Tendency and Coincidence Evidence

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Craig Smith
Public Defender

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How we define these concepts in basic terms?

1. **Tendency evidence** which is admitted will mean a judge specifically telling the jury that the evidence may disclose a pattern of behaviour by the accused that shows that he or she has a tendency to act in a particular way, with a particular mindset and making it more likely that the accused committed the offence (a specific direction is set out in the Bench Book which should be read).

2. Tendency evidence is used to prove a person acted or thought in a particular way because on a previous occasion he or she acted or thought in a similar way.

   R v Harker [2004] NSWCCA 427 Howie J said at [57]:

   > *…The simple fact is that tendency evidence is placed before the jury as evidence tending to prove the guilt of the accused. The jury are asked to reason that, because the accused acted in a particular way on some other occasion or occasions, he or she must have acted in the same way on another occasion. In the present case, the Crown wishes to adduce the evidence in order to argue that because the respondent acted in a particular way towards DE, he must have acted in the same way towards the complainant. The jury is entitled to use tendency evidence as "positive proof" of the accused's guilt where it is admitted after a consideration of s 101(2). But the use to be made of the evidence has nothing to do with whether the accused has been charged with any offence arising from the conduct that is the subject of the evidence.*

   FB [2011] NSWCCA 217 per Whealey JA (Buddin and Harrison JJ agreeing):

   > *[23] It is clear law that evidence that a person has or had a particular tendency is adduced in order to render more probable the proposition that, on a particular occasion relevant to the proceedings, the person acted in a particular way or had a particular state of mind. The section proceeds on the basis of inferential reasoning that people behave consistently in similar situations. The evidence is used to provide a foundation for an inference to that effect. As Simpson J (with whom McClellan CJ at CL agreed) in Chittadini [2008] NSWCCA 256; 189 A Crim R 492 stated:*
   >
   > > *Tendency evidence is tendered to prove (by inference), that because, on a particular occasion, a person acted in a particular way (or had a particular state of mind), that person, on an occasion relevant to the proceedings, acted in a particular way (or had a particular state of mind).*

3. Tendency evidence does not have to relate to conduct similar to that with which the accused has been charged.

Ford (2009) 201 A Crim R 451 per Campbell JA (Howie and Rothman JJ agreeing):

> *[38] The second flaw is the judge's apparent view that the tendency evidence must itself show a tendency to commit acts that are closely similar to those that constitute the crime with which a particular accused is charged. That is not so. All that a tendency need be, to fall within the chapeau to section 97(1), is "a tendency to act in a particular way".*

FB [2011] NSWCCA 217 per Whealey JA (Buddin and Harrison JJ agreeing):

> *[24] More often than not, in a criminal trial, tendency evidence is placed before the jury as evidence tending to prove the guilt of the accused. However, evidence may be offered simply to show a tendency to act in a particular way, not necessarily in a criminal manner. Indeed, it is not necessary that the tendency to commit a particular crime or, for that matter, to commit a crime at all. Section 97 applies to both civil and criminal proceedings. It represents a fresh start in relation to the issues involved in the categories of evidence known historically as propensity evidence and similar fact evidence.*

4. The evidence must, however, be relevant to a fact in issue in the case (see [15] below).

5. **Coincidence evidence** which is admitted will mean a judge specifically telling the jury that because of the similarity between the relevant acts and the improbability of those occurring coincidentally, that it may be used to establish that the accused committed the offence (a specific direction is set out in the Bench Book which should be read). The ***Evidence Act*** speaks of coincidence evidence proving a particular act or state of mind of an accused because of the improbability of two or more related events occurring coincidentally (section 98).

