

TENDENCY EVIDENCE

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Common Law

- At common law such evidence was known as propensity evidence
- Evidence that an accused has a propensity to commit crimes of the sort with which he is charged is relevant to the question of whether they committed the offence in question.

The tendency rule as per the Evidence Act 2008

Section 97

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

(a) **reasonable notice** is given to the other party;
and

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

Tendency reasoning

- a. Evidence that the accused has acted in a certain way on one or more occasions, leading to an inference that:
- b. The accused has a tendency to act in that way, leading to an inference that:
- c. The accused acted in accordance with that tendency on the occasion that is the subject of the charge.

Note: The conduct referred to in the first step could be:

- Something for which accused has been convicted; or
- Something being determined in the same trial; or
- Uncharged conduct

The tendency rule

- Applies in both civil and criminal proceedings.
- Does not apply to evidence relevant only to the credibility of a witness (s 94(1)).
- Does not apply to bail or sentencing (s 94(2))
- Does not apply where character/reputation/conduct or tendency is a fact in issue s 94(3).
- Where evidence is not to be adduced to prove a particular matter, it must not be used to prove that matter even if relevant for another purpose (s 95).

Tendency evidence, in order to be admissible for a tendency purpose must have ‘significant probative value’.

‘Significant’ is not defined.

It has been held to mean ‘important’ or ‘of consequence’: *R v Lockyer* (1996) 89 A Crim R 457.

But *Semaan v R* (2013) 39 VR 503; [2013] VSCA 134, [38], per Priest JA:

“in context ‘significant’ must bear a meaning closer to ‘substantial’ than to ‘important’ or ‘of consequence’ which, as synonyms, to me do not adequately convey the import of ‘significant’.”

‘Probative value’ means the **extent** to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue

Section 101 must also be satisfied by the prosecution

101 - Further restrictions on tendency 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 an accused, or coincidence evidence about an accused, that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.

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

See: *R v Ellis* (2003) 58 NSWLR 700

Assessing Probative Value

***IMM v R* [2016] HCA 14 (French, Kiefel, Bell & Keane JJ)**

Differing approach between NSW where credibility/reliability was not relevant to assessment of probative value, and Victoria where such factors were taken into account.

- **Held, NSW approach is correct.** The wording of the statute means that '[t]he assessment of "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue" requires that the possible use to which the evidence might be put, which is to say how it might be used, be taken at its highest.'
- Questions of credibility/reliability are not taken into account.

HOW HIGH IS THE BAR

- A Tendency to commit crimes of the type with which the D is charged will not, by itself, satisfy the **significant probative value (SPV)** benchmark
- Showing a person is sexually interested in children and who has a tendency to act on that interest will not satisfy SPV notwithstanding that it is unusual as a matter of ordinary human experience
- It depends on the circumstances of the case and must prove more than a disposition to commit crimes of the kind in question
- The mere fact a D has committed an offence against one complainant is ordinarily not of itself significantly probative of the D having committed an offence against another complainant: *IMM*
- It is the precise nature of the particular tendency and its capacity to be important to the rational assessment of whether the prosecution has discharged its onus of proof: *RHB*
- There must be something which *links the two together* for the tendency evidence to be capable of affecting the assessment of the likelihood that the D committed the offences: *Hughes; McPhillamy*

Example of a particular tendency:

RHB v R [2011] VSCA 295

- Accused charged with sexual offence against his granddaughter (aged 10-11)
- Prior convictions in relation to:
 - One daughter when approx. 6 y.o. and again when 12-13
 - Second daughter when approx. 5 y.o.
- Prosecution alleged tendency evidence. **Held, correctly admitted.**

RHB v R continued

The evidence possessed a number of similarities:

- Sexual acts against female lineal descendants
- The acts were similar, even if 'commonplace'.
- Committed in the home while in accused's care
- Other adults were close by, and risk of detection was significant.
- Significant time period between offences.
- Relevant to rebut accused's suggestion of 'accident'

RHB v R continued

- The question of '**contamination**' did not arise as the accused had admitted the offences against his daughters.
- Any 'contamination' in relation to complainant was relevant to her evidence, and not the admissibility of the tendency evidence.

