Topic 8: Tendency and Coincidence

Case: *Makin v AG (NSW)*

Facts: In the late 19th century, children being born out of wedlock would commonly be given to couples willing to care for them in exchange for a small fee. The Makins took the child in, but the money given to raise and care for the child was insufficient. The child was eventually bound buried in a drain in the backyard of a neighbouring property.

The Makins argued that they had taken in the child, but had given him back and did not know what happened thereafter. However, it was soon discovered that there were in fact 12 babies buried in neighbouring properties connected to the Makins'.

The question before the jury was not whether the Makins had murdered the 12 children, but whether the Makins innocent explanation was improbable in consideration of the facts.

Mr and Mrs Makin were charged with the murder of the child. Mr Makin suffered the death penalty by hanging, while Mrs Makin was given life imprisonment.

Issue:

- *On the charge of murder of the one child, could evidence of the bodies of the 12 babies buried in neighbouring properties be admitted?*

Held:

The evidence of the 12 dead babies is admissible. As Herschel J said:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried..."

"On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged…were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Case: *DPP v Boardman*

Facts: Boardman was a headmaster at a school in England for international students learning English. He was charged and convicted of 1 count of buggery with 1 boy aged 16, and 1 count of inciting a boy aged 17 to commit buggery.

Both complainants gave evidence that, it various ways, they had ended up Boardman's study and that he had propositioned them to engage in the acts of buggery.

Held:

'Pure propensities' must be guarded against. For example, simply because a person has been convicted of burglary in the past is not sufficient evidence to show a person is likely to have committed burglary when found near the scene of one. However, if there is particular, distinctive modus operandi in the way the burglary is committed (eg. abseiling down from a skylight), and it is shown that this is the modus operandi for this burglar, the probative value of the evidence is heightened and may be open to admissibility.

The distinctive feature here is that both complainants alleged the accused had wished to be the passive partner in the acts of buggery. This is unusual, and from which a tendency argument may be run (i.e. if it is shown an accused is a person who engages in the particular act alleged, it may be inferred that he is more likely to have done the act with another victim.)

But more precisely, the question to be asked is: 'what are the chances of 2 complainants coming up with a story including a particular feature'. One explanation is that the particular feature is true. But another is that the

complainants have colluded in bringing the particular allegation forward. This may indicate a prior animosity in the complainants towards the accused, which could suggest the evidence is simply made up.

However, collusion may not be as deliberate as this, or may not be deliberate at all; 'contamination' between witnesses may be entirely innocent, such as family members communicating with one another. This is not collusion per se, but could nevertheless provide a basis for a peculiar act alleged. In these circumstances, there may an entirely innocent explanation for evidence which is peculiar in nature.

Case: *Pfenning v R*

Facts: Is notable because the evidence adduced arose *after* the offence charged (*i.e. Michael Black was killed; a further child was abducted; evidence of the abduction was adduced*). Was there a rational explanation consistent with innocence?

Held: The trial judge questioned whether there was evidence consistent with a rational explanation of innocence. Looking at the evidence, what are the other explanations for Michael's disappearance? They searched for him and dredged the river, no body was found - drowning unlikely; no ransom note was ever found - kidnapping unlikely; thrill kill dismissed. The trial judge concluded that the only other explanation was that Pfennig killed for sexual purposes.

Given his tendency to lay false trials after committing sexual offences against young boys, the Crown would have argued that Pfennig was likely to have committed the offence charged.

Case: *Hoch v R*

Facts: Hoch was convicted of sexual assault against 3 boys in a juvenile detention facility. The three, 2 brothers and a friend, made allegations against Hoch. There was evidence of animosity in the 3 boys against Hoch.

NOTE: When these sorts of cases arise, the defence will seek to apply for *severance;* that is, to have each allegation heard separately. There is a presumption in Victoria under legislation that multiple allegations in sexual offence cases will be heard together.

If complaints are to be heard together, their evidence must be *cross-admissible* (i.e. evidence used by one complainant can be used to support the allegations by the other complainants). The question to be asked is: *is the evidence so probative that the claims can be heard together, such that they are cross-admissible?* **(cf. *Boardman - prior convictions for acts of a similar nature could be used as tendency evidence to prove commission of the act on the occasion charged).*** If the evidence is not so probative that it substantially outweighs potential prejudice to the accused, it will not be cross-admissible, and the claims may be severed and heard separately (because it is too prejudicial for the claims to be heard together).

Held:

In cases of this nature, where there are multiple complainants and no prior convictions of the same type, there is often a rational explanation consistent with innocence; that is, the complainants colluded. As per the principle of 'improbability of similar lies', there is another rational view to be had here suggesting innocence. The evidence is inadmissible under the 'no other rational view' test.