Hennessy [2001] NSWCCA 36, a case involving the section before it was amended, approved of a direction in the following terms at [18] (see also the directions extracted in ***R v Gee*** [2000] NSWCCA 198 and ***R v Folbigg*** [2005] NSWCCA 23):

> *Similarities which go beyond ones you would expect to find as between crimes of this type. That is to say armed robberies on financial institutions. Similarities so marked and destructive that they cannot be mere coincidence. You should look to see whether the similarities relied upon are so striking, or of such a clear underlying unity as to make coincidence not*

an explanation, and whether the similarities indicate that the same person was responsible for each offence…

6. A recent summary of the approach to s.98 evidence is provided in ***Gale & Duckworth*** [2012] NSW CCA 174 where Simpson J (McClellan CJ at CL and Fullerton J agreeing) said:

> *[25] At its heart, s 98 is a provision concerning the drawing of inferences. The purpose sought to be achieved by the tender of coincidence evidence is to provide the foundation upon which the tribunal of fact could draw an inference. The inference is that a person did a particular act or had a particular state of mind. The process of reasoning from which that inference would be drawn is:*
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> > *two or more events occurred; and*
> >
> > *there were similarities in those events; or there were similarities in the circumstances in which those events occurred; or there were similarities in both the events and the circumstances in which they occurred; and*
> >
> > *having regard to those similarities, it is improbable that the two events occurred coincidentally;*
> >
> > *therefore the person in question did a particular act or had a particular state of mind.*
>
> *[26] What is important to recognise, in my opinion, is that this process of reasoning and the drawing of the inferences (that the person did the act or had the state of mind) is for the tribunal of fact: see DSJ; NS [2012] NSWCCA 9. Part of that process involves findings of fact. Did the two (or more) events occur? Were there relevant similarities? Where the party tendering the evidence relies upon a number of asserted similarities, the tribunal of fact must identify which, if any, of those similarities have been established. Before asking itself the penultimate question - is it improbable that the two events occurred coincidentally? - it must discard any asserted similarities not established.*
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> *…*
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> *[31] In a case in which it is found that there is such evidence, then, in my opinion, the correct process in the determination of the admission of evidence under s 98 involves a series of steps, as follows:*
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> > *the first step is to identify the "particular act of a person" or the "particular state of mind of a person" that the party tendering the evidence seeks to prove;*
> >
> > *the second step is to identify the "two or more events" from the occurrence of which the party tendering the evidence seeks to prove that the person in question did the "particular act" or had the "particular state of mind";*

> *the third step is to identify the "similarities in the events" and/or the "similarities in the circumstances in which the events occurred" by reason of which the party tendering the evidence asserts the improbability of coincidental occurrence of the events;*
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> *the fourth step is to determine whether "reasonable notice" has been given of the intention to adduce the evidence (or, if reasonable notice has not been given, whether a direction under s 100(2) ought to be given, dispensing with the requirement);*
>
> *the fifth step is to make an evaluation whether the evidence will, either by itself or in conjunction with other evidence already given or anticipated, "have significant probative value";*
>
> *in a criminal proceeding, if it is determined that the evidence would have "significant probative value", the sixth step is the determination whether the probative value of the evidence "substantially outweighs" any prejudicial effect it may have on the defendant (s 101(2)).*
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> *the sixth step necessarily involves some analysis both of the probative value of the evidence in question and any prejudicial effect it might have: RN [2005] NSWCCA 413, and a balancing of the two.*

7. It is very common for there to be an overlap between tendency and coincidence evidence. That is, often the one body of evidence can be properly characterised as either tendency or coincidence evidence.

A way to think

8. Before moving any further can I suggest that thought be given to how the receiver of the information, in an application to have the evidence admitted, will be thinking. Ask yourself the questions:

    a) What is the Judge or Magistrate actually thinking?

    b) What is the essential point that will decide the issue?

    Concentrate on those points.

9. It is important therefore to understand what the purpose of the tender of the evidence is. What will the evidence be used for? The Judge or Magistrate will initially be concerned with the relevance and purpose of the tender of the evidence.

