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Tendency and Coincidence Evidence

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'Evidence scholars seldom meet together, even for merriment and diversion, but the conversation ends in a quarrel about these questions.'
- Heydon J. in *HML v The Queen* [2008] HCA 186 at para [320]

There was a time when a criminal law practitioner could go through his or her career without ever being troubled by the intricacies of what used to be called similar fact evidence, so rarely was it called upon by the prosecution, let alone successfully called upon. Those days have definitely passed.

Until Regina v Ellis (2003) 58 NSWLR 700 the predominant view was that the common law principles applied to the admission of tendency and coincidence evidence under the Evidence Act. In particular, the predominant view was that the Pfennig test applied (Pfennig v The Queen (1994-5) 182 CLR 461). That test was in summary that similar fact evidence was not admissible unless the judge concluded that there was no rational view of the similar fact evidence which was consistent with innocence. In Regina v Ellis, the Court of Criminal Appeal clearly rejected the view that the Pfennig test applied to propensity and coincidence evidence.

As a result of Regina v Ellis, the critical test became the test set out in s. 101 of the Evidence Act: did the probative value of the evidence substantially outweigh any prejudicial effect that evidence had on the accused. The rejection of the Pfennig test left practitioners with very little clear guidance about the circumstances in which tendency and coincidence evidence would be admissible.

For example, an application to tender propensity evidence most commonly arises in a child sexual assault case where it is alleged that the accused has sexually assaulted the complainant on occasions other than those charged, and/or has sexually assaulted the siblings or friends of the complainant. The Evidence Act provides little assistance in determining whether or not that material is admissible.

Since Regina v Ellis there have been a number of cases which have clarified what is required for tendency and coincidence to become admissible. Of particular importance are the judgments of Simpson J in Regina v Fletcher (2005) 156 A Crim R 308 and Regina v Zhang (2005) 158 A Crim R 504 which spell out the various hurdles which the prosecution must overcome in order to get tendency and coincidence material into evidence. This paper will focus on these cases.

The aim of this paper is to assist practitioners to understand what a trial judge should consider in determining whether or not tendency and coincidence evidence is admissible, and whether such evidence might be admissible as 'relationship' evidence. A secondary aim of this paper is to assist practitioners to help make decisions excluding tendency and coincidence evidence appeal proof. That aim is necessitated by the increasing number of appeals by the prosecution against decisions of trial judges rejecting tendency and coincidence evidence.

For convenience some of the more relevant provisions of the Evidence Act are set out at the end of this paper.

Tendency and coincidence evidence

Regrettably there is no clear dividing line between tendency and coincidence evidence. In my opinion the artificial distinction made between tendency and coincidence evidence was a mistake.

In many instances material might be both tendency and coincidence evidence. For example the facts in Ellis were that a number of break-ins occurred in which a glass pane was carefully removed and placed intact within the shop which was robbed. On the one hand, this material could be regarded as coincidence evidence, because the circumstances of the offences were 'substantially and relevantly similar' (s. 98). However the evidence could also be regarded as propensity evidence, in that the evidence suggested that Ellis had a tendency to commit break and enters in a particular way (s. 97). In fact in Ellis the Crown sought to tender the evidence both as tendency and coincidence evidence.

It is probably unhelpful to be too concerned about whether a particular piece of evidence is more truly categorised as tendency or coincidence evidence. Rather the tendency and the coincidence principles should be regarded as alternative and overlapping avenues by which material may be introduced into evidence.

A summary of the basis of admissibility of tendency evidence

Where the prosecution in a criminal trial seeks to adduce tendency evidence, the prosecution must satisfy the judge that:

> (1) the prosecution has given reasonable notice in writing of the intention to adduce the evidence (s. 97 (1) (a));
>
> (2) that the evidence has (either by itself or having regard to other evidence adduced or to be adduced) significant probative value (s. 97 (1) (b)); and
>
> (3) the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused (s. 101)

A summary of the basis of admissibility of coincidence evidence

Where the prosecution in a criminal trial seeks to prove that a person did a particular act or had a particular state of mind because of the improbability of 2 or more related acts occurring coincidentally, the prosecution must satisfy the judge that:

> (1) the prosecution has given reasonable notice in writing of the intention to adduce the evidence (s. 98 (1) (a));
>
> (2) that the evidence has (either by itself or having regard to other evidence adduced or to be adduced) significant probative value (s. 98 (1) (b)); and
>
> (3) the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused (s. 101)

Two or more related events are to be taken to be related events if and only if they are substantially and relevantly similar, and if the circumstances in which they occurred are substantially similar (s. 98(2)).

Reasonable notice in writing

A requirement for the admissibility of both tendency and coincidence evidence is that the party seeking to adduce the evidence gives the other party or parties to the proceedings reasonable notice in writing: s. 97 (1) (a) and s. 98 (1) (a) Evidence Act.

Regulation 5 of the Evidence Regulations sets out the requirements for a notice (set out here in a slightly summarised form):

> (a) the substance of the evidence … that the party giving the notice intends to adduce, and
>
> (b) if that evidence consists of, or includes, evidence of the conduct of a person, particulars of:
>
> > (i) the date, time, place and circumstances at or in which the conduct occurred, and
> >
> > (ii) the name of each person who saw, heard or otherwise perceived the conduct, and
> >
> > (iii) in a civil proceeding-the address of each person so named, so far as they are known to the notifying party.

In Regina v Zhang Simpson J. said that a properly drafted coincidence notice would identify four matters (at para [133]):

· the two or more related “events” the subject of the proposed evidence;
· the person whose conduct or state of mind is the subject of the proposed evidence;
· whether the evidence is to be tendered to prove that a person did a particular act, and, if so, what that “act” is;
· whether the evidence is to be tendered to establish that that person had a particular state of mind, and, if so, what that “state of mind” is.

It was held in Regina v AN (2000) 117 A Crim R 176 that a general notice in terms of 'In each case in respect of each complaint the Crown will lead evidence of the charges in respect of each of the other complainants' did not comply with the requirement of notice. On the other hand, it has been held that ‘it is sufficiently compliant with the regulation if the notice states, either in its own body or by reference to documents readily identifiable, the nature and substance of the evidence sought to be tendered’: per Adams J. in R v AB [2001] NSWCCA 496 at para [15].

