Introduction

In the decision of *R v Etheridge* [2020] QCA 34, Sofronoff P observed that the following statements from *Alford v Magee* (1952) 85 CLR 437 at 466 per Dixon, Williams, Webb, Fullagar and Kitto JJ (see also *Fingleton v The Queen* (2005) 227 CLR 166 at 196-197) should constitute the preface to this Benchbook:

> "**And it may be recalled that the late Sir Leo Cussen insisted always most strongly that it was of little use to explain the law to the jury in general terms and then leave it to them to apply the law to the case before them. He held that the law should be given to the jury not merely with reference to the facts of the particular case but with an explanation of how it applied to the facts of the particular case. He held that the only law which it was necessary for them to know was so much as must guide them to a decision on the real issue or issues in the case, and that the judge was charged with, and bound to accept, the responsibility of deciding what are the real issues in the particular case, and of telling the jury, in the light of the law, what those issues are. If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the *asportavit*, probably no judge would dream of instructing the jury on the general law of larceny. He would simply tell them that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny. It may be that the issues in a civil case tend, generally speaking, to be more complex than in a criminal case. But the same principle is applicable, and looking at the matter from a practical point of view, the *real* issues will generally narrow themselves down to an area readily dealt with in accordance with Sir Leo Cussen's great guiding rule.**"
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> (footnotes omitted)

Use of this Bench Book

The sample directions contained in this bench book are not intended as an elaborate specification to be adopted religiously on every occasion. A summing-up should be tailored to fit the facts of the particular case, and not merely taken ready-made "off the peg".[1] As Sofronoff P explained in *R v Sunderland* [2020] QCA 156, sample directions are not to be:

> "treated as a draft that can be cut and pasted into a summing up. There is 'no magic formula or incantation' that can be invoked in every case to satisfy the burden that the law places upon a trial judge to give appropriate and adequate directions. Each summing up must be tailor-made to fit the requirements of the case at hand".[2]

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1 *Nembhard (Neville) v The Queen* (1982) 74 Cr App R 144 at 148. In *Holland v The Queen* (1993) 117 ALR 193 at 200 the High Court approved a statement in *R v Lawrence* [1982] AC 510 at 519 that "a direction to a jury should be custom built to make the jury understand their task in relation to a particular case"; cf. *R v Mogg* (2000) 112 A Crim R 417 at [50]-[52], [70]-[74]; and *R v Hytch* (2000) 114 A Crim R 573 at [10]: "A trial judge ordinarily has an obligation to sum up the respective cases of both the prosecution and the defence [*R v RNS* [1999] NSWCCA 122] and to remind the jury in the course of identifying the issues before them of the arguments of counsel [*RPS v The Queen* (2000) 199 CLR 620]."

2 At [55] (footnotes omitted).

The particular form and style of a summing-up, provided it contains what must, on any view, be certain essential elements, must depend not only upon the particular features of the particular case, but also on the judge's view as to the form and style which will be fair, reasonable and helpful.[3]

Trial Judge's role in summing up

A summing-up should be clear, concise and intelligible. If overloaded with detail, whether of fact or law, and following no obvious plan, it will not have the attributes it should display.[4]

The object of the summing-up is to help the jury. A jury is not helped by a colourless reading out of evidence. The judge is more than a mere referee, who takes no part in the trial save to intervene when a rule of procedure or evidence is breached. The judge and the jury try a case together. It is the judge's duty to give the jury the benefit of the judge's knowledge of the law and to advise them in the light of the judge's experience as to the significance of the evidence.[5]

The function of a summing-up is not to give the jury a general dissertation on some aspect of the criminal law, but to tell them the issues of fact upon which they must make up their minds in order to determine whether the defendant is proven guilty of a particular offence.[6]

In *R v ITA* [2003] NSWCCA 174 the Court remarked at [90] *inter alia* that:

> 'The precise nature of the task of the judge depends on many things, including the context of the trial, its length, its complexity, the way that it has been run, the issues that arise and, importantly, whether counsel seek more from the judge than that which has been provided. The judge must ensure that the case of the accused is put fairly before the jury and, of course, must ensure that the accused has a fair trial. In fulfilling this duty, the judge will derive important assistance from counsel. The atmosphere at a criminal trial is not easy to assess on appeal. Counsel at trial are well placed to determine whether, in the light of the way in which the case has been run, particular directions to the jury are defective'.

McMurdo P described it this way in *R v Mogg* (2000) 112 A Crim R 417 at 427 at [54]:

> 'The onerous duties of a Trial judge will ordinarily include identifying the issues, relating the issues to the relevant law and the facts of the case and outlining the main arguments of counsel'.

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3 *McGreevy v DPP* [1973] 1 WLR 276 at 281.

4 *R v Landy, White and Kaye* [1981] 1 WLR 355 at 367; and *Flesch v The Queen* (1986) 7 NSWLR 554 at particularly at 558, where Street CJ stated "a summing up should be as succinct as possible in order not to confuse the jury".

5 *R v Sparrow* [1973] 1 WLR 488 at 495. In *Holland,* the High Court approved a statement from *Lawrence* that "a direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book".

6 *R v Mowatt* [1968] 1 QB 421 at 426. In *Holland,* the High Court approved a statement from *Lawrence* that "the purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case." See also *R v Adams, ex parte A-G* [1998] QCA 64; and *Mogg* at [71]-[72]: "A trial judge's duty…will rarely if ever be discharged by presenting in effect an abstract lecture upon legal principles followed by a summary of the evidence. It is of little use to explain the law to the jury in general terms and then leave it to them to apply to the case… the law should be given to the jury with an explanation of how it applied to the facts …". Cf *R v Chai* (2002) 76 ALJR 628 at 632 [18].

Gaudron A-CJ, Gummow, Kirby and Hayne Justices said in *RPS v The Queen* (2000) 199 CLR 620 at 637 that:

- the fundamental task of a Trial judge is to ensure a fair trial of the accused;
- this will require the judge to instruct the jury about so much of the law as the jury need to know in order to dispose of the issues;
- that will require instructions about the elements of the offence, the burden and standard of proof and of the respective functions of judge and jury;
- and will require the judge to identify the issues in the case and to relate the law to those issues; it will require the judge to put fairly before the jury the case which the accused makes.
- In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence.
- None of this must be permitted to obscure the division of functions between judge and a jury, and that it is for the jury and it alone to decide the facts.
- Although a Trial judge *may* comment on the facts, the judge is not bound to do so except to the extent that the judge's other functions require it.
- Often, perhaps much more often than not, the safer course for a Trial judge will be to make no comment on the facts beyond reminding the jury, in the course of identifying the issues before them, of the arguments of counsel.