10. The "what is the purpose of the evidence point" is well illustrated by the judgment of McClellan CJ at CL in ***Regina v Qualtieri*** (2006) 17 A Crim R 463 (a relationship evidence case) at [80]:

> *To my mind it is essential in any trial where the Crown seeks to tender evidence which may suggest prior illegal acts by the accused, especially where the charges relate to alleged sexual acts, that a number of steps are followed.*
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> *Although the circumstances of the particular trial may require some modification the relevant steps will generally be -*
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> *· Identification of the evidence which the Crown seeks to tender and the purpose of its tender.*
>
> *· If the Crown asserts that the evidence is evidence of a tendency on the part of the accused the admissibility of that evidence must be assessed having regard to s 97 and s 101 of the Evidence Act (see Fletcher [2005] NSWCCA 338). Ireland J also provides an analysis of the relevant provisions of the Evidence Act in AH at 709.*
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> *· If the evidence is tendered merely to provide context to the charges which have been laid, it is first necessary to consider whether any issue has been raised in the trial which makes that evidence relevant (see R v ATM [2000] NSWCCA 475 at [72]). …*
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> *· If admitted, the trial judge must carefully direct the jury both at the time at which the evidence is given and in the summing up of the confined use they may make of the evidence. …The jury must be told that they cannot use the evidence as tendency evidence.*

11. In determining whether evidence is tendency or co-incidence evidence the Court is not bound by a statement of the Crown that evidence is to be used as context evidence. The Court should look at the actual trial and consider how the evidence is to be used - see ***RG*** [2010] NSW CCA 173:

> *[34] While it is tempting to suggest that, since the stated purpose of the tender of the evidence was not to establish a tendency, the Dictionary definition excludes the application of s 97 and s 101, to do so would be to over simplify. While neither the District Court nor this Court ought lightly to find that a purpose stated by a responsible trial advocate or Crown prosecutor is not the true purpose of the tender of the evidence, neither Court is bound by such a statement. In some cases at least, it will be necessary for the trial court, or this Court, to examine the reality of what is sought to be achieved by the admission of the evidence. If that analysis shows that, notwithstanding that the Crown's stated purpose was to establish a "context", or a "relationship", the reality is that the evidence was tendered to establish a tendency, then s 97 and s 101 must be applied.*

12. The purpose of tendency and coincidence evidence:

    a) Is to get before the jury the evidence, and have the jury directed, that they can use the evidence for a "tendency or coincidence" purpose making it more likely the accused committed the offence;

    b) Is not, necessarily, to establish the nature of the relationship between the accused and the complainant: ***R v AH*** (1997) 42 NSWLR 702. That is, tendency and coincidence evidence may have nothing at all to do with giving a context to the relationship between the accused and the complainant;

    c) Is not, necessarily, to establish that there exists a relationship between the parties which is not innocent: ***Harriman v The Queen*** (1989) 167 CLR 590;

    d) Is not, necessarily, to establish that the accused had a particular state of mind at a time very proximate to the offence: ***Regina v Player*** [2000] NSWCCA 123; ***Regina v Adam*** [1999] NSWCCA 189***; O'Leary v The King*** (1946) 73 CLR 566; ***R v Salami*** [2013] NSWCCA 96.

13. Not all tendency or coincidence evidence is admitted. Some examples are:

    a) ***Regina v Qualtieri***: a majority of the Court, Howie and Latham JJ, doubted that evidence of a complainant in a sexual assault case of acts outside the indictment could ever be used as tendency evidence (compare ***HML v The Queen*** [2008] HCA 16);

    b) ***Regina v GAC*** [2007] NSWCCA 315: because the significant probative value of the evidence was outweighed by prejudice in a child sexual assault case;

    c) ***R v F*** [2002] NSWCCA 125: where the Court dismissed an appeal from the Crown against an order separating the trial concerning one complainant from the trial concerning three complainants on the basis that there was a reasonable possibility of concoction (see matters relating to this area raised later in the paper);

d) ***Regina v Watkins*** (2005) 153 A Crim R 434: where the conduct of the accused in defrauding a company in 1983/84 should not have been used as tendency/coincidence evidence in a trial for suggested fraudulent activities some 15 years later;

e) ***AE v R*** [2008] NSWCCA 52: a child sexual assault case with two complainants where evidence of tendency and coincidence was wrongly admitted because the trial judge had erred in assessing the possibility of concoction and had erred in deciding that the probative value of the evidence substantially outweighed the prejudice to the accused;

f) ***O'Keefe v R*** [2009] NSWCCA 121: a sexual assault case where the suggested tendency evidence did not have the necessary probative value, and what value it did have was substantially outweighed by the prejudice to the accused;

g) ***Gale & Duckworth*** [2012] NSW CCA 174: in a serious larceny case where the substantial probative value of the coincidence evidence did not substantially outweigh the potential prejudice to the accused.