The court has a power to dispense with the notice requirements: s. 100 Evidence Act. In practice, few judges appear to be prepared to exclude tendency or coincidence evidence on the basis of a failure to give notice to the defence. In the decided cases on dispensing with the requirement to give notice, a matter which is regarded as critical is whether or not the party opposing leave being granted can point to any prejudice: see for example Tsang Chi Ming v Uvanna Pty Ltd (1996) 140 ALR 273 (a case about dispensing with notice about hearsay evidence).

Significant probative value

The second requirement for the admissibility of both tendency and coincidence evidence is that the evidence has a ‘significant probative value’.

‘Probative value’ is defined in the Dictionary to the Evidence Act as meaning the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

The word 'significant' used in the phrase 'significant probative value' has been said to mean 'important' or 'of consequence': Regina v Lockyer (1996) 89 A Crim R 457.

In Regina v Fletcher Simpson J said that a judge making a ruling under s. 97(1) is required to assess the extent to which the evidence in question has the capacity to rationally affect the probability of the existence of a fact in issue, and then make an assessment and prediction of the probative value which a jury might ascribe to the evidence (at para [33]). The determination of whether or not the evidence has significant probative value involves an assessment and prediction of the probative value that a jury might ascribe to the evidence: Regina v Fletcher at para [33].

Realistically, in most cases tendency and coincidence evidence sought to be adduced by the prosecution will be found to have significant probative value. The real issue is likely to be whether the test under s. 101 is satisfied.

Rejection of the ‘Pfennig test’

Where the party seeking to tender tendency or coincidence evidence is the prosecution, that evidence cannot be used unless the probative value of the evidence substantially outweighs any prejudicial effect that the evidence may have on an accused: s. 101 Evidence Act.

At common law the test for the admissibility was and is still the Pfennig test, based on the decision of the High Court in Pfennig v The Queen (1995) 182 CLR 461. That test was that similar fact evidence was not admissible unless it bore no reasonable explanation other than the inculpation of the accused in the offence charged (at 481). Importantly, the majority in Pfennig reasoned that (at 483):

> Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. And, unless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle.

Since the test set out in s. 101 also adopts the test that the probative value of the evidence must substantially outweigh its prejudicial effect, it was argued and accepted in a number of cases that the Pfennig test applied to s. 101: see for example Regina v Lock (1997) 91 A Crim R 356.

This question of the applicability of the Pfennig test was considered by a 5 judge bench of the Court of Criminal Appeal in Regina v Ellis (2003) NSWLR 700. In that case it was held that the Pfennig test no longer applies, and the only test is whether the probative effect of the evidence substantially outweighs the prejudicial effect on the accused. Special leave to appeal to the High Court was granted but was later revoked. In their joint judgment, Hidden and Buddin JJ. said that application of the statutory test and the common law test would often lead to the same result. However Spigelman CJ (with whom all the other judges of the Court of Criminal Appeal agreed) said

that he did not agree with the additional comments of Hidden and Buddin JJ, but said (at para [96]):

> 96 My conclusion in relation to the construction of s101(2) should not be understood to suggest that the stringency of the approach, culminating in the *Pfennig* test, is never appropriate when the judgment for which the section calls has to be made. There may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the "no rational explanation" test were satisfied.

This really begs the question of how a judge is to determine whether or not to apply the Pfennig test. It seems that the safest course is to turn to the wording of s. 101 itself.

Applying the s. 101 test: assessing probative value

There a number of steps which must be taken by a court in determining whether or not the test under s. 101 is satisfied. The first step, as in the determination under s. 97 and s. 98, is to assess the extent to which the evidence in question has the capacity to rationally affect the probability of the existence of a fact in issue, and then make an assessment and prediction of the probative value which a jury might ascribe to the evidence: Regina v Fletcher at para [33].

In cases decided since Ellis, it has become clear that a consideration of the probative value of the proposed tendency or coincidence evidence requires a consideration of the degree of similarity between two or more acts. In Regina v Fletcher Simpson J. said (at paras [49] to [50]):

> 49 In relation to each count on the indictment, the ultimate fact in issue was whether the appellant conducted himself as alleged by the complainant. But they are not the only facts in issue. Just what facts are in issue in any case depends upon the facts and circumstances alleged by the prosecution (including facts and circumstances from which the prosecution would seek to have inferences drawn) and any responses made by the person accused. If evidence tends to elucidate (i.e. rationally affect the assessment of the probability of any such fact), then that evidence has probative value. Any fact upon which the prosecution relies to establish the offence charged is, of course, a fact in issue, even where it is not disputed by the accused. A layperson may well be forgiven for thinking that evidence of a tendency to sexual misconduct with adolescent boys could rationally affect the assessment of the probability that the appellant sexually misconducted himself with the complainant as an adolescent.
>
> 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.

It is submitted that both in relation to tendency evidence and in relation to coincidence evidence, the critical matter is whether or not there is a striking similarity between the proposed evidence and the events charged. In making that assessment, the common law authorities will be of assistance. An important factor will be whether the suggested similarities are part of the usual behaviour of offenders, or whether they are in truth distinctive. In DPP v Boardman [1975] AC 421 Lords Hailsham and Salmon gave this example: if a burglar goes in through a ground floor window, that will not constitute a striking similarity, but if the burglar leaves an esoteric symbol painted in lipstick on the mirror, there may be a striking similarity. Similarly in a sex case, repeated acts of sexual intercourse are unlikely of themselves to have a striking similarity, but performing them in the headdress of a Red Indian chief might.

It is important to note that the similarities or differences in the accused's alleged pattern of behaviour are not limited merely to the nature of the sexual acts themselves. In Fletcher, Simpson J. said (at 324):

> 67 In my opinion, the present appellant's argument focused too narrowly upon a tendency to have sexual intercourse in a particular fashion. The DPP's explanation, provided to the appellant's legal advisors, shows that the "tendency" which it sought to establish was wider, and more detailed. The DPP sought to establish a pattern of behaviour, or even a *modus operandi*, in the appellant's behaviour. This included the use of his position as parish priest in meeting Catholic families and involving himself in their lives, developing a special relationship with the families, the children of the families, and in particular with a child the focus of his attention; and the introduction of the child

> to sexually explicit material and, eventually, inappropriate sexual behaviour.