Case: *R v Ellis*

Facts: Ellis was convicted of 11 counts of break-enter and steal, or attempted break-enter and steal. The offences were all committed on commercial premises in rural NSW, with access to the premises *obtained or attempted by removing an entire pane of glass from its seals.*

Originally, there were 13 such counts on the indictment. Before the trial commenced, an issue arose as to admissibility of evidence of each offence as tendency or coincidence evidence in relation to all other offences on the indictment.

Held:

Tendency is used to prove **identity** of the accused. Here, each store was broken into after removing whole panes of glass from the windows. This shows a distinctive and peculiar tendency, suggesting the same individual committed

all offences. Because this method of breaking-and-entering is very distinctive, it would likely get past significant probative value.

Case: *Velkoski v R*

Facts: Velkoski was charged and convicted of numerous offences against children at a childcare facility run by his wife. He was not registered to have contact with the children.

There was a variety of offences committed against the children in the type of touching that occurred and the genders of the children.

Issue:

- *What is the extent to which the evidence of the various children is cross-admissible?* (noting that if evidence were not cross-admissible, it would prejudicial and unsafe to place it before the jury.)

Held:

The Court has so far been adopting an unduly restrictive view of the similarities required for tendency reasoning. Although unlike s. 98 (*re coincidence*), s. 97 (*re tendency*) does not refer to similarities in the events or circumstances, in Victoria **there must be some degree of similarity in the acts and/or circumstances in order to be significantly probative and thereby support tendency reasoning. It is not sufficient if the evidence proves only a disposition, or a 'mere propensity', to commit crimes of the kind in question.** Vague and non-specific allegations that a person has acted a certain way in the past are not admissible. The law has always sought to stop such reasoning - it is insufficiently probative and highly prejudicial.

It is therefore necessary 'to identify and assess the strength of the features of the acts relied upon' to ascertain the probative value of the evidence. Odgers states that the following factors may be considered to show tendency:

- *The number of occasions* - the more proof there is of an event recurring, the more probative the tendency inference;
- *The time intervals between occasions* - not always relevant, but numerous events close in time is evidence a person is displaying a tendency that is strongly probative;
- *Similarities in conduct/circumstances* - the probative value here depends on what is being proved: if identity is being proven (i.e. who did it), a higher level of similarity is needed with a distinct modus operandi **(Pfennig; Ellis)**; but if something else is being proven, such as a sexual interest in a particular person **(CW v DPP)**, it may be proved in other ways (i.e. not by the same sort of offending as charged - eg. inappropriate behaviour with daughter falling short of the offence charged may be used as evidence to show the accused likely committed the offence charged);
- *Whether it is disputed* - a prior conviction is more straightforward, as it has been proved and by its very nature, far more probative. However, a challenge arises where the evidence is disputed. That is not to say such evidence has no probative value, but it does mean that it must be considered in terms of its prejudicial effect as well (the danger being that the jury will fill in the gaps of the Prosecution's case); and
- *The issue to which it is relevant (e.g. proving identity/conduct/state of mind)* - see discussion in point 3.

It is not permissible simply to state that the evidence demonstrates the accused's interest in particular victims, and a willingness to act on that interest. **The relationship between offender and victim** (e.g. teacher/pupil, parent/child) will generally not be sufficient unless highly unusual (*but in light of* ***Hughes v R,*** *this may not be put as strongly. It would be incorrect to say the relationship between the offender and victim can never be relevant. In fact, the offender taking advantage of their position in relation the victim is highly relevant to tendency. Even in* ***Velkoski v R,*** *the offending perpetrated by the offender came about from taking opportunistic advantage of his position in relation to the children in his wife's care.* ***There may even be an argument that the relationship between offender and victim underpins the tendency***).

Although there must be similarities, it is not necessary to show 'striking similarities' or that it would be an 'affront to common sense' not to admit the evidence (***Boardman*** *is no longer the test*). Nonetheless, it is desirable (*a guide*) to assess whether there is 'underlying unity', a 'pattern of conduct' or 'modus operandi' or 'such similarity as logically

and cogently implies that the particular features of those previous acts render the occurrence of the act to be proved more likely' (*this imports the notion of 'striking similarity' as almost being required under s. 97 for the tendency to apply*).

In this case, various counts not involving penile touching were excluded because the acts were too different: various counts which did not involve touching the boys inappropriately are not sufficiently probative. That is, they were not sufficiently similar and did not go far enough to demonstrate the tendency.