Tendency Evidence

Relevant considerations

- Nature of the proceedings
- Whether it is relevant
- Whether it shows a tendency to act in a particular way or have a particular state of mind
- Nature of the tendency
- Number of occasions
- Time gaps between them
- Degree of specificity between conduct
- Similarity of conduct/circumstances
- Whether it is disputed
- Why it is being adduced e.g.: to explain or contradict tendency evidence adduced by another party

Probative Value

IMM v R (2016) 257 CLR 300; [2016] HCA 14

- Appellant convicted of sexual offences against step-granddaughter
 - Complainant's evidence was direct evidence of the charged offences
 - Tendency evidence was in regards to being touched inappropriately
 - The trial judge approached the task of assessing probative value of the tendency on the assumption that the jury would accept the evidence and credibility and reliability were not considered (NSW approach)
 - High Court: held this was the correct approach
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- Caution: There may be cases where the evidence is so unreliable or lacking credibility that it could not rationally affect the assessment of the existence of a fact in issue, in which case it is irrelevant.
 - Inherently incredible or fanciful or preposterous evidence would not meet the threshold of relevance and that evidence taken at its highest can still be weak and unconvincing

Test for Tendency

***Hughes v R* (2017) 263 CLR 338; [2017] HCA 20**

D charged with 11 counts of sexual offences against five underage girls aged between 6 & 15 years. Tendency evidence admitted from underage girls and adult workers

High Court:

- The absence of reference to ‘similarity’ and other common law phrases in s 97(1)(b) is a clear indication of the intention of Parliament in enacting Pt 3.6 of the Evidence Act. The section is not to be applied as if it had been expressed in those terms.
- There are situations however where a high degree of similarity is necessary to establish significant probative value. For example, where it is adduced to prove the identity of the offender for a known offence, this will almost certainly require a high degree of similarity to be probative

Hughes v R

An assessment of the probative value of tendency evidence requires two considerations.

1. the extent to which the evidence supports the tendency
2. the extent to which the tendency makes more likely the facts making up the charged offence

Hughes v R

- The tendency evidence which the appellant was alleged to have pursued involved a substantial risk of discovery by friends, family members, workmates or even casual passers-by
- This level of disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience

Uncharged acts

***R v Bauer* (2018) 266 CLR 56; [2018] HCA 40**

- 18 charges of sexual offences against RC between 1988 and 1998
- Evidence of charged and uncharged acts given by RC
- Evidence of uncharged act against RC was given by her half-sister
- Issue of whether uncharged acts could be admissible as tendency evidence to prove the offences charged

High Court:

“... a complainant’s evidence of an accused’s uncharged acts in relation to him or her (including acts which, although not themselves necessarily criminal offences, are probative of the existence of the accused having had a sexual interest in the complainant on which the accused has acted) **may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant whether or not the uncharged acts have about them some special feature of the kind mentioned in *IMM* or exhibit a special, particular or unusual feature of the kind described in *Hughes*.**”

R v Bauer

- the fact of itself that evidence of uncharged acts is given by a complainant does not mean that it lacks significant probative value
- In this case, in contrast to *Hughes*, there was only one complainant, all of the charged and uncharged acts were alleged to have been committed against her, and none of them was far separated in point of time or far different in nature and gravity from the others. Here, therefore, there was no need of any "special feature" in order to render the evidence of one charge cross-admissible in proof of the other charges, or to render the evidence of uncharged acts admissible in proof of the charged acts.

R v Bauer

- *IMM* may be limited to its facts where an accused is charged with multiple offences against a single complainant and which there is a relatively remote and innocuous uncharged act as support for evidence of the charged acts
- In a multiple complainant sexual offences case...the logic of probability reasoning dictates that, for evidence of offending against one complainant to be significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together...If there is some common feature of or about the offending, it may demonstrate a tendency to act in a particular way...*Hughes* illustrates the point.
- Useful Judicial College summary of the case:
- <https://judicialcollege.vic.edu.au/resources/case-note-r-v-bauer-2018-266-clr-56>

***R v Bauer*, [51]**

‘The juridical basis of cross-admissibility of evidence of charged acts and of the admissibility of evidence of uncharged acts in such cases rests on the "very high probative value" of that kind of evidence which results from ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity presents itself to do so again, he or she will seek to gratify his or her sexual attraction to that other person by engaging in sexual acts of various kinds with that person’

R v Bauer

Questions of possible contamination or concoction amongst witnesses are for the jury, unless the judge considers that the risk is so great that a jury could not rationally accept the evidence:

‘Accordingly, unless the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence, **the determination of probative value excludes consideration of credibility and reliability.** Subject to that exception, the risk of contamination, concoction or collusion goes only to the credibility and reliability of evidence and, therefore, is an assessment which must be left to the jury...The replacement of the *Hoch* test with the less demanding s97 criterion of significant probative value means that that common law rule of exclusion has no application. Under the *Evidence Act*, provided evidence is rationally capable of acceptance, the possibility of contamination, concoction or collusion falls to be assessed by the jury as part of the ordinary process of assessment of all factors that may affect the credibility and reliability of the evidence.’

***McPhillamy v R* [2018] HCA 52; (2018) 361 ALR 13**

From the headnote:

Evidence – Criminal trial – Sexual offences – Tendency evidence – Admissibility – Where appellant acolyte and complainant altar boy – Where appellant alleged to have followed complainant into church's public bathroom and committed offences – Where evidence that appellant, while working as an assistant housemaster, sexually offended against homesick boarding students who sought out appellant in private bedroom led as tendency evidence – **Where tendency expressed as appellant having sexual interest in young teenage boys under his supervision and to act on that interest – Where tendency evidence of acts occurring ten years before offences charged** – Where no evidence other than complainant's evidence that appellant had offended again in ten year period – **Where tendency evidence unchallenged in cross-examination** – Whether tendency evidence possessed significant probative value.