There are conflicting views about whether or not the probative value of the evidence should be assessed on the assumption that the jury will accept the evidence. Spigelman CJ said in Regina v Shamouil [2006] NSWCCA 112 in the context of s. 137 that in assessing the probative value of the evidence it should be assumed that the evidence will be accepted. However in Pfennig v The Queen (1995) 182 CLR 461 Mason CJ, Deane and Dawson JJ. said that the probative value of disputed similar fact evidence will be higher if the evidence was not disputed (at 482). Recently James J. applied the Pfennig approach in Regina v KJF (James J, unreported 4/10/2007).

Further, where there is a gap between the previous behaviour tendered as tendency evidence and the current alleged offences (such as a period of 15 years where there was no re-offending, pleas of guilty to the earlier offences, and evidence of reparations) that will suggest that the evidence has less probative value (Regina v Watkins (2005) 153 A Crim R 434 at paras [33] and [37].

Applying the s. 101 test: 'substantials outweighs any prejudicial effect'

The second step is to identify the prejudicial effect. In Regina v RN [2005] NSWCCA 413 at para [11] Sully J. (with whom the other judges of the Court of Criminal Appeal agreed) said:

> 11 What his Honour had then to do was to define what prejudicial effect, if any, the admission of the challenged evidence might have upon the respondent. Having thus identified some perceived prejudice, his Honour had to carry out the exercise of balancing the high probative value which his Honour saw, correctly as I respectfully think, in the challenged evidence, against that perceived prejudice, so as to reach a considered and reasoned answer to the question whether the former factor outweighed substantially the latter factor.

Failure to identify the prejudicial effect of the tendered evidence may amount to a judicial error.

'The danger of unfair prejudice' means that there is a real risk that the evidence will be misused by the jury in some unfair way: Regina v BD (1997) 94 A Crim R 131 at 139, Papakosmas v The Queen (1999) 196 CLR 297 at para [91] (per McHugh J). Putting it another way, 'unfair prejudice' may mean damage to the defence case in some unacceptable way, for example by provoking some irrational, emotional or illogical response, or by giving the evidence more weight than it deserves (per Wood CJ at CL in Regina v Suteski (2002) 56 NSWLR 182 at para [116]).

In the context of tendency and coincidence evidence, the 'unfair prejudice' is that the ordinary person will think that when someone with an established tendency to act in a certain way will yield to that tendency whenever the opportunity arises: Regina v AH (1997) 42 NSWLR 702 at 709. Putting that another way, the danger of unfair prejudice may be the risk that knowing of the prior criminal conduct of the accused, the jury might be diverted from a proper consideration of the evidence and simply assume the accused's guilt: for example, see Regina v Watkins (2005) 153 A Crim R 434 esp. at paras [49] to [50].

The judge is then required to balance the probative evidence against the danger of unfair prejudice. In so doing it is necessary for the judge to consider whether or not the unfair prejudice can be cured by directions. A failure to do so may amount to appellable error. In Regina v Ngatikaura (2006) 161 A Crim R 329 Beazley JA said (at para [32], dissenting):

> 32 A court is required, as part of the assessment of the question whether the probative value of the evidence is outweighed by any unfair prejudice, to consider whether an appropriate direction can be given to the jury to ensure that the evidence is not misused in any way: see *R v Cook* at [37]. His Honour did not give any express consideration to that question. The possibility that a direction may be given to the jury is integral to the assessment a trial judge must otherwise make in determining whether the probative value of the evidence is outweighed by the unfair prejudice. Failure to give consideration to that question means that his Honour's consideration whether s.137 should (assuming that was his Honour's ruling) be applied so as to exclude the evidence of the prior offences, miscarried.

It is sometimes argued that because it should be assumed that juries will follow directions (see for example McHugh J. in Gilbert v The Queen (1999) 201 CLR 414 at 425), the availability of directions means that in effect tendency and coincidence should never be excluded (see the Crown's submissions in Regina v GAC [2007] NSWCCA 315 at para [87]). It is submitted that for a number of reasons this argument is misconceived. Firstly, if that were the case, there would have been no need for the legislature to include s. 101 in the Evidence Act. Secondly, there have been times when the Court of Criminal Appeal itself has concluded that a judge should have found that the probative value of evidence was outweighed by the danger of unfair prejudice. For example in Regina v Watkins (2005) 153 A Crim R 434 Barr J. (with whom the other judges of the Court of Criminal Appeal agreed) said (at paras [50] to [51]):

> 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.
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> 51 I have explained why the probative value of the evidence, both under section 97 and section 98, was bound to be heavily qualified. Against that heavily qualified evaluation had to be weighed the serious risk to which I have adverted and the difficulty of removing it by direction to the jury. In my opinion it was not open to his Honour to conclude that the probative value of the evidence substantially outweighed any prejudicial effect it might have on the appellant. The evidence ought not to have been admitted. The first and second grounds of appeal have been made good. I would allow the appeal.

Single complainant, multiple acts

A common factual situation where the problem of tendency and coincidence evidence arises is a case where a single complainant alleges a number of sexual assaults by the accused over a long period of time. In Regina v Qualtieri (2006) 171 A Crim R 463 Howie J. said (at para [118]):

> 118 On the other hand evidence of the relationship between the accused and the complainant that is admitted for the purposes of showing that the accused had a tendency or propensity to have sexual relations with the complainant will almost never be found in the complainant's account of his or her relationship with the accused. That is because the complainant's account of the relationship would rarely have sufficient probative value to overcome the precondition of admissibility for tendency evidence in s 97 and s 101. It is presumably the lack of sufficient probative value of the complainant's evidence to prove a tendency on the part of the accused that led McHugh and Hayne JJ in ***Gipp v The Queen*** (1998) 194 CLR 106 at [76] to require that evidence of the complainant to be used for this purpose to be proved beyond reasonable doubt. Tendency evidence generally does not have to be proved to that standard. Evidence of the accused's sexual interest in the complainant will usually be found outside of the complainant's evidence, such as in a letter written by the accused to the complainant or some other act of the accused that shows a sexual interest in the complainant or children generally.