NOTE: The High Court later disagreed with the analysis in *Velkoski.* The alternative view is that opportunistic sexual offending against children in care is a tendency relevant, even if the actual *form* of the offending is different. This is a relevant in determining whether Velkoski had a tendency to commit sexual offences against boys (*note: a tendency to touching girls would not be relevant to prove a tendency of touching boys*).

Case: *Hughes v R*

Facts: Hughes was charged with 11 counts of sexual offences against 5 underage girls. The complainants were aged between 6 and 15 at the time of offending, but the offending committed against the girls varied (*this would become significant if similarities are required*). Tendency evidence was admitted from other underage girls, as well as from adults who worked with the accused (*this was known as the workplace tendency evidence*).

The Prosecution alleged that proof that ***'a man of mature years has a sexual interest in female children aged under 16 years and a tendency to act on that interest by engaging in sexual activity with underage girls opportunistically, notwithstanding the risk of detection, is capable of having significant probative value*** on his trial for a sexual offence involving an underage girl.'

The fact that the form of the offending committed against the girls varied was not relevant. This was not a modus operandi case asking, 'who did it?', but rather 'did Hughes do it?' The way a defence in this type of case would be put is that it would be so unlikely that he would behave this way with the young girls where there is a risk of detection. This was the distinctive feature. When thinking about the probative value of the Prosecution's assertion, consider whether they were all heard separately. This would be unlikely, as the accused demonstrated a distinctive pattern of behaviour that rebutted the accused's suggestion that this would be unlikely to happen - hence its probative value.

'Notwithstanding the offending' is not relevant here; the court was not trying to pin the case on an unknown offender, and was not trying to look for some distinctive features. Rather, the question was whether Hughes was likely to have behaved in the way alleged. When hearing all complaints together, the conclusion is that the accused was likely to have engaged in all offences alleged. But also consider the prejudice of the lineup of allegations made.

NOTE:

1. For multiple complainant claims to be heard together, all must satisfy the tendency argument and be cross-admissible (including complainants against whom the offender is charged, together with the girls brought in to give evidence against whom the accused was not charged). *Cross-admissibility was unlikely here because there were 3 different types of evidence brought: 1) by complainants against whom the offender was charged; 2) the girls brought in to give evidence against whom the accused not charged; 3) the tendency evidence provided by the other adults in the workplace.*
2. The workplace tendency evidence was only admissible in relation to one count which occurred at the workplace. Their relevance was to particular counts involving exposure in the workplace, and was designed to support the conclusion the offender would behave in that way in the workplace because he had a tendency to behave that way in relation to children.

Held:

The High considered the divergence of approach between NSW and Victoria, holding the NSW approach to be correct: **there is no requirement that the conduct evidencing the tendency displays features of similarity with the charged conduct.** The approach in *Velkoski* is 'unduly restrictive'.

The correct test is as stated in ***R v Ford*****:** *the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged.'* The disputed evidence is considered in the light of other evidence to be adduced. Where adduced to prove identity, it likely requires a higher degree of similarity. This is not the case where adduced to establish the offence occurred (***Hughes, cf. Ellis***).

Case: *IMM v R*

Facts: The appellant was convicted of sexual offences against his step-granddaughter. 'Tendency' evidence was adduced of inappropriate touching, and was admitted at trial as showing a sexual interest in the child.

The issue where NSW and Victoria differed was in whether the credibility and reliability of a complainant was relevant at this stage. In NSW, credibility/reliability were not relevant to an assessment of probative value, but in Victoria, credibility and reliability are considered at this point.

Held:

NSW approach is correct. The wording of the statute re 'probative value' i.e. '[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 be taken at its highest.' Questions of credibility/reliability are not considered at this stage. It is assumed the jury will accept the complainant's evidence, and its probative value on that basis.

However, there may be cases where the evidence is so unreliable/lacking in credibility that it could not be considered to be of 'probative value' i.e. could not 'rationally affect the assessment of the existence of a fact in issue', in which case it is irrelevant.

The evidence here did not have 'significant probative value'. The reason for this was that the evidence was of the complainant, supporting allegations made by the complainant. "Evidence from a complainant adduced to show an accused's sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true."

Here, the complainant made an allegation, and tendency evidence was being adduced of another allegation made by the complainant to support the idea the accused had a sexual interest in her *(**cf. Hughes - multiple complainants, CW v DPP - indecent photographs on the accused's phone of his daughter which independently suggested a sexual interest*)**.** In effect, the complainant was adducing her own evidence to support her allegations. This did not reach the level of significant probative value, but self-supporting and unduly prejudicial.

Case: *RHB v R*

Facts: The accused was charged with sexual offences against his granddaughter (aged 10-11). He had prior convictions in relation his first daughter, when she was approximately 6-years-old and again when 12-13, and with his second daughter when she was approximately 5-years-old. The prosecution sought to adduce the prior convictions as tendency evidence.