The sections and cases setting out the relevant principles

14. A court should approach an argument about the admission of tendency or coincidence evidence by considering:

a) Whether the evidence is relevant;
b) Whether there has been notice;
c) Whether the evidence has significant probative value;
d) Whether the probative value of the evidence substantially outweighs the prejudice to the accused of the admission of the evidence.

15. A checklist for that approach with the relevant sections is as follows:

a) Is the evidence relevant – section 55/56;

The cases emphasise that the tendency sought to be established must be relevant to a fact in issue.

Ford (2009) 201 A Crim R 451 at [39] per Campbell JA (Howie and Rothman JJ agreeing)

BP [2010] NSWCCA 303 at [107] per Hodgson JA

b) Has there been notice or can it be dispensed with: s97(1)(a), 98(1)(a) and s100;
c) The tendency rule – section 97
d) The coincidence rule – section 98
e) The ultimate test as to whether the significant probative value of the evidence substantially outweighs the prejudicial effect of the evidence – section 101

16. In ***Regina v Fletcher*** (2005) 156 A Crim R 308 and ***Regina v Zhang*** (2005) 158 A Crim R 504, Simpson J helpfully sets out the process the Court must go through, assuming notice has been given or the requirement for it has been dispensed with, when deciding a tendency or coincidence question (see also ***Gale & Duckworth*** [2012] NSW CCA 174). In ***Zhang*** Simpson J said at [139] – [140]:

> *In Fletcher (at [32] – [35]) I analysed the processes by which the tender of tendency evidence under s97 of the Evidence Act is to be determined. The analysis is no different in the case of evidence tendered under s98. The principles are these: -*
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> > *(i) coincidence evidence is not to be admitted if the court thinks that evidence would not, either by itself, or having regard to other evidence already adduced, or anticipated, have significant probative value;*
> >
> > *(ii) probative value is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (see the Dictionary to the Evidence Act);*
> >
> > *(iii) the actual probative value to be assigned to any item of evidence is a question for the tribunal of fact – here, the jury;*
> >
> > *(iv) the probative value actually to be assigned to any item of evidence cannot finally be determined until all of the evidence in the case is complete;*
> >
> > *(v) the task of the judge in determining whether to admit evidence tendered as coincidence evidence is therefore essentially an evaluative and predictive one. The judge is required, firstly, to*

> *determine whether the evidence is capable of rationally affecting the probability of the existence of a fact in issue; secondly (if that determination is affirmative) to evaluate, in the light of any evidence already adduced, and evidence that is anticipated, the likelihood that the jury would assign the evidence significant (in the sense explained by Hunt CJ at CL in Lockyer (1996) 89 A Crim R 457) probative value. If the evaluation results in a conclusion that the jury would be likely to assign the evidence significant probative value, the evidence is admissible. If the assessment is otherwise, s98 mandates that the evidence is not to be admitted.*

Assessing the probative value of the evidence – capacity of the evidence

17. In deciding whether to admit the evidence a trial judge must assess the capacity of the evidence to have probative value. Issues of credibility, reliability or weight of the evidence are not relevant to the question: ***DSJ*** (2012) 215 A Crim R 349 per Whealy JA at [55]-[56] (following ***Shamouil*** (2006) 66 NSWLR 228):