It is submitted that the cases provide guidance as to material which will become admissible as tendency evidence in a sexual assault case. Firstly, the mere fact of a sexual interest in persons of the age and gender of the complainant (for example, young boys) of itself will not be sufficient unless there is something in the nature of a striking similarity between the conduct tendered as tendency evidence and the conduct charged (Fletcher). Secondly, material coming from the complainant himself/herself will be unlikely to qualify as tendency evidence (Qualtieri), although it may be admissible as 'relationship evidence', as to which see below.

On the other hand, in a recent decision on the common law situation, HML v The Queen [2008] HCA 16, Hayne J. (with whom Gummow and Kirby JJ. agreed) said (at para [1107]):

> Evidence of other sexual conduct which would constitute an offence by the accused against the complainant will usually satisfy the test stated in *Pfennig*. It will usually satisfy that test because, in the context of the prosecution case, there will usually be no reasonable view of the evidence, if it is accepted [120], which would be consistent with innocence. That is, there will usually be no reasonable view of the evidence of other sexual conduct which would constitute an offence by the accused against the complainant other than as supporting an inference that the accused is guilty of the offence charged.

It is submitted that the view of Howie J. is to be preferred. It is difficult to see logically how a Crown case can be supported by evidence of other alleged incidents, where the only support for these incidents comes from the complainant.

Multiple complainants and the Hoch test

Another very common factual situation is where multiple complainants (often siblings and friends) allege sexual assaults being committed by the one accused. At common law such evidence was not admissible as similar fact evidence if it was reasonably explicable on the basis of concoction. In Hoch v The Queen (1988) 165 CLR 292 Mason CJ, Wilson and Gaudron JJ. said (at 296-7):

> In cases such as the present the similar fact evidence serves two functions. Its first function is, as circumstantial evidence, to corroborate or confirm the veracity of the evidence given by other

> complainants. Its second function is to serve as circumstantial evidence of the happening of the event or events in issue. In relation to both functions the evidence, being circumstantial evidence, has probative value only if it bears no reasonable explanation other than the happening of the events in issue. In cases where there is a possibility of joint concoction there is another rational view of the evidence. That rational view — viz. joint concoction — is inconsistent both with the guilt of the accused person and with the improbability of the complainants having concocted similar lies. It thus destroys the probative value of the evidence which is a condition precedent to its admissibility.
>
> Thus, in our view, the admissibility of similar fact evidence in cases such as the present depends on that evidence having the quality that it is not reasonably explicable on the basis of concoction. That is a matter to be determined, as in all cases of circumstantial evidence, in the light of common sense and experience. It is not a matter that necessarily involves an examination on a voir dire. If the depositions of witnesses in committal proceedings or the statements of witnesses indicate that the witnesses had no relationship with each other prior to the making of the various complaints, and that is unchallenged, then, assuming the requisite degree of similarity, common sense and experience will indicate that the evidence bears that probative force which renders it admissible. On the other hand, if the depositions or the statements indicate that the complainants have a sufficient relationship to each other and had opportunity and motive for concoction then, as a matter of common sense and experience, the evidence will lack the degree of probative value necessary to render it admissible. Of course there may be cases where an examination on the voir dire is necessary, but that will be for the purpose of ascertaining the facts relevant to the circumstances of the witnesses to permit an assessment of the probative value of the evidence by reference to the consideration whether, in the light of common sense and experience, it is capable of *reasonable* explanation on the basis of concoction. It will not be for the purpose of the trial judge making a preliminary finding whether there was or was not concoction.

The question arises whether the Hoch test survives the Evidence Act, and the decision of the Court of Criminal Appeal in Ellis.

In cases which followed the enactment of the Evidence Act, it was held that the principles in Hoch v The Queen should continue to be applied: see Regina v Colby [1999] NSWCCA 261 esp. at para [107], and Regina v OGD [No. 2] (2000) 50 NSWLR 433 esp. at para [77]).

The decision in Ellis did not disapprove of the Hoch formulation and it appears to remain applicable to cases decided under the Evidence Act.

It is very important to note that it is insufficient for judges to simply apply the principles in Hoch without reference to s. 101 of the Evidence Act: see for example Regina v RN [2005] NSWCCA 413. The question of whether the concoction is excluded as a reasonable possibility is relevant to the assessment of the probative value of the evidence, and it should be referred to in that context. In Regina v RN [2005] NSWCCA 413 Sully J said (at para s [11] and [13]:

> 11 What his Honour had then to do was to define what prejudicial effect, if any, the admission of the challenged evidence might have upon the respondent. Having thus identified some perceived prejudice, his Honour had to carry out the exercise of balancing the high probative value which his Honour saw, correctly as I respectfully think, in the challenged evidence, against that perceived prejudice, so as to reach a considered and reasoned answer to the question whether the former factor outweighed substantially the latter factor.
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> ……
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> 13 I accept that it would be quite wrong to suggest that Judge Coolahan should have written out in his Honour's judgment a checklist of the steps which s 101 required to be followed and then, so to speak, have ticked off each one, step by step, in a fashion more apt to McHugh J's "mathematical calculation", than to a value judgment. It must be, however, that any s 101 ruling must make apparent that the Judge has, in fact, looked in a precise way at what the section actually says and requires; and has then considered in a precise way, which has been given adequately transparent expression, how the Judge has assessed the relevant evidence given on the voir dire, and how he has then balanced out the competing statutory considerations.

Discretion.

In Regina v Ngatikaura (2006) 161 A Crim R 329 Simpson J. (with whom Rothman J. agreed) said that if evidence was admitted as tendency or coincidence, there was no room for the rejection of the evidence under s. 135 or s. 137 of the Evidence Act (at para [71]). The argument for this approach is that if evidence overcomes the very stringent test set out in s. 101 of the Evidence Act, it will necessarily not be excluded under s. 135 or s. 137 Evidence Act.

Tendency/Coincidence Evidence led by the Defence.

Tendency/coincidence evidence led by the defence is admissible if:

(1) the other party has been given reasonable notice AND

(2) the court thinks it would have highly significant probative value: ss. 97 and 98 Evidence Act

Very importantly, s. 101 of the Evidence Act does not apply to tendency and coincidence evidence tendered on behalf of the accused in a criminal trial.

