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DISCLOSURE –

HIDDEN TRAPS

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"DISCLOSURE – HIDDEN TRAPS." CDP Foleys – 2/2

Basic principles – 'the golden rule'.

R v H, R v C. – (2004) UKHL 3, House of Lords.

Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. The ***golden rule*** *is that full disclosure of such material should be made.*

PII vs the golden rule? – *circumstances where PII legitimate bar to disclosure, then some derogation from the golden rule of full disclosure may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial.*

Other landmark UK case- R v Ward (1993) 1 WLR 619.

"*An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence*."

Note that whilst the rule was stated with reference to scientific evidence, it relates to a general test based upon relevance.

Australian approach.

Notorious case of Mallard. (2005) HCA 68. Convicted murder. Served 8 years of sentence.

Course of petition for mercy, 'fresh evidence' adduced and much of it had been in the possession of investigating police before, and during the trial, and had not been disclosed to the defence. Or more properly described as "supressed", it had been removed from material that was supplied to the defence.

After reviewing the Australian and international authorities, Kirby J said this.

The foregoing review of the approach of courts, in national and international jurisdiction, indicates the growth of the insistence of the law, particularly in countries observing the accusatorial form of criminal trial, of the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. Especially is this so where the material evidence may cast a significant light on the credibility or reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused.

See also Kirby J @ 83.

'*Ultimately, where there has been non-disclosure or suppression of material evidence, which fairness suggests ought to have been provided to the defence, the question is whether the omission has occasioned a miscarriage of justice. The courts are guardians to ensure that 'justice is done' in criminal trials. Where the prosecutor's evidentiary default or suppression 'undermines confidence in the outcome of the trial' that outcome cannot stand. A conviction*

must then be set aside and consequential orders made to protect the accused from a risk of a miscarriage of justice.'

Are cases where limited non-disclosure means that unlikely to have altered the outcome of the criminal trial, then the proviso may be applied.

In Mallards case, the question of whether the relevant material was in possession of the Prosecution was not explored on the appeal but it was conceded by the DPP on appeal that at least some of the evidence in question should have been disclosed to the defence.

See also Lawless (1979) 142 CLR 659.

Obligation at common law.

Important to remember that the provisions in the Criminal Procedure Act (the Act) aside, [1]the prosecution have an obligation at common law to disclose all ***relevant*** evidence to an accused, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty.

It is also important to remember that the request does not trigger the obligation to disclose. The duty of disclosure exists independently of the request. See R v Ward (1993) 1 WLR 619.

Grey v The Queen (2001) 75 ALJR 1708.

[1] See s 41 – 44. Summary procedure See 110-111. Indictable - See also s 416 which reserves the common law obligation of the Prosecution re disclosure.

***Mallard and the Victorian CCA*.**

See consideration of the principle expressed by the High Court in Mallard[2] by the Victorian Court of Appeal in AJ v The Queen (2011) VSCA 215.

For a more recent affirmation of the principles in Mallard see Kev v The Queen (2015) VSCA 36.

There are some limitations however:

Note that the obligation does not extend to material that the defence may use as a '*red herring*.' Any such material must be relevant, capable of giving rise to legally admissible evidence, and legitimately able to be invoked as *exculpatory* material. @ 82. Kev v R.

Or in other words, the information must be capable of being put to legitimate forensic use.

See also R v Farquharson (2009) 26 VR 410

Current Problems?.

Current regime of disclosure pre-trial (Form 32) assumes, ***incorrectly***, that investigators both understand and properly comply with their disclosure obligation. This may be an inherently unsafe assumption.

Mallard should be re-read. It is a salient reminder of the fact that it ***may*** be unrealistic to expect investigators to approach their obligation without bias. From anecdotal accounts, it may be that Vicpol is trending towards an approach to disclosure that should cause us all to be wary and be on our collective guard. Either by conscious decision of the informant or not,

[2] (2005) 224 CLR 125

following are some recent examples of occasions where relevant material was not disclosed to either the prosecution or defence prior to trial.

Torney – Supreme Court murder trial.

ID trial - County Court.

This unsatisfactory state of affairs may have arisen as a result of the informant descending into the arena and assessing the question of ***relevance***.

Barring a claim to PII or one of the matters referred to in s 45 of the Act all relevant material in the hands of the investigators gathered in the course of the investigation should be disclosed to the Prosecution. It then falls to the Prosecution to discharge their obligation pursuant to Director's Policy and common law obligation.

Indivisibility between the police and the prosecution.

Courts both here and in the UK have consistently asserted that the police are clearly part of the prosecution for the purposes of disclosure.[3] In light of that clear principle, it is no response for the Prosecution/Crown to say they cannot disclose something of which the police have never made them aware.

Thus while police are clearly part of the prosecution, who and what constitutes part of the total apparatus of the prosecution, may be unclear when dealing with other government agencies.

See R v Blackledge & ors (1996) 1 Cr App R 326. – Very broad interpretation of the Crown as a single indivisible entity for the purposes of disclosure. Any material held by an agency or department of the State/Crown was deemed to be in the possession of the Prosecution.

Unworkable – since been repealed by statute in the U.K / retracted by UK and Australian authority.

[3] R v Gray (2001) 184 ALR 593, R v Mallard (2005) 224 CLR 125.

Relevant information held by third parties?

Consider the necessity for a subpoena.

DHS – Allegations of sexual assault, then a must if complainant previously involved. Don't rely on the informant to disclose this material.

Practical Solutions- form 32, up the ante.

