

## **Tendency and Coincidence Evidence**

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(not a paper by Stephen Odgers SC)

*“Particularity does not require similarity”*

1. How did it come to this?
2. Once upon a time when the world (and the author) were much younger, the daring criminal law practitioner could go about his or her business untroubled by and even largely unaware of such things as propensity and similar fact evidence, or their evil mutant Evidence Act 1995 spawn, tendency and coincidence evidence.
3. These concepts were the preserve of a lecture at law school dealing with legendary cases the likes of which would never occur in one’s lifetime: multiple wife-murderers, baby farmers and the like. Now, they are the stuff of every second trial in the Monday list. One cannot shake hands with a prosecutor without being served with a tendency notice.
4. Of course, much about the world, and the criminal law, has changed, particularly in the prosecution of sexual offences. There is a much greater awareness now that very often, things did go on behind closed doors. There is greater protection of alleged victims in the criminal process. Old accepted rules about how women and young children were “supposed” to behave in the face of unwanted sexual behaviour have been turned on their head. Law reform enacted by the NSW parliament has tended to erode common law protections of the accused and has been intended to facilitate reception of complainant evidence and protection of complainants as witnesses.
5. The volume of sexual offences being charged and prosecuted seems unprecedented. Historical sexual offences, particularly child sexual offences are emerging at

increasing rates. The Royal Commission into institutional sex abuses will release a flood of potential prosecutions of historical child sex offences across the country, and particularly in this State. It might be expected that more complainants will be emboldened and come forward.

6. Unfortunately, it is hardly surprising that sexual abuse of relatively powerless minors by those entrusted with their care has occurred and does occur in a variety of situations, from orphanages to schools to swimming lessons to dance classes to television studios. And it is hardly surprising that adults who behave in this way will do so more than once, and with more than one victim. So again, it is hardly surprising that it is the prosecution of sexual offences, particularly against children, which has driven much of the development of the law relating to admissibility of tendency evidence, and to a slightly lesser extent coincidence evidence.
7. In this context then, there follows a brief recap on the Evidence Act principles relating to the reception of tendency and coincidence evidence, and evidence led for other purposes of uncharged acts allegedly committed by the accused. Obviously the interest at this conference is in the representation of accused persons in criminal trials; but it is important to note that these principles apply in the civil context, and very important to remember that these principles may be called in aid on behalf of an accused person as well.

#### **Tendency Evidence Applications**

8. One party to a proceeding – usually, but not always, the prosecution – will seek to lead evidence of a “tendency” of a person – usually the accused – to have a particular state of mind, or to act in a particular way on other occasions not the subject of the prosecution. It is done for a **purpose**: the aim is that by establishing through evidence that the person (the accused) had the particular tendency makes it more likely that (s)he acted in accordance with that tendency on the occasion the subject of the prosecution.

## **Coincidence Evidence Applications**

9. One party to a proceeding – usually, but not always, the prosecution – will seek to lead evidence of conduct or events in which a person – usually the accused – was involved on other occasions which are similar to the conduct or events alleged in the prosecution. It is done for a **purpose**: establishing that the person (the accused) was involved in those events or occasions makes it more likely that it was that person (the accused) involved in the events or circumstances the subject of the prosecution.

## **The Evidence Act**

### **The tendency rule: section 97**

*"Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:*

*(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and*

*(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value."*

### **The coincidence rule: section 98**

*"Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:*

*(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and*

*(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value."*

### **Criminal prosecutions: section 101(2)**

#### ***101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution***

*(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.*

*(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant."*

10. Both rules are negative. They provide that evidence of tendency or coincidence is *not admissible* unless certain **conditions** are met.

#### **The conditions**

- Notice
- Significant probative value
- In criminal trials: Substantially outweigh any prejudicial effect on the accused section 101(2)

#### **What is tendency evidence?**

11. Think of tendency evidence as **circumstantial** evidence of a person's **propensity**. It provides the foundation for an inference: because the person had the relevant tendency, it is more likely that he or she acted pursuant to that tendency in the way asserted by the tendering party on this occasion, the subject of the proceedings; see *Elomar v R* [2014] NSWCCA 303 at [359].

### **What is coincidence evidence?**

12. Think of coincidence evidence also as **circumstantial** evidence relying on **similar facts**. It provides the foundation for an inference to be drawn that a person did a particular act or had a particular state of mind on the occasion in question because of the similarities with a prior occasion or occasions with which the person was involved. The process of reasoning is discussed in *R v Gale, R v Duckworth* [2012] NSWCCA 174 at [25]-[31].