> *[55] In my opinion, it is plain that s 98, in its terms, poses this simple question: whether the evidence being considered is capable, to a significant degree, of rationally affecting the assessment (ultimately by a jury) of the probability of the existence of a fact in issue. Again, in its terms, it requires the trial judge to assess whether the evidence has capacity to that extent and for that purpose. In Shamouil Spigelman CJ, in examining s 137 of the Evidence Act, pointed out that, by reason of the terminology of the Dictionary definition of "probative value", the focus is on the capacity of the evidence to have the effect mentioned. As the Chief Justice said, "It does not direct attention to what a tribunal of fact is likely to conclude".*
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> *[56] Assessment of the probative value of the evidence, whether for the purposes of ss 97, 98, 101 or 137 Evidence Act , does not, generally speaking, depend on any assessment of its credibility or reliability: Shamouil At 237 [60]. Nor does it depend upon any prediction of the likelihood that a jury will in fact accept it. The trial Judge considering probative value has to make his own estimate or assessment of probative value predicated upon the assumption that the jury will accept the evidence. See also Lodhi [2007] NSWCCA 360 at [174]-[177]; Mundine [2008] NSWCCA 55 at [33] where this Court said:*
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> > *"probative value" is not to be determined by the weight that might be given to any piece of evidence. What is to be considered is the role that that piece of evidence, if accepted , would play in the resolution of a (disputed) fact - or the contribution it might, if accepted , make to that resolution. ... to make the assessment of probative value on the basis of the perceived credibility or reliability of the witness through whom it is given, or perceived weakness in the evidence, would be to attempt to anticipate the weight the jury would attach to it, a task to be undertaken by the jury when all the evidence is complete.*

18. This approach has been followed, it appears, in ***XY*** [2013] NSWCCA 121 (Basten JA, Hoeben CJ at CL; Simpson J, Blanch J, Price J) a case dealing

with the admission of evidence under s.137. A five judge bench was convened to consider the conflict between ***Shamouil*** and the Victorian case of ***Dupas*** [2012] VSCA 328 which ruled the judge should consider the credibility and reliability of the evidence, not just the capacity of the evidence to have probative value. ***XY*** is somewhat complicated by the fact that the decision was reached by a majority (3-2) and the decision of all five judges was based on different reasons. Despite this, four of the five judges considered that the approach in ***Shamouil*** should be followed (see Basten JA at [64-66], Hoeben CJ at CL at [86]; Simpson J at [167], [175] and Blanch J at [206]-[207]) and only Price J expressed a preference for allowing a trial judge to consider the credibility, reliability and weight of the evidence: [224]-[225].

19. When assessing the probative value of co-coincidence evidence a trial judge should not completely ignore possible alternative explanations. However the judge is not required to discover and weigh up all alternative hypotheses – merely to consider whether such alternatives alter his or her view of the capacity of the coincidence evidence to rationally affect a fact in issue.

DSJ (2012) 215 A Crim R 349 per Whealy JA:

> [*78] In this appeal the Crown has conceded that, in performing the task under s 98, a trial Judge may, in an appropriate case, have regard to an alternative explanation arising on the evidence. The Crown, however, insisted that, in so doing, the trial Judge is restricted to examining whether the Crown hypothesis has cogency, that is, whether the Crown evidence is capable of being regarded as significant in its ability to prove the Crown case. If the coincidence evidence, either by itself or having regard to other evidence in the Crown case, positively and forcefully suggested an explanation consistent with innocence, then the coincidence evidence could scarcely be regarded as important or of consequence in proving the fact or facts in issue. What is required is this: the trial Judge must ask whether the possibility of such an alternative explanation substantially alters his (or her) view as to the significant capacity of the Crown evidence, if accepted, to establish the fact in issue. Does the alternative possibility, in the Judge's view, rob the evidence of its otherwise cogent capacity to prove the Crown's case? If it does not, the trial judge may safely conclude that the evidence has significant probative value.*
>
> *[79] In a practical sense, there are two avenues of approach to be taken. First, in examining the coincidence evidence (together with other material already in evidence or to be adduced) the trial Judge is required to ask whether there emerges, from a consideration of all the Crown evidence, a possible explanation inconsistent with guilt. For regard to be had to the alternative explanation, it must be a real possibility, not a fanciful one. It must be a broad or overarching possibility, capable of being stated in*

general terms, even though it may derive from an individual piece or pieces of evidence or the evidence taken as a whole.