***McPhillamy v R* [2018] HCA 52; (2018) 361 ALR 13**

- Accused of sexually assaulting “A”, an altar boy under his supervision, on two occasions in 1995-1996 in the public toilets of the church. At the trial, the prosecution was permitted to call evidence from “B” and “C” two students boarding at St Stanislaus’ College 10 years earlier
- Where there are multiple complainants, the tendency evidence must have some degree of similarity for it to possess significant probative value
- The tendency evidence did not have significant probative value, did not have the special feature and was not sufficiently linked to past offending
- To make the link, the prosecution will need to identify the tendency with precision
- The evidence did little more than insinuate that because the appellant had previously sexually offended against B and C ten years prior, under different circumstances, it was more likely he committed the offences alleged by A

PREJUDICIAL EFFECT

‘The undue impact, adverse to an accused, that the evidence may have on the mind of the jury over and above the impact that it might be expected to have if consideration were confined to its probative force’:

Pfennig v R (1995) 182 CLR 461

Section 137

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the accused.

- Consider the risk of impermissible reasoning.
- The jury may:
 - Convict as punishment for conduct other than that charged;
 - Overestimate the probative value of the evidence; and/or
 - Be distracted from the central issues in the case
- BUT see ***DPP (ACT) v DL* [2018] ACTCA 61** – may include procedural disadvantage flowing from the admission of that evidence in a given case

Jury Directions Act 2015 (Vic)

Section 26

other misconduct evidence means—

- (a) coincidence evidence; or
- (b) tendency evidence; or
- (c) evidence of other discreditable acts and omissions of an accused that are not directly relevant to a fact in issue; or
- (d) evidence that is adduced to assist the jury to understand the context in which the offence charged or any alternative offence is alleged to have been committed;

Jury Directions Act 2015 (Vic)

Section 27 Direction on other misconduct evidence adduced by the prosecution

- (1) Defence counsel may request under section 12 that the trial judge direct the jury on other misconduct evidence adduced by the prosecution.
- (2) In giving a direction referred to in subsection (1), the trial judge must—
 - (a) identify how the other misconduct evidence is relevant (whether directly or indirectly) to the existence of a fact in issue in the trial and direct the jury not to use the evidence for any other purpose; and
 - (b) if the evidence forms only part of the prosecution case against the accused, inform the jury of that fact; and
 - (c) direct the jury that it must not decide the case based on prejudice arising from what the jury has heard about the accused.
- (3) In giving a direction referred to in subsection (1), the trial judge need not—
 - (a) explain further what the jury should consider in deciding whether to use the other misconduct evidence; or
 - (b) identify impermissible uses of the other misconduct evidence; or
 - (c) refer to any other matter.

Evidence Relevant for a Non-Tendency Purpose

- Evidence which is not tendered for a tendency purpose does not fall within the rule.
- For example, evidence of uncharged acts as evidence of “context” in relation to allegations of sexual assault.
- Another example, evidence of prior conduct which reveals a motive for the charged offence.
- Such evidence may nonetheless be excluded under s 137.

Evidence of conduct which forms part of a relevant transaction (“Res Gestae”)

Admits evidence of conduct or statements which form part of the event which constitutes the offence, or which are necessary to put the event into context

It can be admitted for a non-tendency purpose.

***O’Leary v R* (1946) 73 CLR 566**

***R v AB & Baker* [2008] VSC 107**

Separate Trials: ss 193 & 194 Criminal Procedure Act

193 Separate trial may be ordered if:

- the case of an accused may be prejudiced because the accused is charged with more than one offence in the same indictment; or
- a trial with the co-accused would prejudice the fair trial of the accused; or
- for any other reason it is appropriate to do so.

194 Sexual offences are presumed to be heard together, and the presumption is not rebutted merely because evidence on one charge is inadmissible on another charge.

Approaching a tendency evidence problem

Express tendency thus:

- The fact that A did X; [and
- The fact that A did Y];
- Strongly reveals a tendency in A to do [X, Y] (applying the two-step test from *Hughes*) which makes it more likely that A acted in conformity with that tendency on the occasion/s in question.
- In criminal proceeding – go to s101 (PV v PE – use rational from *Bauer* and *DL*.)
If admitted, which Jury Directions may apply?
- If Civil – go directly to discretions available in that jurisdiction (s135/136)

Approaching a coincidence evidence problem

Express coincidence thus:

1. The fact that [X] occurred; and
2. the similar fact [Y] occurred;.
3. makes it improbable that the **similarity** between the two occurrences is merely a coincidence.