Significant means less than substantial: Regina v Lockyer (1996) 89 A Crim R 457. Where evidence is led by the defence of the propensity of prosecution witnesses (for example to be violent) as tendency evidence, the evidence does not go solely or mainly to credit of the prosecution witness and so the bad character of the accused may not be raised by the prosecution in response: Regina v Hancock (NSW CCA u/r 21/11/1996).

In the case of Regina v Cakovski (2004) 149 A Crim R 21 it was held that in a self defence murder case where 20 years previously the deceased had murdered 3 people, the evidence was wrongly rejected.

Relationship evidence

In some cases evidence may be admitted of conduct between the accused and the complainant/victim, not as tendency evidence, but as evidence as to the ‘relationship’ between them. Difficult questions arise as to whether ‘relationship’ evidence is being relied on for a tendency or a non-tendency purpose. If the evidence is relied on for a non-tendency purpose, then special directions are required, limiting the use which a jury can make of the evidence to non-tendency purposes: see s. 96 Evidence Act. As to relationship evidence generally, see the article by Justice Howie, ‘Relationship Evidence under the Evidence Act’, (1997) 4 Crim LN 22.

There are a small number of well recognised categorises of cases where relationship evidence is admissible.

Relationship evidence in sexual assault cases

‘Relationship evidence’ arises most commonly in sexual assault cases. ‘Relationship evidence’ may or may not be tendency evidence, depending what use is sought to be made of it. However

Relationship evidence may be admissible for non-tendency purposes. For example:

(1) where the charged sexual offences are merely examples repeated sexual assaults, the evidence may be admissible in order to put the offences into a context so that the complainant’s evidence is not confined artificially to the incidents charged (see for example Regina v Chamilos (NSW CCA Regina v Beserick (1993) 30 NSWLR 510);

(2) where the complainant explains his/her apparent lack of surprise, protest and complaint by a history of sexual and physical violence (see for example Regina v Toki (2000) 116 A Crim R 536 especially at paragraph [83])

In Regina v Leonard (2006) 67 NSWLR 545 Hodgson J.A. said (at 556, paragraph [49]):

> 49 However, it does seem to me that, in some cases, it may be appropriate to draw further distinctions. It seems to me that, where a man is charged with particular sexual assaults against a complainant, evidence that he committed similar assaults against the complainant on other occasions could be relevant in at least three different ways, only one of which would be as tendency evidence:
>
> > (1) It may be relevant to the extent of removing implausibility that might otherwise be attributed to the complainant's account of the assaults charged *if* these assaults were thought to be isolated incidents, in particular implausibility associated with the way each party is said to have behaved on these particular occasions.
> >
> > (2) It may be relevant in supporting an inference that the accused was sexually attracted to the complainant, so that he had a motive to act in a sexual manner towards the complainant.
> >
> > (3) It may be relevant in supporting an inference that the accused not only had the motivation of sexual attraction, but also was a person who was prepared to act on that motivation to the extent of committing sexual assaults.

Hodgson J.A. expressed the view that the first use referred to was relationship evidence, the second use was evidence of motive and so was not tendency evidence, and the third use was tendency evidence.

However, it is submitted that reliance on other uncharged acts as evidence of motive is necessarily relying on tendency reasoning: that is, because the accused had committed uncharged sexual acts, he was more likely to have committed the charged sexual offences. Evidence of motive was regarded as tendency evidence by the High Court in HML v The Queen [2008] HCA 169 see for example per Gleeson CJ at paragraph [26], Kirby J. at paragraph [63], Hayne J. at paragraph [247], Heydon J. at paragraph [277], Kiefel J. at paraph [506].

Relationship evidence in murder trials

In murder trials, evidence of the relationship between the accused and the deceased, and a history of violence between them may be admissible, unless the evidence is about incidents remote from the time of death.

In Wilson v The Queen (1970) 123 CLR 334 the appellant was charged with the murder of his wife. The Crown led evidence of quarrels between Wilson and the deceased and in particular evidence that during these quarrels the deceased stated that she knew Wilson wanted to kill her.

In a passage which begins with a classic statement of the central role of relevance in the law of evidence, Barwick C.J. said (at 337):

> The fundamental rule governing the admissibility of evidence is that it be relevant. In every instance the proffered evidence must ultimately be brought to that touchstone. The evidence of which the admissibility was challenged on behalf of the applicant consisted of accounts given by witnesses who had heard the utterances to which they deposed. There were two occasions on which a witness spoke of a then current quarrel between the applicant and his wife. In respect of the earlier of these occasions, said to have taken place in Tasmania in 1967, a witness stated that he heard the quarrelling though the parties were not within his sight and that he specifically heard the deceased arguing and say to the applicant, "I only know you want to kill me for my money". In respect of the later of these occasions, said to have been in the month of March 1968 in Tasmania, a witness said that the applicant in the course of a quarrel with the deceased in the presence of others besides the witness, pushed her to the ground for no other reason than that she had not desisted from rubbing the duco of her motor car when he had told her to stop doing so. Whilst on the ground the deceased according to the witness had said "I know you want to kill me, why don't you get it over with". On the first occasion the witness did not hear any reply by the applicant and on the latter occasion the applicant made no reply.
>
> It is quite apparent that the nature of the current relationship between the applicant and his wife was relevant to the question to be decided by the jury. Evidence of a close affectionate relationship could properly have been used by the jury to incline against the conclusion, which might otherwise have been drawn from the circumstances, that the applicant killed his wife. Equally, evidence that there had developed mutual enmity could be used to induce the conclusion that he had killed his wife and that his story of an accidental shooting lacked credibility.

Barwick C.J. added that evidence of the relationship remote in time from the killing might not be admissible (at 339). The courts appear to be prepared to regard the question of what is to be regarded as 'remote in time' very narrowly. In Regina v Serratore [2001] NSWCCA 123 it was held that the trial judge had rightly admitted evidence that Serratore had requested another man to kill his wife five months before her death as admissible.

Regina v Lock (1997) 91 A Crim R 356 concerned evidence led in a stabbing murder. Whilst evidence of three previous stabbing incidents tendered by the Crown was held to be inadmissible as evidence to demonstrate the accused's tendency to stab the deceased, it was nonetheless admissible as background relationship evidence and Hunt CJ at CL found no reason to exclude it pursuant to s.137 of the Evidence Act.