The practical focus of this paper is making sure that the material in the hands of the police is furnished to the prosecution.

Our starting point should be a Form 32 request that is extensive. It's not enough to request police notes and priors of witnesses. Beyond the s 110 (e) list, following is a suggested list of material that should be included in every Form 32 request.

- Witness prior convictions or findings of guilt
- Police records including running sheets, surveillance logs, crime scene notes, exhibit logs, diaries, (official or otherwise) LEAP records, investigation reports, and Interpose records relating to the investigation;
- Results of any forensic/scientific procedures carried out by the prosecution at any stage;
- Expert witness notes or notifications received by police from expert witnesses;
- Notes of prosecution witnesses received by police in the course of the investigation;
- Any statement taken upon which the prosecution do not intend to rely;
- Any draft and/or partial and/or unsigned statements made by anyone in relation to this matter;

- Any recordings (written, audio or otherwise) of conversations made by prosecution witnesses or potential witnesses (including police and civilians) in relation to this matter;
- Any records of interview conducted with any person in relation to this investigation
- Any telephone records and results of any requests from telecommunications providers(including call charge records, reverse call charge records, cell tower locations etc);
- A copy of any video or listening device and any recordings/transcripts or notes relating to that device
- A copy of any telephone intercept and any recordings/transcripts or notes relating to that telephone intercept

Again, barring a legitimate claim to PII, do not accept the following police/ prosecutorial response to request for further disclosure.

1. That interpose reports are required to be subpoenaed.

2. That the informant needs the authorization of his superior before he will hand over an interpose and the superior is refusing to provide it.

3. That any medical notes of treating Dr are required to be subpoenaed because VIFM has a 'policy" where they will not disclose notes without the consent of the party involved. The obligation for disclosure of expert notes applies to all expert witnesses. DNA, fingerprints, etc.

4. Be wary of receipt of an interpose record that has been redacted beyond the personal details of witnesses (this is standard)[4]. Beyond that, it is not for the informant to take it upon him or herself to redact this document. If they insist, they must make an application to the court to seek to redact any part and state the grounds for seeking to redact it. This can

[4] See s 114 of the Act

be vital- the interpose can often prove to be fertile ground as a record of the course of an investigation. Particularly so, in allegations of sexual assault where there will inevitably be an initial disclosure interview with the complainant.

5. Police notes – same logic as 4 above – beyond the standard redactions, don't accept notes that have been redacted/ or ask about the redactions in the course of cross examination at the committal if they refuse to provide an unredacted version.

<u>Committals – invaluable for further disclosure</u>.

It's one thing for an investigator to ignore/fail to comply with the requests in the Form 32, not quite so easy when asked specifically on oath about the existence or not of such material.

This is why committals are becoming more invaluable. [5]If one assumes that the requests in the Form 32 are largely ignored prior to committal, then it is essential that all the vital questions are asked of the informant at committal. Bear in mind, the question doesn't trigger the obligation to disclose (the *golden rule* dictates that it is there already) but the important element is that you will have established the existence of the said material or not. If it exists, call for it there and then. And ***always*** ask if there is any further material in their possession that they (the informant) did not consider relevant and have not disclosed.

We need to remind the police and prosecution that, barring a proper claim to PII or other exclusion in the public interest, disclosure of relevant material to

[5] Once we accept the premise that pre-committal disclosure is largely inadequate, then we do not want to fall the way of other jurisdictions such as W.A and Tasmania where committals do not exist. See also NSW where the onus is on the defence to convince the Court that there are substantial and special reasons why a witness should give oral evidence.

the ***defence is a right, not a privilege***. As a defence lawyer, it can sometimes feel the opposite is true, when constant demands for relevant material go unheeded.

Conclusion.

Have we been lulled into a false sense of security regarding disclosure by dint of the provision of Form 32 requests and the regime provided for in the Act? While there is yet to be the profound miscarriage of justice here as occurred in Mallard, are we potentially heading in the same direction? Remember the golden rule, the onus is not on the defence to ask, it is on the police/prosecution to disclose.

J Condon SC

Foleys List

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Standard request in sex cases

Schedule etc

The items sought (pursuant to the subpoena) are copies of the following: -

1. Any recording of anything said by the defendant or any prosecution witness touching upon and relating to the subject matter of this investigation
2. The original notes of all prosecution witnesses.
3. Copies of all requests, in whatever medium, for statements or for assistance in preparing statements of witnesses or potential witnesses, made to police officers in the course of the investigation, whether those officers are witnesses or not.
4. All day book entries, diary entries and note book entries of all police officers involved in this investigation recording the nature and scope of their involvement in the investigation
5. Copies of all notes of any SOCIT officers and any unit members that have had contact with the complainant X or child witness Y in this matter.
6. All LEAP report and case entries in respect of this matter.
7. All SOCIT investigation entries recorded on the Interpose system, now known as the Full Response Report
8. The attendance register in relation to the accused
9. Any attendance register in relation to prosecution witnesses in this case.
10. All relevant crime reports filed
11. Prior convictions and or findings of guilt and LEAP records relating to all prosecution witnesses

12. All VARE interview logs and preparation notes together with contemporary notes of both the interviewer and the monitor in respect of the VARE conducted with complainant X
13. Any diary entries in the possession of Victoria police made by the complainant relating to the allegations
14. Copies of any documents downloaded from social network sites in the possession of the police in relation to this matter
15. Any notes, documents or tapes relating to any pre-text conversation if attempted, irrespective of outcome