### **Aren't they the same thing?**

13. Often. The same evidence might be both tendency and coincidence evidence, particularly where the conduct relied on has great similarity with the charged conduct.

### **Tendency**

14. Section 97 is confined to evidence tendered to prove the existence of a *tendency of a person to have a particular state of mind or to act in a particular way*. It is therefore concerned with **motives or reasons** for engaging in conduct.
15. It usually applies where a particular person (the accused) has been identified as the alleged offender, that is, the complainant(s) state: "the accused did these acts" which are the subject of the prosecution. Has that accused demonstrated a tendency to act in that way on other occasions, to be motivated to do that sort of thing on other occasions, to have a reason for acting in that way on other occasions? If so, that may help assist in establishing that the accused demonstrated the same motive or reasoning, and behaved accordingly on this occasion.
16. The underlying theory is that people tend to act similarly in similar situations. The more unusual or aberrant the demonstrated tendency (eg. adult interest in sex with children), the more likely that the person acted pursuant to it on the occasion(s) of alleged aberrant sexual interest in children in question.

17. It is now clear that there does not need to be **similarity of conduct** or “underlying unity” of conduct in the particular acts said to demonstrate the tendency and the acts the subject of prosecution: *PWD* (2010) 205 A Crim R 75; *Hughes* [2017] HCA 20, notwithstanding that the section applies to a tendency to act “in a *particular way*”. Particularity does not require similarity. More on this later.

### **Coincidence (similar fact)**

18. What the tender of coincidence evidence actually seeks to establish is that it is **not** a coincidence.
19. Section 98 applies to evidence tendered to prove that a person did *a particular act*. It relies on similarities of conduct and/or circumstances of a past event with which the accused’s involvement can be established, to show that there is such coincidence between that past conduct and/or those past circumstances and the similar conduct and circumstances the subject of the prosecution, that it points to the accused as the offender on this occasion; it is not a coincidence.
20. Coincidence evidence is most often relevant where the **identity** of the accused as the offender is in dispute. So, if someone is attacked in a particular way by an unidentified attacker, or say, in a particular location (see for example *Selby v R* [2017] NSWCCA 40); or, a shop is broken into a particular way (see *Ellis* (2003) 58 NSWLR 700), and there is evidence of a person (the accused) acting in that particular way on a prior occasion or occasions, that prior conduct, together with other evidence, may strongly point to the accused being the offender on this occasion.

### **Issues in an Application**

- Has adequate Notice been given?
21. The failure to give “reasonable notice” is “no minor matter”: *Andelman* 227 A Crim R 81. The two requirements are *fairness* and *identification of the alleged tendency or coincidence*. See *Gardiner* (2006) 162 A Crim R 233 in which Simpson J sums up the requirements of a Tendency Notice (and all the cases beforehand eg *Zhang* [2005] NSWCCA 437)

- Does the evidence have **significant** probative value?
22. Under the Evidence Act 1995 the probative value of evidence is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue. It is a test of **capability**, looking at the possible use to which the evidence might be put, or **how it might be used**, at its highest. It is not a high test.
23. But relevant and probative tendency or coincidence evidence must be excluded unless it is also **significant**.
24. “Significant” probative value means more than mere relevance but can mean less than a “substantial degree of relevance”.
- Do pre-Evidence Act decisions help?
25. No. The provisions of the Evidence Act set out the criteria for admissibility; see *Ellis* (above); *Ngatikaura* (2006) 161 A Crim R 329.
- The Big Issue: Do you have regard to its reliability in assessing its probative value?
26. No. (by majority anyway) see *IMM v The Queen* [2016] HCA 14, particularly pars [39] to [45].
- Why not?

#### **Probative Value generally**

27. The words “*if it were accepted*” in section 55 *Evidence Act* qualify the assessment of relevance. The question whether evidence is accepted is one for the tribunal of fact.
28. The question of capability of evidence to affect the assessment (by the tribunal of fact) of the probability of the existence of a fact in issue is qualified by the assumption that the tribunal of fact accepts it. To be relevant the evidence only needs to be “*capable*” of affecting that assessment; so generally evidence of only slight probative value will be prima facie admissible.

