

TENDENCY AND COINCIDENCE

This is about evidence where there is a pattern of human behaviour – if you see this in the facts discuss these two areas.

Tendency or Coincidence:

- Tendency reasoning involves using evidence about a particular person to infer that a pattern of behaviour will follow. Coincidence reasoning proceeds in the other direction, using evidence about a particular pattern of behaviour to infer that a person was behind it.

<p>Tendency: evidence <u>about a person</u> to infer behaviour</p> <ul style="list-style-type: none"> - Questions about how many times does a person have to do something to have a tendency to do something. - This is associated with behaviour. It is in relation to character, reputation, conduct and tendency (inclinations and practice). 	<p>Coincidence: using evidence <u>about pattern of behaviour</u> to infer that a person was responsible</p>
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NOTE: CANNOT USE ADMITTED EVIDENCE FOR OTHER PURPOSES FOR TENDENCY OR COINCIDENCE (S95)

TENDENCY ARGUMENT:

1. **Is this something where tendency could be an issue?** → see s97(a)
 - o Is there evidence about a person and their repeat behaviour of some kind? → evidence of the character, reputation or a tendency that person has or had?
2. **What is the probative value of the evidence?** → s101(2)
 - The evidence is not admissible unless the probative value of the evidence substantially outweighs any prejudicial effect. (s101(2)) → this applies to criminal trials only
 - o Cogency of evidence → (*Jacara v Perpetual Trustees*) → do you have lot of documentation, the quality of the evidence in relation to the tendency.
 - o Similarity → (*R v Milton*) → between the thing I did and suggested that I did this time, say tendency to be violent and how similar is the previous activity to this activity
 - o How well-established the tendency is? → (*R v Watkins*) – how often you’ve done it.
 - o How rare is the tendency? → (*Ibrahim v Pham*) – the rarer the better
 - o How recent is the tendency? → (*R v Watkins*) – If it is a long time ago, lesser probative value.
3. **What is the prejudicial effect of the evidence?** → s101(2)
 - o Possibility that the jury may punish for conduct not subject to charge.
 - o Possibility that the jury will over-estimate the probative value of the evidence.
4. **Evaluate the probative value vs prejudicial effect of the evidence.** → s101(2)
 - o This is a balancing exercise.
 - o In criminal trials: 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.
 - o Must have substantially outweighing the prejudicial effect!
5. **If evidence is let in – need to give notice in writing to each other party** (s97(1)(a))

COINCIDENCE ARGUMENT:

1. **Is this something where coincidence could arise?** → see s98(1)
 - o For it to be a coincidence issue, need evidence of:
 - 2 or more similar events;
 - Relied on because of the improbability of the events having occurred coincidentally.
 - To prove that the person committed a particular act/had a particular state of mind. → inadmissible as per s98(1)
2. **What is the probative value of the evidence?** → s101(2)

- The extent of similarity between the two facts (*R v Ellis*).
 - The likelihood of the similarity occurring innocently or whether there is any other reasonable explanation (*Phillips v The Queen*).
3. **What is the prejudicial effect of the evidence?** → s101(2)
 - Possibility that the jury may punish for conduct not subject to charge.
 - Possibility that the jury will over-estimate the probative value of the evidence.
 4. **Evaluate the probative value vs prejudicial effect of the evidence.** → s101(2)
 - This is a balancing exercise.
 5. **If evidence is let in – need to give notice in writing to each other party** (s98(1)(a))

Legislation →

<p>S 94 Application</p>	<p>1. This Part does not apply to evidence that relates only to the credibility of a witness. (As such, it does not apply to the provisions of the credibility rule)</p> <p>2. This Part does not apply so far as a proceeding relates to bail or sentencing.</p> <p>3. This Part does not apply to evidence of – a. The character, reputation or conduct of a person; or b. A tendency that a person has or had – If that character, reputation, conduct or tendency is a fact in issue. (these are the exceptions to tendency and coincidence)</p>
<p>S 95 Use of evidence for other purposes</p>	<p>1. Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.</p> <p>2. Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant. (the antithesis of S 60 for hearsay, and S 77 for opinion. This is because hearsay and opinion are less prejudicial than tendency and coincidence evidence)</p>
<p>S 96 Failure to act</p>	<p>A reference in this Part to doing an act includes a reference to failing to do that act.</p>
<p>S 97 The tendency rule</p> <p>Dictionary – Part 1 definition of ‘probative value’ "probative value" of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue</p>	<p>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 unless – (Prima facie, this means evidence that is relevant to prove a tendency is not admissible, regardless of its relevance)</p> <p>a. The party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence; and (in the exam, write something along the lines of: ‘notice must be given in order to satisfy 97(a))</p> <p>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. (for what is significant, see <i>Velkoski v The Queen</i>: “If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible”)</p> <p>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.</p> <p>NOTE: The tendency rule is subject to specific exceptions concerning character of an expert opinion about an accused (Section 110 and 111) Other provisions of this Act, or of other laws may operate as further exceptions.</p>

	<p>(See <i>Velkoski v The Queen</i>: for something to be admitted for tendency, it depends upon the degree of similarity of the operative features. It cannot generally be used to prove his state of mind (i.e. a particular interest in victims) unless the degree of similarity is very high. More detail above)</p>
<p>S 98 The coincidence rule</p> <p>Dictionary – Part 1 definition of ‘probative value’ "probative value" of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue</p>	<p>1. Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless –</p> <p>a. The party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence; and</p> <p>(in the exam, write something along the lines of: ‘notice must be given in order to satisfy 97(a)’) </p> <p>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.</p> <p>(for what is significant, see <i>Velkoski v The Queen</i>: “If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible”)</p> <p>NOTE: One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.</p> <p>2. Subsection (1)(a) does not apply if –</p> <p>a. The evidence is adduced in accordance with any directions made by the court under section 100; or</p> <p>b. The evidence is adduced to explain or contradict coincidence evidence adduced by another party.</p> <p>NOTE: Other provisions of this Act, or of laws, may operate as exceptions to the coincidence rule.</p> <p>(See <i>Velkoski v The Queen</i>: for something to be admitted for coincidence, it depends upon the degree of similarity of the two events. It must be highly improbable that a coincidence could arise. More detail above)</p>
<p>S 99 Requirements for notices</p>	<p>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.</p>
<p>S 100 Court may dispense with notice requirements</p>	<p>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.</p> <p>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.</p> <p>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 notice.</p> <p>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.</p> <p>5. The direction –</p> <p>a. Is subject to such conditions (if any) as the court thinks fit; and</p> <p>b. May be given either at or before the hearing.</p> <p>6. Without limiting the court’s power to impose conditions under this section, those conditions may include one or more of the following –</p> <p>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;</p> <p>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;</p> <p>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.</p>

S 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 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.
(See R v Clarke: substantially outweighed means 'well outweighed' or considerably outweighed'. See also R v Lisoff: It must be more than a mere possibility or danger. It must be a 'real' danger)
(See Pfennig v R, McHugh J, '[t]he use of the term "outweigh" suggests an almost arithmetical computation. But prejudicial effect and probative value are incommensurables')
3. This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the accused.
(note that the above sections are a hurdle for the prosecution, but not the defence. However, where the defence adduces evidence, the tendency rule does not affect the prosecution's rebuttal)
4. This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the accused.