[80] Secondly, the trial Judge must ask whether that possibility substantially alters his (or her) view as to the otherwise significant capacity of the coincidence evidence to establish the fact or facts in issue. Of course, if the trial Judge has already concluded that the coincidence evidence does not reach that level of significance in terms of its capacity, he will have rejected the evidence in terms of s 98. In that situation, the possibility of an alternative inference may, for the time being, be set to one side. Later in the trial, when the evidence has concluded, that possibility will become a matter for the jury to assess and determine when it comes to consider whether the Crown has proved its case beyond reasonable doubt.

[81] The Crown, in making its concession, however, stressed that at no stage in this process was the trial Judge required or entitled to assess the actual weight of any part of the evidence, or to make any actual assessment concerning the probabilities of any alternative theory. Nor was the trial judge required or entitled to make a comparison of the Crown theory and the probabilities of any alternative theory. This proposition appears consistent with established authority. Any attempt by the trial Judge to anticipate the actual weight the jury would attach to the evidence is prohibited, as I have explained.

[82] I agree with the Crown's concession and with the important qualification attached to it by the Crown in it submissions. This brings me to the reason why I consider that the contested interpretations advanced by Mr Odgers and Mr McHugh are not correct and cannot be accepted. This is because, in my opinion, they require the trial Judge to embark on a task that is entrusted solely to the jury. This is the task of fact finding. It is the task of assigning weight to the evidence; of accepting facts that are considered of value, and rejecting those that are not. It is ultimately the task of determining whether the Crown has proved its case beyond reasonable doubt. In a circumstantial case, it is the task of deciding whether, having regard to the whole of the evidence, there is an explanation consistent with innocence. If the jury decide that is the situation, the Crown will have failed to prove its case beyond reasonable doubt. The trial Judge can play no part in any of these matters.

20. This case was referred to by three judges in ***XY*** [2013] NSWCCA 121.

Hoeben CJ at CL pointed out:

[88] …When assessing the probative value of the prosecution evidence sought to be excluded, i.e., its capacity to support the prosecution case, a court can take into account the fact of competing inferences which might be available on the evidence, as distinct from determining which inference or inferences should be or are most likely to be preferred. It was that to which the court was referring in DSJ; NS (2012) 215 A Crim R 349 at [10] (Bathurst CJ); [11] (Allsop P) and [78] (Whealy JA).

Simpson J said an assessment under ss. 97 and 98 did not require the trial judge:

[166] …. weighing the relative merits of competing explanations for the conduct the subject of the tendency or coincidence evidence: see DSJ; NS (2012) 215 A Crim R 349 at [10], [78]-[82].

Blanch J after referring to DSJ said:

[204] The alternative explanation or explanations must amount to a "real possibility" or be such as to "rob the evidence of its otherwise cogent capacity".

…

[207] In this case … I find the capacity of the evidence to prove guilt is compromised because of the competing inferences open when interpreting the conversations and the unfair prejudice is highly significant. It is evidence that may inflame the jury or divert the jurors from their task. Furthermore, such prejudice could not be corrected by directions to the jury and it outweighs the probative value of the evidence.

21. After this process the final step, set out by Simpson J in ***Fletcher*** at [48] (see also ***DAO v R*** [2011] NSWCCA 63), is the section 101 determination which is:

… whether, in the opinion of the court, the probative value of the evidence substantially outweighs any prejudicial effect it may have upon the accused. That again involves an assessment and prediction of the use the jury may make of the evidence, against the risk that it may make some improper use of it. This task is also an evaluative one or one involving "a degree and value judgment" and is reviewable on appeal on House principles.

An observation about what happens in practice

22. Having set out the above summary of the relevant sections and some important cases, the following practical observations can be made:

    a. A Court will rarely be concerned with notice and, if it is, an adjournment may cure that concern;

    b. As to the probative value of the evidence the Court will usually be concerned with two areas: "similarities" and the "possibility of contamination"; and

    c. As to the s101 determination, assuming the evidence is of significant probative value, the judge will be concerned whether they can "direct away" any prejudice.

23. Practically, in the majority of cases, and assuming you have thought about what the judge is thinking, you will concentrate your submissions as to what has been said in the preceding paragraph.