### **Probative value: tendency and coincidence evidence**

29. For the purposes of sections 97 and 98 the enquiry is whether the probative value of the evidence is “*significant*”. But this assessment is still made on the assumption that the evidence is accepted by the tribunal of fact.
30. Some evidence may be so inherently incredible, fanciful or preposterous that it could not be accepted by a rational jury. Therefore it could not be relevant, so it is inadmissible. But contestable or contested issues of credibility and/or reliability are matters for the jury, not bars to admissibility.
- A common situation: the tendency/coincidence evidence comes from the complainant alone
31. In *IMM* the tendency evidence came only from the complainant. The evidence was of another occasion of conduct of a sexual kind that had not been charged.
32. At [62] the plurality stated: “*it is possible that there may be some special features of a complainant’s account of an uncharged incident which give it significant probative value. But without more, it is difficult to see how a complainant’s evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having significant probative value...*”
- What about concoction/contamination?
33. Let’s look at a post-*IMM* example. In NSW the issue of the possibility of concoction and/or contamination issue was considered in the light of *IMM* in *GM* (decision restricted) [2016] NSWCCA 78.
34. The indictment contained counts of sexual conduct in respect of three complainants, being two sisters and an unrelated complainant. A further two sisters’ evidence was relied on as supporting the relevant tendency.
35. The test to apply was set out at [111]:

*“Does the evidence in this matter amount to a real risk of contamination or concoction so as to give rise to a competing inference sufficient to deprive the tendency evidence of significant probative value. Put another way, is there a competing inference to be drawn from the evidence such as to render the tendency evidence inherently implausible. In carrying out that evaluative exercise, questions of credibility, reliability and weight should be disregarded”.*

36. The CCA held that the trial judge was in error in applying the *Hoch* common law approach (“no rational view... inconsistent with the guilt of the accused”) and also in making assessments of credibility/reliability of the witness when determining the concoction/contamination issue, such as:

- “A close examination of the statements and committal evidence raised real doubts about the extent of discussions, giving rise to a suggestion of concoction”;
- “It was incredulous that some complainants maintained they had not discussed the detail of their allegations”;
- “It defied credulity that two complainants would have met and discussed going to the police but not discussed in greater depth their particular allegations”.

37. The judge’s findings as to reliability and credit were contested issues for the jury to resolve.

38. The witnesses’ evidence was not inherently implausible, nor did it give rise to a competing inference sufficient to diminish its significant probative value. The probative value substantially outweighed any prejudicial effect on the accused, particularly in circumstances where directions could remove any potential unfairness.

39. How inherently implausible does inherently implausible need to be? In *GM*, Justice Hall at pars [119]-[120] postulated a hypothetical scenario of former school pupils, now adults, forming a support group in which they discussed the abuse by a particular teacher, out of which the criminal and tendency allegations emerged.

40. Depending on the evidence, such a scenario may involve a denial of contamination which is inherently implausible, or give rise to a competing inference which would substantially erode the significant probative value of any tendency evidence.

### **Section 101 issues**

41. See the discussion of the appropriate tests in *Hughes* [2015] NSWCCA 330 at pars [189] to [193]. Summary:

- It is an evaluative judgement, a balancing exercise carried out on the assumption that the evidence is accepted by the tribunal of fact (*IMM* again)
- “Prejudicial effect” means the same as “unfair prejudice” in s137
- The decision can be changed later. The decision about admissibility is often made in advance of the actual evidence being given; if the evidence comes out differently, the admissibility decision can be re-visited.
- In determining the prejudicial effect that evidence may have, it is legitimate and appropriate for the judge to take into account any directions which may ameliorate or reduce that prejudicial effect
- Just in case we forgot, the common law *Pfennig* approach is dead; the requirement that the evidence be only consistent with the guilt of the accused is incompatible with the balancing exercise required by section 101(2).

### **Hughes v R [2017] HCA 20**

42. What has the High Court decision in *Hughes* done to our understanding of the law concerning tendency evidence?

43. To the extent that interstate rivalries and state-based jurisprudence interest us, it appears that the High Court has, by slender majority, followed the New South Wales CCA approach to assessing admissibility of tendency evidence over the Victorian Court of Appeal approach.

44. To the extent that we as defence lawyers attempt to apply and understand the law every day when we defend people facing serious charges, the High Court has

confirmed what we always suspected: it is very hard to resist the tender of tendency evidence, even when the evidence does not rely on precise similarity of conduct for its admissibility.

