

Tendency Evidence

What is tendency evidence? (s 97)

- Evidence of character, reputation, conduct or a tendency that a person has or had;
- Adduced to prove that a person has a tendency to behave in a particular way, or to have a particular state of mind;
- From which the jury infers a fact in issue
- Hence, tendency is a form of circumstantial evidence
- The definition focusses upon the purpose of the evidence (*Quach*)
- Tendency commonly consists of multiple charges, prior convictions or uncharged acts
- May apply in criminal *and* civil proceedings

When is tendency evidence admissible?

1. A tendency notice is filed and served (ss 97(1)(a) and 99)
 - The court may dispense with this requirement (s 100)
2. The evidence has significant probative value (s 97(1)(b))
3. If the Crown adduces the evidence, its probative value substantially outweighs its prejudicial effect (s 101(2))

N.b.: if evidence is inadmissible as tendency but relevant for another purpose, it cannot be used for a tendency purpose (s 95)

Significant probative value

Two key questions in *Hughes*:

1. The extent to which the evidence proves the tendency
2. The extent to which the evidence makes the facts in issue more likely

Section 101

- If the Crown adduces tendency evidence, its probative value must substantially outweigh its prejudicial effect (s 101(2))
- This is a value judgment rather than a discretionary exercise
- Does not apply if the Crown adduced tendency evidence to explain or contradict tendency evidence adduced by an accused (s 101(3))

Probative value – relevant factors

- The issue to which the evidence is relevant
- The amount of misconduct
- The time-gap between the misconduct
- Any geographic connection between the misconduct
- The specificity of the tendency (*Hughes*)

Probative value – is similarity required?

- No (*Hughes; cf Velkoski*)
- This is because Pt 3.6 of the Act does not import common law notions of “underlying unity”, “pattern of conduct” or “modus operandi” (*Hughes; cf Velkoski*)
- However, similarities and differences are *relevant* if they bear upon the tendency (*Hughes*)
- If ID is in issue, prob value will “almost certainly depend upon close similarity” (*Hughes*)

Probative value – are credibility and reliability relevant?

- Credibility and reliability are generally irrelevant (*IMM* majority; *Bauer*)
- This is because the trial judge assumes the jury will accept the evidence and takes the evidence ‘at its highest’ (*IMM*)
- The exception is where the **evidence is** so unreliable or incredible that it could not rationally affect the assessment of the probability of the existence of a fact in issue (*IMM*)
- Similarly, the reasonable possibility of concoction, collusion or contamination between witnesses is irrelevant unless the risk is so blatant that the jury could not rationally accept the evidence (*Bauer*; *cf Pfennig, Hoch, Boardman, AE and Velkoski*)
- This is because concoction, collusion and contamination are matters of credibility and reliability for the jury (*Bauer*)

When do uncharged acts have probative value?

- In single complainant cases, evidence of uncharged acts against the complainant need not demonstrate a 'special, particular or unusual feature' (*Bauer; cf IMM*)
- This is because, where the accused yields to a sexual attraction in the complainant by committing a sexual act, it is more likely that the accused will commit further sexual acts when the opportunity presents itself (*Bauer*)
- The exception is where the uncharged act is temporally remote from the charged conduct (*Bauer; IMM*)

Prejudicial effect – relevant factors

- *‘Prejudicial effect’* means the undue impact of the evidence on the jury, adverse to the accused, over and above the probative value of the evidence (*Pfennig*)
- **If there are multiple similar allegations:** the jury may assume each allegation is true rather than assessing each charge individually. It may also assume the accused is the type of person who would commit the offences
- **If the evidence is morally repugnant:** the jury may have an emotional reaction to the evidence, which blurs its judgment
- **If the evidence is weak:** the jury may give it excessive weight
- The Crown will submit that any prejudice is curable by a direction on ‘other misconduct evidence’ (*Jury Directions Act 2015 (Vic) s 27*)

Coincidence Evidence

What is coincidence evidence? (s 98)

- Evidence of two or more similar events;
- Adduced to prove that, because the events are so similar, it is improbable they occurred coincidentally;
- From which the jury infers a fact in issue, including:
 - whether the offence was committed;
 - the identity of the offender;
 - the *mens rea*; or
 - whether multiple complainants are telling the truth
- Coincidence evidence commonly consists of multiple charges or prior convictions
- May apply in criminal *and* civil proceedings

When is coincidence evidence admissible?

1. A coincidence notice is filed and served (ss 98(1)(a) and 99)
 - The court may dispense with this requirement (s 100)
2. The evidence has significant probative value (s 98(1)(b))
3. If the Crown adduces the evidence, its probative value substantially outweighs its prejudicial effect (s 101(2))

N.b.: if evidence is inadmissible as coincidence but relevant for another purpose, it cannot be used for a tendency purpose (s 95)

Significant probative value

- Like tendency evidence, coincidence evidence is inadmissible unless it has significant probative value
- However, the two-step test in *Hughes* does not apply

Section 101

- Where the Crown adduces coincidence evidence, its probative value must substantially outweigh its prejudicial effect (s 101(2))
- Does not apply if the Crown adduces coincidence evidence to explain or contradicting coincidence evidence adduced by an accused (s 101(4))

Probative value – relevant factors

- The ‘touchstone of admissibility... is similarity’ (*PNJ*)
- Hence, the similarity between the evidence is the main factor (*Samadi and Djait, AE*)
- The evidence need not demonstrate ‘striking similarity’ (*CW*)
- Where identity is in issue, the similarities must demonstrate a distinct ‘modus operandi’; ‘stock in trade’ similarities are insufficient (*Sutton*)
- Whether there is a similar motive is relevant (*CW; Perry*)
- Again, consider the amount of misconduct and the time-gap
- Again, credibility, reliability and concoction are generally irrelevant (*IMM; Bauer*)

Prejudicial effect – relevant factors

- The prejudice of coincidence evidence reflects that of tendency evidence

The overlap between tendency and coincidence

- Prosecutors may rely upon T&C in the alternative, especially in sex trials (*Murdoch*)
- Tendency evidence of joint-complainants may establish the accused's tendency to have a sexual interest in certain victims and a willingness to act upon that interest
- Whereas, coincidence evidence may demonstrate the improbability that joint-complainants have given such similar accounts by coincidence