24. Practically, when a Court is considering the probative value of the evidence there will be two areas which will usually be relevant, and particularly so in sexual assault cases: similarities and contamination.

Similarities

25. The "similarities" submission will likely address the similarities and differences in the alleged offending behaviour when compared to the suggested tendency or coincidence evidence. To demonstrate by using again a passage from ***Fletcher*** at [50]:

> *But this is where caution needs to be exercised. While it may be tempting to think, for example, that evidence of a sexual attraction to male adolescents has probative value in a case where the allegations are, as here, of sexual misconduct with a male adolescent, an examination must be made of the nature of the sexual misconduct alleged and the degree to which it has similarities with the tendency evidence proffered. There will be cases where the similarities are so overwhelming as to amount to what, in pre-Evidence Act days was called 'similar fact' evidence, showing 'a striking similarity' between the acts alleged; and there will be cases where the similarities are of so little moment as to render the evidence probative of nothing. And there will be cases where reasonable minds may differ as to the extent to which proof of one fact or circumstance may rationally affect the assessment of the probability of the existence of another fact".*

26. Where similarities exist in relation to tendency evidence the evidence will usually have significant probative value, however, the absence of close or striking similarities does not necessarily mean that the evidence will be excluded. It may be sufficient if the purported tendency evidence is capable of establishing a pattern of behaviour on the part of the accused.

Ford (2009) 201 A Crim R 451 per Campbell JA (Howie and Rothman JJ agreeing):

> *[125] In my view there is no need for there to be a "striking pattern of similarity between the incidents". All that is necessary is that the disputed evidence should make more likely, to a significant standard, the facts that make up the elements of the offence charged. In my view it meets that test*.

PWD (2010) 205 A Crim R 75 per Beazley JA (Buddin J and Barr AJ agreeing):

> *[79] The authorities are clear that for the evidence to be admissible under s 97 there does not have to be striking similarities, or even closely similar behaviour. By contrast, coincidence evidence is based up*on similarities.

BP [2010] NSWCCA 303 per Hodgson JA (Price and Fullerton JJ agreeing):

> *[108] It is not necessary in criminal cases that the incidents relied on as evidence of the tendency be closely similar to the circumstances of the alleged offence, or that the tendency be a tendency to act in a way (or to have the state of mind) that is closely similar to the act or state of mind alleged against the accused; or that there be a striking pattern of similarity between the incidents relied on and what is alleged against the accused: Ford at [38], [125], PWD at [64] - [65]. However, generally the closer and more particular the similarities, the more likely it is that the evidence will have significant probative value.*

Contamination

27. The "possibility of contamination" submission, if available on the evidence, will be based on what was said by the High Court in ***Hoch v The Queen*** (1988) 165 CLR 292 (see also ***Fletcher*** at [59]-[60]). In ***Hoch*** the Court quoted with approval from a decision in ***DPP v Boardman*** [1975] AC 421 at 444 which said:

> *The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstances that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other.*
>
> *I use the words 'a cause common to the witnesses' to include not only ... the possibility that the witnesses may have invented a story in concert but also the possibility that a similar story may have arisen by a process of infection from media of publicity or simply from fashion. In the sexual field, and in others, this may be a real possibility ...*

See also ***BP*** [2010] NSWCCA 303 per Hodgson JA:

> *[110] One matter that powerfully affects both the probative value of tendency evidence and the possibility of prejudicial effect is the risk of concoction or contamination of evidence. If the evidence of tendency from*

different witnesses is reasonably capable of explanation on the basis of concoction, then it will not have the necessary probative value: Hoch (1988) 165 CLR 292. However, this will be so only if there is a real chance rather than a merely speculative chance of concoction: Colby [1999] NSWCCA 261 at [111], OGD (No 2) [2000] NSWCCA 404; (2000) 50 NSWLR 433 at [74], [112]. The onus is on the Crown to negate the "real chance" of concoction: OGD at [74], F [2002] NSWCCA 125; (2002) 129 A Crim R 126 at [48].

[111] Relevant to consideration of concoction are the factors mentioned in Hoch at 297, namely relationship, opportunity and motive. One of these on its own is not sufficient to base a finding of a real possibility of concoction: RN [2005] NSWCCA 413 at [15], OGD at [111] – [112].