### **The facts**

45. The facts of Hughes were sadly familiar, in that many years after the events a man of otherwise previous good character was alleged (and found) to have developed and over a number of years acted on a desire for sexual contact with young girls, and had managed to keep it hidden. The particular circumstances of some of the allegations occurring in the context of an innocent television sitcom were simultaneously salacious and poignant. Mr Hughes had been the star of a popular television show called *Hey Dad..!*, and the character he played was for some years a fixture on the television screens of middle Australia, although only some of the tendency evidence arose in the context of that show.
46. The eleven charges faced by Hughes occurred over a period of seven years from 1984 to 1990, and were founded in the evidence of five girls then aged between six and sixteen (the complainants). Each of the complainants also gave evidence of uncharged acts.
47. The charged and non-charged acts against the first complainant occurred in her bedroom when Hughes was a dinner guest at her family home; the second complainant's evidence concerned acts of Hughes on occasions when she stayed overnight at his family home; the offences against the third complainant occurred when Hughes took her and his daughter swimming, and when she stayed overnight at his home; the acts against the fourth complainant occurred in the driveway of her family home after Hughes had driven her home; the fifth complainant was an actor on *Hey Dad..!* and Hughes' acts of indecency occurred in the studio and on set.
48. The evidence of each of the complainants as to charged and uncharged acts was led as tendency evidence in respect of every other count.

49. Six other witnesses ranging in age from about ten to twenty-four years of age (the non-complainants) gave evidence of uncharged acts; evidence of three of these non-complainants was led as tendency evidence in respect of each count on the indictment; the remaining three non-complainants gave tendency evidence in respect of events occurring around the filming of *Hey Dad..!*, and the admissibility of their evidence was confined to the one only of the indictment counts which related to the fifth complainant's workplace allegation.
50. The charged and uncharged conduct committed by Hughes covered a very wide range of sexual assaults and acts of indecency committed on or towards the complainants.
51. Pausing here, one can see that there was conduct covering a wide range of aberrant sexual behaviour; occurring in a variety of situations, locations and circumstances; involving females between a wide range of ages from six years to over twenty years of age; and occurring at random times over a seven-year time span.
52. In other words there was no pattern to the conduct; it had no underlying unity; it did not involve similar acts or circumstances.
53. It is also apparent that close consideration to questions of admissibility of the tendency evidence was given by the trial judge, who ruled on the admissibility of particular alleged tendency evidence in respect to particular counts, particularly in the restricting of the "workplace" tendency allegations.

#### **The tendency alleged**

54. The prosecution Notice alleged tendencies of :
- "having a sexual interest in female children under sixteen years of age"; and
  - "using his social and familial relationships...to obtain access to female children under sixteen years of age so that he could engage in sexual activities with them".
55. The differing forms of sexual conduct were particularised in the Notice. Importantly, the Notice particularised that the conduct occurred in the vicinity of another adult.

This tended to highlight an important aspect of the tendency, being a willingness to opportunistically engage in his sexual interest in circumstances where there was some risk of detection.

### **The defence arguments**

56. It was the defence case that each of the witnesses had fabricated her account.
57. Essentially Hughes argued that the very broad range of conduct relied on as tendency evidence lacked sufficient similarity to the charged conduct to have significant probative value. Relying on the Victorian Court of Appeal decision in *Velkoski v The Queen* it was argued that tendency evidence must possess “*sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct*”.
58. The defence conceded the admissibility of the evidence of two of the complainants as tendency evidence cross-admissible on the counts concerning those two complainants.

### **What we learned**

59. A brief resume of the legal principles confirmed by the four-member majority of the High Court might read as follows:

#### **Significant probative value**

60. Where the Crown alleges a tendency of the accused to act in a particular way or to have a particular state of mind, there are really two questions:
- To what extent does the evidence support the tendency alleged; and
  - To what extent does the tendency alleged make more likely the facts of the alleged offence(s)?