Statements by the victim about what he/she thought about the relationship at the time may not be admissible: Regina v Frawley (1993) 69 A Crim R 208 especially at 220 and 225.

If the evidence sought to be tendered about the relationship between the accused and the deceased includes evidence of violence by the accused towards the deceased, then a question arises as to whether or not the Crown must satisfy the test for the admissibility of tendency evidence. It is submitted that the better view is this evidence is tendency evidence, and must satisfy the test for tendency evidence before it can be admitted into evidence.

In Regina v Andrews [2003] NSWCCA 7 the appellant had been convicted of the murder of his wife. The Crown had led evidence that there during their marriage Andrews had displayed extreme jealousy and violence towards the deceased and men who the appellant were showing an interest in her. Andrews appealed ground that this evidence was really tendency evidence and that it did not satisfy the tests for admissibility of tendency evidence. Hulme J. (with whom Heydon JA and Hidden J agreed) said that there was 'much to be said' for the view that this

evidence was tendency evidence, but that because there was an overwhelming case, even if the tests for tendency evidence had not been met, the proviso should be applied.

'Harriman' Evidence

At common law, it was held in Harriman v The Queen (1989) 167 CLR 590 that evidence of prior drug dealings between the accused and a witness could be used to show that the association between the two was for a guilty rather than an innocent purpose.

The facts in Harriman were unusual. Harriman was charged with a man Martin with being knowingly concerned in the importation of heroin. Martin had posted the heroin from London in 1987 to 5 separate addresses in Western Australia. There was evidence that Harriman and Martin, who were business partners, had travelled together to Chiang Mai in Thailand. Martin, who had become a Crown witness, gave evidence that Harriman obtained the 5 packets of heroin and given them to Martin.

The disputed evidence was evidence that Harriman and Martin had been involved in supplying heroin in Western Australia in 1986 and 1987.

It is difficult to understand why the evidence of the kind held to have been rightly admitted in Harriman should not be regarded in truth as being in the nature of tendency evidence, and accordingly its admissibility should be determined on that basis.

In cases decided since the Evidence Act came into force, it has been held that evidence admitted on the basis of the principles in Harriman should not be required to comply with the requirements for tendency evidence: see for example Regina v Quach (2002) 137 A Crim R 345.

However, it has been held that evidence of prior drug dealings of an accused, not said to be tendency or coincidence, is not admissible as 'relationship' evidence: Regina v Fung (2002) 136 A Crim R 95.

Other areas where ‘relationship’ evidence might be admissible

Although there appear to be few cases on the point, it is difficult to see why ‘relationship’ evidence in a case involving violence short of murder (possibly ranging from assault right up to attempted murder) is inadmissible.

Regina v Cornelissen and Sutton [2004] NSWCCA 449 was a case involving manslaughter by unlawful and dangerous act, (punch) and where at trial, evidence was given of four previous incidents involving physical violence between the deceased and Cornelissen. The CCA held that this evidence was intended to be, and could be admitted as relationship evidence but could not be used by the jury as tendency evidence. In that respect the trial judge erred by not directing the jury accordingly.

In Atroushi v Regina [2001] NSWCCA 406 was a conviction appeal of a case involving stalking and possessing a loaded firearm. Evidence was led to show that the appellant made threatening phone calls to the complainant and persistently followed and threatened her and members of her family. This evidence was held to be relationship evidence and admissible in order to place the evidence of the offence charged into a true and realistic context, and in order to assist the jury to appreciate the full significance of what would otherwise appear to be an isolated act occurring without any apparent reason.

‘Relationship’ evidence usually arises in cases where the allegation is of violence or sexual assault, but it may arise in other cases as well. In Regina v Chan (2002) 131 A Crim R 66 evidence of previous dealings in heroin was held to be admissible when notwithstanding that it revealed criminal acts, it was relevant otherwise than to prove tendency in that it revealed the relationship between the accused and his “errand boy”.

Other types of evidence not regarded as ‘tendency’ or ‘coincidence evidence

There are other kinds of evidence which may be admissible for a purpose other than tendency or coincidence reasoning.

Where facts are so bound up with the facts of the crime that to leave them out would make the picture incomplete they are admissible even if they disclose other offences: O’Leary v The King (1946) 73 CLR 566. This principle has been held to be still applicable after the Evidence Act came into force in Regina v Adam (1999) 47 NSWLR 267.

Evidence which would be inadmissible as tendency or coincidence evidence may be become admissible if an accused raises his good character.

Is 'relationship evidence' admissible if it does not qualify as tendency evidence?

In R v AH (1997) 42 NSWLR 702 the Court of Criminal Appeal further clarified that there are two species of 'relationship evidence' that may be admitted in sexual assault cases. That is, evidence of conduct with a sexual connotation between the complainant and the accused, other than that which is the subject of the offence or offences charged is relevant in two different ways

> a) the relationship revealed may place the evidence of the events which give rise to a particular charge into their true context as part of the essential background against which the evidence of the complainant and of the accused necessarily fall to be evaluated: **B v The Queen** (1992) 175 CLR 599 at 610 (see also 602-603); and
>
> (b) the guilty passion of the accused revealed - or, in less inflammatory terms, the sexual desire or feeling of the accused for the complainant - is directly relevant to proving that the offence charged was committed: **Rex v Ball** [1911] AC 47 at 71; see also **Pfennig v The Queen** (1975) 182 CLR 461 at 526"

If the Crown introduces the relationship evidence as 'background' or 'context' evidence (species 'a'), it is not tendency evidence and the requirements under sections 97 and 101 do not apply. However if the Crown wishes to admit the relationship evidence as species 'b', that is the evidence used to demonstrate that the guilty passion of the accused tends to show that the accused did do the act/s in question, then the evidence is 'tendency evidence' and its admission is governed by sections 97 and 101.

There have been a number of judgments which have suggested that 'relationship' or 'context' evidence is admissible only if the tendered evidence is admissible as tendency or coincidence evidence. In Gipp v The Queen (1998) 194 CLR 106 the majority of the High Court, quashing a conviction, was made up of Gaudron, Kirby, and Callinan JJ. Of those judges, Gaudron (at 113) and Callinan JJ (at 168) seemed to express the view that uncharged sexual conduct was not admissible unless the evidence was admissible as propensity evidence or unless the defence's conduct of the case made it admissible in some other way. Of the minority, Kirby J. (at 157) seemed to share that view. Arguably, then a majority of the High Court thought that 'relationship' evidence was not admissible unless it qualified as tendency or coincidence evidence.