28. An argument concerning the "possibility of contamination" would routinely occur during the voir dire on the admissibility of the tendency or coincidence evidence. The voir dire would often be conducted on the basis of the documents (i.e. the statements of the relevant witnesses) but, on occasions, the parties may wish to examine the relevant witnesses on the voir dire.

29. If the Court proceeds to the section 101 determination, it must have already accepted that the evidence has significant probative value. That being so, practically, your submission will need to address why directions cannot cure the prejudice to the accused. In ***Regina v GAC*** [2007] NSWCCA 315 the Court of Criminal Appeal dismissed the prosecutor's appeal after a trial judge had not admitted tendency evidence. The Court said at [84]-[85]:

The prejudice was, as the respondent pointed out, similar to that identified in Watkins (2005) 153 A Crim R 434, where Barr J (with whom Grove and Howie JJ agreed) said -

"[49] It seems to me that the difficulty about the evidence was the risk to which it gave rise that the jury would be overwhelmed by the knowledge that the appellant had been convicted of a series of frauds on a previous employer and would refuse to contemplate the appellant's defence to the charges before them, which were of a similar nature. His Honour recognised such a risk during a debate with counsel on 12 May 2004 when he said this –

It gives rise to prejudgment. What do you say to the proposition that in this case that as a possibility, a jury might hypothetically, as soon as they learn about the 1984 matter, fold their arms and say 'oh well we might as well rack the cue here, he's obviously guilty, we won't listen to any more evidence, it's all over, he's done it before, he must have done it this time', why wouldn't they possibly take that approach?

> *[50] It seems to me that there was a real danger that the jury's recognition of the appellant's prior guilt was likely to divert them from a proper consideration of the evidence as bearing on the question of his intent in the charges before them. The difficulty of obviating that risk had to be taken into account in assessing the likely prejudicial effect of the evidence."*
>
> *The judge had regard to directions to the jury as an available course. He said that the jury might reason in the manner last mentioned "[n]otwithstanding the warnings that a trial judge must give" (at [50]). He said that the jury would be told not to punish the respondent again by basing their verdict on emotional rather than rational considerations, but no matter how many times the jury was told to be rational and dispassionate it was "in the trial of a self-confessed child molester … a big ask" (at [50]-[51]). In his Honour's view "[t]he potential for very great prejudice remains regardless of what could be said by the trial judge to ameliorate it" (at [51]).*

30. In effect, what the Court of Criminal Appeal said, is that when the trial judge decided not to admit the evidence after considering the issues set out above, there was no error. That is, the decision was open to the trial judge.

If the evidence is admitted what should you do?

31. If the evidence is admitted it is obvious that it is not helpful. It does not mean that all is lost. The following will still be necessary:

    a. Advising the accused as to how this will affect the running of the trial and the likelihood of any potential outcome compared to the trial not being run;

    b. If the trial is to run:

        i. Often much can be made of differences in the relevant behaviour;

        ii. Often much can be made of the possibility of contamination;

        iii. It may be that a tactical decision as to how a trial will be run will change (e.g. before the admission of the evidence a sexual assault case might not suggest fabrication but after the admission of the evidence it might).

    c. If the trial is run, help the judge direct the jury on the evidence. Why not draft a direction yourself? If appropriate ask the judge whether it would be of assistance to discuss it before the summing up. The benefit of

having drafted something yourself is that it will help you understand if the judge makes a mistake in the summing up and allow you to raise it.

32. The basic point is that if the evidence is admitted, consideration has to be given to whether, and how, the trial should be run.

Conclusion

33. The above matters are hopefully of some practical assistance.

34. This is not a detailed paper setting out all of the relevant provisions and case law. For further assistance see the useful discussion in the Bench Book and look at the papers of John Stratton SC and Dina Yehia SC, Deputy Senior Public Defenders available through the Public Defender's website.

C. Smith
Public Defender
Public Defenders Chambers

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Ph: (02) 9268 3111
Fax: (02) 9268 3168