61. In a case where the question is not the identity of the offender but whether the known alleged offender (the accused) committed the offence (ie most “tendency” cases, and certainly Hughes) then **both** these questions have to be considered.
62. The evidence supporting the tendency alleged must have significant probative value- either alone, or supported by other evidence to be led. So, where the tendency evidence, either alone or when considered with other evidence, strongly supports proof of a relevant tendency of the accused (the first question); and further, that proven tendency strongly supports the proof of a fact that makes up the offence charged (the second question), then that tendency evidence is likely to have a high (significant) degree of probative value.
63. The alleged tendency evidence is not required to have “underlying unity” or to show a “pattern of conduct”; in other words the prosecution does not have to prove the commission of identical or similar acts (notwithstanding that the section is directed at evidence that a person acted in a “particular” way).
64. The majority considered that the fact that there is no mention of concepts such as “similarity”, “underlying unity” etc. in section 97 is a clear indication that the consideration of admissibility of tendency evidence does not rely on those concepts. It may be that a tendency to act in a particular way may be established to the level of significant probative value by evidence of acts which are not similar to the conduct the subject of the prosecution- or even similar to other acts relied on as tendency evidence. It was noted that “commonly” there may be “a similarity” between the tendency asserted and the offence charged.
65. In other words, a tendency to act in a particular way is not the same as a tendency to commit a particular act.
66. The majority also left open some wriggle-room, noting that the statutory terms of the inquiry into whether “the court thinks” that the probative value of the evidence is “significant” means that “it is inevitable that reasonable minds might reach different conclusions”.

### **Multiple counts**

67. Where there are multiple counts on the indictment it is necessary to consider each count separately to assess the admissibility of tendency evidence which is sought to be adduced in relation to that count.

### **Fabrication**

68. The majority held that logic and human experience suggest that proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that a complainant has either misconstrued innocent conduct or fabricated his or her account has been excluded.

### **Application to the evidence in Hughes' case**

#### **Probative value**

69. The tendency evidence had significant probative value. When considered together the evidence provided strong support to show Hughes' tendency to engage opportunistically in sexual activity with underage girls despite a high risk of detection. Proof of that tendency had significant value as proof of his guilt of the charged offences.
70. Importantly, the fact that he expressed his sexual interest in a variety of ways did not deprive the tendency evidence of its significant probative value.

#### **Fabrication**

71. The force of the tendency evidence as significantly probative of Hughes' guilt was not that it gave rise to a likelihood that, having offended once, he was likely to offend again; rather its force was that any individual complaint should not be rejected as unworthy of belief because, taken in isolation it appeared improbable having regard to ordinary human experience.

72. The Court hypothesised separate trials in respect of each complainant's evidence alone; taken in isolation, a single complainant's evidence of an opportunistic, isolated incident of predatory sexual behaviour in circumstances of real risk of discovery might seem inherently unlikely as being at odds with jury experience of the probabilities of ordinary human behaviour. But proof of his tendency to do just that—engage in sexual activity with underage girls opportunistically, notwithstanding evident risk, was capable of removing that doubt.

### **Coincidence Evidence**

73. As we know section 98 of the Evidence Act 1995 refers in terms to “similarities” in the events and circumstances relied on as coincidence evidence. A recent NSW CCA decision of *Selby* [2017] NSWCCA 40 deals with the different mode of reasoning in relation to coincidence evidence, and also demonstrates what might be called the “New South Wales” approach by our CCA to dissimilarities in the evidence relied on to rebut coincidence.

74. This was not a case alleging sexual misconduct, but rather involved an allegation of demanding money with menaces occurring on one occasion, and an allegation of intimidation of the same victim alleged to have occurred on an occasion three months later. Both offences occurred at the victim's business premises. The victim did not know the offender, but recognised him on the second occasion as being the offender from the first occasion.

75. *Selby* pleaded guilty to the second offence. Evidence of this conduct was allowed as coincidence evidence on the trial of the first offence. The admission of the coincidence evidence was not contested on appeal, but the directions concerning its use were in issue.

76. Evidence relied on by the Crown included that the victim rang police immediately after the second offence and said it was the same man who had committed the first offence; in cross-examination he denied the possibility of there being two different people; there were similarities in appearance and conduct of the two men, including similar clothing, wearing of sunglasses, having the head covered, and producing a

small black handgun from the jacket pocket; and both offences were of the same nature and had been committed at the same location against the same victim.

77. The defence pointed to **dissimilarities**: the first man had a ginger goatee, the second was clean-shaven; there was a white cut or scar on the first man's lip which caused him to mumble his words, whilst the second man spoke without disability; and the words spoken on each occasion showed a lack of connection between the offences, in that there was a demand for money on the first occasion and, on the second, rather than following up that demand the offender simply made a threat to the lives of the victim and his family.
78. The argument for Selby was that coincidence evidence, *contra* tendency evidence, is based on similarities; where the similarities were outweighed by dissimilarities coincidence reasoning was not available, because the evidence was robbed of its significant probative value.
79. The CCA dealt with the issue by going back to the basis of coincidence reasoning: that mode of reasoning is based on the improbability that something was a coincidence. The fact that two (or more) events bear some dissimilarities does not displace that mode of reasoning, because two or more events will always be dissimilar in some respects. *The question is whether the dissimilarities undercut the improbability of something being a coincidence.*
80. Once identified similarities raise the improbability of coincidence, and give the evidence its probative value, then the existence of dissimilarities will not diminish that probative value. The question instead is whether the dissimilarities are *relevant in that they detract from the strength of the inferential mode of reasoning permitted by section 98.*
81. In Selby's case the CCA held the dissimilarities in appearance and voice did not undercut the improbability that the same victim was targeted for a similar offence at the same premises in a relatively short period of time by different individuals.