However in Regina v Fraser (NSW CCA unreported 10/8/1998) the NSW Court of Criminal Appeal held that because there was no clear ratio decidendi in Gipp v The Queen, the courts should continue to admit 'relationship' and 'context' evidence in line with cases such as Regina v Beserick. McHugh J. made a similar statement in KRM v The Queen (2001) 75 ALJR 550 at para [31].

This issue was raised in the decision of the High Court in Tully v The Queen (2006) 81 ALJR 391. Kirby and Hayne JJ concluded that the case was not an appropriate vehicle to clarify whether relationship evidence was admissible if it was inadmissible as propensity evidence (at para [66], [71]). Callinan J. expressed 'very serious concerns' about the admission of 'relationship' evidence, but in the end said that 'This case is not however the one for final resolution of these questions.' (at para [149]). Heydon and Crennan JJ. said that they agreed with Callinan JJ.

This brings us to the very recent decision of the High Court in HML v The Queen [2008] HCA 16. In this case three appeals from South Australia were heard together, all involving the question of directions when uncharged sexual conduct is led in sexual assault cases. Importantly, South Australia is a state where the Evidence Act does not apply.

The unreported version of the case takes up 118 pages, and each of the justices of the High Court gave a separate judgment. It is not easy to say what impact the decision will have on the law in New South Wales.

Hayne J. (with whom arguably Gummow and Kirby JJ. agreed at paragraphs [41] and [46]) said (at paragraphs [106-7]):

> [106] Admissibility of evidence of other sexual acts directed at the complainant by the accused, which are not acts the subject of charges being tried, is to be determined by applying the test stated in *Pfennig v The Queen* [119]. It is not to be determined by asking whether the evidence in question will put evidence about the charges being tried "in context", or by asking whether it describes or proves the "relationship" between complainant and accused.
>
> [107] Evidence of other sexual conduct which would constitute an offence by the accused against the complainant will usually satisfy the test stated in *Pfennig*. It will usually satisfy that test because, in the context of the prosecution case, there will usually be no reasonable view of the evidence, if it is accepted [120], which would be consistent with innocence. That is, there will usually be no reasonable view of the evidence of other sexual conduct which would constitute an offence by the accused against the complainant other than as supporting an inference that the accused is guilty of the offence charged.

Hayne J. concluded that the jury should be directed that it could use evidence of uncharged acts as evidence that the accused was guilty if satisfied beyond reasonable doubt that some or all of the uncharged acts did occur (at paragraph [132]).

The High Court was at pains to point out that in HML only the question of admissibility of uncharged sexual acts under the common law was being considered (see for example Kirby J. at paragraph [54]). It is submitted that the preferable approach is that the same test should apply for uncharged sexual acts whether those acts are tendered as ‘relationship evidence’ or ‘tendency evidence’.

In Boney v Regina NSWCCA 165 the Court of Criminal Appeal referred to but did not decide whether or not the High Court’s decision in HML effected the position of uncharged sexual acts in a jurisdiction where the Evidence Act applies (see paragraph [88]).

If it is the case that ‘relationship’ evidence does not need to satisfy the stringent test for the admissibility of tendency evidence, the test for its admissibility is simply one of relevance. On a practical level, it should be noted that In Regina v Beserick (1993) 30 NSWLR 510 Hunt CJ at CL said that uncharged sexual activity which precedes the charged acts was more likely to be admissible that uncharged acts which succeed it (at 527). Admission of the ‘relationship’ evidence might also be excluded under the discretionary provisions in ss. 135 and 137 Evidence Act.

Directions about ‘relationship’ or ‘context’ evidence

If evidence is admitted not as tendency or coincidence evidence, but as ‘relationship’ or ‘context’ evidence, special directions are required to prevent the jury from using tendency or coincidence reasoning. That is, the jury should be directed that it should not reason that because the accused has engaged in sexual conduct with the complainant on another occasion, he must have done so on the occasion charged (see for example Regina v Beserick (1993) 30 NSWLR 510 and Regina v ATM [2000] NSWCCA 475).

In Regina v Qualtieri [2006] NSWCCA 95 McClellan CJ at CL (with whom Howie and Latham JJ. agreed) said (at paragraph [80]):

> 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. Although the circumstances of the particular trial may require some modification the relevant steps will generally be –
>
> · 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 *R v Fletcher* [2005] NSWCCA 338). Ireland J also provides an analysis of the relevant provisions of the *Evidence Act* in *R v AH* at 709.
>
> · 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]). In relation to crimes of a sexual nature, particularly involving children, it may be anticipated that lack of complaint or surprise by the complainant may be an issue at the trial. If it is, it will nevertheless fall upon the trial judge to determine whether the proffered evidence should be admitted having regard to s 135 and s 137. Because the evidence will inevitably be prejudicial, great care must be exercised at this point in the trial.
>
> · 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. They should be told in clear terms that the evidence has been admitted to provide background to the alleged relationship between the complainant and the accused so that the evidence of the complainant and his/her response to the alleged acts of the accused, can be understood and his/her evidence evaluated with a complete understanding of that alleged relationship. The jury must be told that they cannot use the evidence as tendency evidence.

His Honour approved the following direction from the Bench Book (at paragraph [81]):

> However, I must give you certain important warnings with regard to this evidence of other acts,

> which we can conveniently refer to as 'context evidence.'
>
> You must not use this evidence of other acts as establishing a tendency on the part of the accused to commit offences of the type charged, and, therefore, it cannot be used as an element in the chain of proof of the offences charged.
>
> You must not substitute the evidence of the other acts for the evidence of the specific offences charged.
>
> You must not reason that, because the accused may have done something wrong to [*the complainant*] on another occasion, [*he/she*] must have done so on the occasions charged.
>
> You must give careful consideration to the time frame within which the other acts are alleged to have occurred. The more remote the other sexual activity is, the less will be its weight … [*this direction will require amplification*].

