views of your colleagues. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached.]**[1]**

If you reach a verdict on which you all agree (on each count and in relation to each accused), then you should return to court as soon as you have done so.

As was explained to you in the jury video at the beginning of your jury service, the law permits me in certain circumstances to accept a verdict of guilty or not guilty which is not unanimous. I can only accept such a verdict when I consider it is appropriate to do so and after you have been deliberating for a certain period of time. If or when the time is reached in which I can accept such a verdict I shall recall you and give you a specific direction in that regard. However, I repeat that your first duty is to try to arrive at a verdict on which you all agree, whether guilty or not guilty.

NOTE.

See R v Deegan [1987] NI 359.

[1] It is suggested that this paragraph might more usefully be included at the part of the Charge relating to the direction on the role of the jury.

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UPDATED 7 FEBRUARY 2014

6.1A MAJORITY VERDICT

At an appropriate time (being not less than 2 hours 15 minutes **[1]**) and after discussion with counsel:

I remind you that your first duty is to return a verdict (be that guilty or not guilty) upon which you are all agreed. If, however, that is not possible I can now accept a majority verdict, that is one upon which at least 10 **[2]** of you are agreed. What I am saying applies separately to each count and each accused.

NOTE.

[1] See R v Rose [1982] 2 All ER at p.539 c/e as to the propriety of accepting majority verdict after two hours and ten minutes at the end of a lengthy and/or complex trial. See also **R v McMoran [1999] NIJB 50** where Carswell LCJ observed ***"We would simply remind Crown Court judges of the risk of over-tiring juries by sending them out in the late afternoon and of the desirability, in a suitable case, of reviewing the time when a jury has been out for a considerable time until a late hour and considering whether they should break overnight."***

[2] This may require modification in the light of **Article 32 of the Juries (NI) Order 1996,** which provides that in almost all cases where there are 12 or 11 jurors, 10 may constitute a majority; and where there are 10 jurors, 9 may constitute a majority. Where only 9 jurors remain, they must be unanimous.

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UPDATED 7 FEBRUARY 2014

6.1B WATSON DIRECTION [1]

I remind you that your duty remains to seek where possible to reach verdicts upon which you are all agreed. Failing that I remind you I can accept majority verdicts as explained to you earlier. If, unhappily, however, (10) **[2]** of you cannot reach agreement you must say so. **[3]**

NOTE.

[1] 87 Cr.App.R.1

[2] This may require modification in the light of **Article 32 of the Juries (NI) Order 1996,** which provides that in almost all cases where there are 12 or 11 jurors, 10 may constitute a majority; and where there are 10 jurors, 9 may constitute a majority. Where only 9 jurors remain, they must be unanimous.

[3] It will be a matter for the individual judge to decide in any given case whether it is necessary or appropriate to give such a direction. It is suggested, however, that if given at all it should not be before the Majority Direction. Indeed a further period of deliberation thereafter may well be appropriate. See discussion of the relevant authorities in R v Greatbanks [2013] NICA 70 and **R –v- Arthur [2013] EWCA Crim. 1852.**

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UPDATED 4 JUNE 2009

6.2 DIRECTION TO THE JURY WHEN IT IS PERMITTED TO SEPARATE AFTER RETIRING TO CONSIDER ITS VERDICT - Article 20(1) of the Juries (NI) Order 1996

(1) "You must decide the case on the evidence and the arguments that you have seen and heard in court, and not on anything you may have seen or heard or may see and hear outside the court.

(2) (The evidence has been completed and) it would be wrong for any juror to seek for or to receive further evidence or information of any sort about the case.

(3) You must not talk to anyone about the case, save to the other members of the jury and then only when you are deliberating in the jury room. You must not allow anyone to talk to you about the case unless that person is a juror and he or she is in the jury room deliberating about the case.

(4) When you leave the court you should try to set this case on one side until you return to court (and retire to the jury room to continue the process of deliberating about your verdict(s)")(1)

NOTE.

(1) R v Oliver [1996] 2 Cr.App.R. at pp.520-521. The court also said:

"It is not necessary for the judge to use any precise form of words provided that the matters set out above are properly covered in whatever words he chooses to use. We consider it would be desirable for this direction to be given in full on the first dispersal of the jury and a brief reminder to be given at each subsequent dispersal.

Finally, we would add that there may be particular circumstances in a particular case when it is appropriate for a judge to give further or other directions. It is not possible for this Court to anticipate every factual situation that may arise. It will not be in every case where these directions are not given that it will amount to a material irregularity. We enumerate these four points only for guidance to judges in future cases."

(2) It may be appropriate to give a similar direction on the first occasion when the jury separates during the trial itself (particularly if the case is one which may be the subject of media reports and/or comments) in which case the passages in (2) and (4) in brackets should be omitted.

ARCHBOLD 2010: 4-425

BLACKSTONE 2010: D18.8

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