### **Relationship/Background/Context Evidence**

82. There is a nether-world of tendency-type evidence often admitted in trials of sexual offences, strictly called context evidence. Its admissibility strictly relies on common law principles, but section 95 of the Evidence Act (evidence relevant for another purpose) is how it gets in.
83. The evidence is usually based on the relationship between the accused and a complainant, although to refer to it as “relationship” evidence before the jury may invite tendency-type reasoning. The better label is context evidence.
84. It is generally evidence of uncharged acts or other behaviour of the accused and/or the complainant which is said to put the charged allegations “in context”, and explain, for example, that the incident did not come “out of the blue” or occur in “startling isolation”; why the complainant did not complain; or, another example, why the complainant was not consenting when she made no complaint or did not raise the alarm (because it had gone on forever; because of threats; because mum didn’t believe me etc.); it may be available to rebut evidence of otherwise good character.
85. Such evidence must do more than establish a relationship between complainant and accused; it is evidence which is necessary to provide the proper context to the allegations.
86. It is not evidence which reasons toward guilt, like tendency and coincidence evidence; rather, it goes to support the credit of the complainant. Careful directions are required to prevent tendency reasoning.
87. It does not have to meet the section 101(2) test, but does have to overcome the lesser test in section 137.

### **Fighting tendency and coincidence evidence**

88. Is there any point you ask? There is always a chance, perhaps evidenced by paragraph [42] of the majority High Court judgment in *Hughes*: “...the open-textured

*nature of an enquiry into whether “the court thinks” that the probative value of evidence is “significant” means that in marginal cases it might be difficult to know whether an appellate court might take a different view of the significance of the tendency evidence from a trial judge...”*

89. The Court goes on to injunct prosecutors to be conservative in assessing what tendency evidence will be relied on. We shall see....
90. Examine the Notice. Does it comply? Does it fairly advise you of what it should? If not object to it. Can the prosecution amend? If so, do you need adequate notice under the Act of what they now more precisely allege? All this may merely delay the inevitable, but chinks may emerge.
91. Does the tendency alleged apply to all the counts? Is the tendency evidence equally applicable to each count, or should different evidence be confined to particular counts? Will this assist you in a severance/separate trial application?
92. Does the tendency evidence come from the one complainant? You would be on stronger grounds to have it excluded as tendency evidence, but it would still be on the one indictment (charged acts) or available as context/relationship evidence (uncharged acts). But at least you won't have the tendency directions to contend with.
93. Multiple complainants: is concoction or contamination a possibility? We know this does not bear on admissibility, it is a matter for the tribunal of fact, but what approach should you take? Deep breath: is it better to run them together, so the one jury can see that possibility? There only needs to be one or two links; of course witnesses will deny it, but you have the benefit of appealing to a jury's experience of the world: how could these people not have spoken about it? Etc.
94. How old is the tendency relied on? Is it possible for people to change? Should you confess and avoid? Yes I did bad things a long time ago when I was young, but not now...

95. Is the prosecution really trying to use tendency-type reasoning in respect of what they are calling “context” evidence?

96. In a coincidence case is the prosecution putting forward as asserted similarities alleged facts of the offence(s) which are in issue in the prosecution? See *Gale and Duckworth* (above)

**Using tendency or coincidence evidence**

97. Don’t forget that the same expansion of the availability of tendency and coincidence evidence is equally available to the accused. If your victim has been dishonest, or violent, or exhibited other conduct or behaviour that shows a tendency to act in a particular way relevant to your defence, even if these incidents were uncharged or not proven then consider using the Evidence Act to your advantage. And they don’t need to be similar....

98. The defence does not have to overcome section 101. The notice provisions are more flexible. And alleging a tendency does not raise character which may come back to bite you.

**Peter McGrath SC**

**August 2017**