A slightly simpler version of the directions required when evidence is relied on not as tendency evidence but as 'relationship evidence' was given in Rodden v Regina [2008] NSWCCA 53 by Hall J. (with whom Beazley JA and Fullerton J. agreed) at paragraph [125]:

> 125 In circumstances of this case, there ought, in my opinion, to have been directions given by the trial judge that addressed the following:-
>
> • That, if the members of the jury accepted the complainant's evidence in relation to the alleged prior conduct, then they could see such evidence as providing background to the alleged offences, as showing the nature of the relationship between the appellant and the complainant at the time of the alleged offences, so that the complainant's allegations could be placed in a realistic context in that the alleged offences were not isolated incidents which occurred, as it were, out of the blue.
>
> • If the jury accepted that there was a background of other incidents of sexual impropriety occurring, that background could not be relied upon as tending to establish that any of the particular offences in fact occurred.
>
> • That they could not use any such evidence as tending to show that, at the time of the alleged offences, the appellant had wrongful sexual feelings towards the complainant and, therefore, it was more likely that he committed the offences in question.

The nature of an appeal against a decision not to admit tendency evidence

A decision of a trial judge to admit, or not to admit, tendency evidence is one which involves a judgement of degree and value. As a result an appeal against such a decision is akin to an appeal against a discretionary determination of a trial judge.

In Regina v Fletcher (2005) 156 A Crim R 308 Simpson J (with whom McClellan CJ at CL agreed) said (at 317):

> 36 A decision to admit or reject evidence tendered under s97 (1) must, obviously, be a decision based upon the information and material available to the judge at the time the decision is made. It is a decision involving "a degree and value judgment" (a phrase drawn from remarks made in the High Court in *Fleming v Hutchinson; Conroy v Veit* (1991) 66 ALJR 211, when refusing special leave to appeal in an application which otherwise has no bearing upon the present case). Sackville J appears to have taken a similar view in *Jacara Pty Ltd v Perpetual Trustees WA Ltd* [2000] FCA 1886; 106 FCR 51. Such a decision is reviewable on appeal only on the principles stated in *House v The King* [1936] HCA 40; 55 CLR 499; see also *R v Milton* [2004] NSWCCA 195 at [33] and *Jacara* at [75].

The reference to the principles in House v The King (1936) 55 CLR 499 is of course a reference to the following passage in the judgment of Dixon, Evatt and McTiernan JJ in that case (at 504-5):

> But the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The

> manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

Similarly in relation to the analogous question of the nature of an appeal against a decision to admit or reject co-incidence evidence under s. 98 Evidence Act, in Regina v Zhang (2005) 158 A Crim R 504 Simpson J (with whom Buddin J agreed) said (at para [141]):

> 141 I repeat that the exercise is essentially evaluative and predictive. The assessment is one, in many cases, on which reasonable minds may differ. Each determination may be reviewed at appellate level only in accordance with the principles stated in **House**.

Similarly in Regina v Milton [2004] NSWCCA 195 Hidden J (with whom Tobias JA and Greg James J agreed) said (at para [33]):

> 33 Whether evidence tendered as tendency evidence passes the test imposed by s101 of the *Evidence Act* is very much a matter of judgment in the particular case. No doubt, in many cases, including the present, it is a question about which reasonable minds might differ. However, what the appellant must show is that it was not open to his Honour to have found that that test was satisfied. I am not so persuaded and, accordingly, I would dismiss these two grounds of appeal.

See also Regina v GAC [2007] NSWCCA 315.

Conclusion

For a time after the decision of Regina v Ellis it seemed that the common law stringency about the admission of tendency and coincidence evidence had been abandoned. However in subsequent cases it has emerged that to a great extent the common law principles limiting the admission and use of tendency and coincidence evidence remain.

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Deputy Senior Public Defender

Mark Carmody

Some relevant provisions of the Evidence Act

55 Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

(a) the credibility of a witness, or

(b) the admissibility of other evidence, or

(c) a failure to adduce evidence.

97 The tendency rule

(1) 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, if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence, or

(b) the court thinks that the evidence would not, 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.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note: The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98 The coincidence rule

(1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence, or

(b) the court thinks that the evidence would not, 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.

(2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:

(a) they are substantially and relevantly similar, and

(b) the circumstances in which they occurred are substantially similar.

(3) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

99 Requirements for notices

Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

100 Court may dispense with notice requirements

(1) The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under section 97.

(2) The court may, on the application of a party, direct that the coincidence rule is not to apply to particular coincidence evidence despite the party's failure to give notice under section 98.

(3) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.

(4) In a civil proceeding, the party's application may be made without notice of it having been given to one or more of the other parties.

(5) The direction:

(a) is subject to such conditions (if any) as the court thinks fit, and

(b) may be given either at or before the hearing.

(6) Without limiting the court's power to impose conditions under this section, those conditions may include one or more of the following:

(a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party,

(b) a condition that the party give such notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence,

(c) a condition that the party give such notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.

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.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

EVIDENCE REGULATION 2005

5 The tendency rule and the coincidence rule-form of notices

(1) This clause is made for the purpose of section 99 of the Act.

(2) A notice given under section 97 (1) (a) of the Act (relating to the tendency rule) must state:

(a) the substance of the evidence of the kind referred to in that subsection that the party giving the notice intends to adduce, and

(b) if that evidence consists of, or includes, evidence of the conduct of a person, particulars of:

(i) the date, time, place and circumstances at or in which the conduct occurred, and

(ii) the name of each person who saw, heard or otherwise perceived the conduct, and

(iii) in a civil proceeding-the address of each person so named, so far as they are known to the notifying party.

(3) A notice given under section 98 (1) (a) of the Act (relating to the coincidence rule) must state:

(a) the substance of the evidence of the occurrence of two or more related events that the party giving the notice intends to adduce, and

(b) particulars of:

(i) the date, time, place and circumstances at or in which each of those events occurred, and

(ii) the name of each person who saw, heard or otherwise perceived each of those events, and

(iii) in a civil proceeding-the address of each person so named, so far as they are known to the notifying party.

(4) On the application of a party in a criminal proceeding, the court may make an order directing the notifying party to disclose the address of any person named in a notice given under this clause who saw, heard or otherwise perceived conduct or events referred to in the notice.

(5) The direction may be given on such terms as the court thinks fit.