Held:

There are different types of complainants (daughters v granddaughter), as well as different forms of offending. However, there is no evidence of collusion rebutting tendency - the prior convictions have already been proven. Further, the evidence of the prior convictions possessed a number of similarities with the offence charged:

1. The sexual offences were committed against female lineal descendants (*but the defence would argue this would not be a relevant tendency if prior convictions were against non-lineal descendants or non-family members. But **Hughes:** similarities are not necessary; different forms of offending against different types of complainants may still be relevant)*.
2. The acts were similar, even if 'commonplace' (*not really relevant. The sexual interest is at issue, not the identity of the accused. Distinctive types of acts are not necessary where the sexual interest is at issue. The fact the accused exhibited this type of interest makes it more likely they would exhibit the offence charged. Rebuts suggestion this was an accident*).
3. The acts were committed in the home while in the accused's care.
4. Other adults were close by, making the risk of detection was significant (*similar to **Hughes***).
5. There was a significant time period between offences (*but this was expected in this type of offending (i.e. generational gap*), *and was not really relevant, particularly because it is an opportunistic offending in which the accused has taken advantage of their position of power relative to the victim).*
6. Relevant to rebut the accused's suggestion of 'accident'.

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

Case: *CGL v DPP*

Facts: 4 complainants made allegations against CGL (the applicant) -

1. *Re Complainant A:* The applicant knew A's sister. He was alleged to have rubbed A's vagina when the applicant was visiting. A was 10 or 12 at the time.
2. *Re Complainant B:* Complainant B was the applicant's stepchild. The accused had committed sexual offences against B between the ages of 13 and 18.
3. *Re Complainant C*: Complainant C was the applicant's stepchild, but from a different mother. The accused committed a single act of indecent assault against C when she was between the ages of 10 and 12.
4. *Re Complainant D*: The applicant committed a single act of indecent assault at a dance when D was 8 or 9.

Held:

The tendency evidence alleged was stated too broadly: a sexual interest in girls aged between 8 and 18. The evidence here did not meet the significant probative value threshold as either tendency or coincidence evidence. There was no 'underlying unity' in the offence; they were, 'in reality, unremarkable circumstances that are common to sexual offences against children.' Without relevant similarities, the evidence was 'pure propensity evidence'.

Case: *CW v DPP*

Facts: Three fires were lit in same area on one night at three Rosebud properties. In terms of arson, each event was commonplace; there was nothing distinctive in the way the act occurred. However, each victim was a business owner with whom the accused was in dispute at the time.

Held:

This was a neat example of coincidence reasoning because it did not relate to the offending itself (i.e. there was no distinctive modus operandi), but rather to the circumstances surrounding the offending. The Court concluded that it would be **contrary to ordinary experience for this series of fires, affecting these particular victims, to have occurred by coincidence.**

Case: *Perry v R*

Facts: Mrs Perry was charged with the attempted murder of her husband. The attempted murder was said to have been committed by arsenic poisoning, as Mr Perry suffered from both arsenic and lead poisoning. At the time of this, arsenic in the home was common (eg. rat poison).

However, Mr Perry, Mrs Perry's third husband, defended Mrs Perry throughout the trial, claiming she had not tried to kill him. Instead, he blamed the arsenic poisoning on his hobby of repairing old church organs. This, he claimed, lead to his lead poisoning, with the arsenic poisoning resulting from his crawling into nooks and crannies while repairing and being exposed to rat poisoning. *Thus, there was an alternative hypothesis consistent with Mrs Perry's innocence as to how Mr Perry came to suffer from arsenic poisoning (cf. Plomp*).

Yet it was found during the trial that:

a) Mrs Perry's second husband had died in March 1961 from arsenic poisoning. Mrs Perry was the resultant beneficiary of his life insurance policy.
b) Mrs Perry's brother died in April 1962 from arsenic poisoning; and
c) Mrs Perry's de facto husband died in March 1970 from barbiturate overdose. Mrs Perry was the resultant beneficiary of his life insurance policy.

Issue:

- *Is the evidence the three prior deaths by poisoning be admissible as tendency or coincidence evidence?*

In a probative sense, it would seem unlike that the third husband would innocently suffer from arsenic poisoning given the family background.

Held:

Had Mrs Perry been convicted of the murder of any of the 3 deaths, such would have been admissible as tendency evidence. If Mrs Perry was to be charged with all the offences at once, the jury would be entitled to look at all of the allegations and infer that it is beyond coincidence that the deaths have only happened coincidentally.

But is this a probative form of reasoning, or is the jury likely to fill gaps in the prosecution's case? Is the brother's death admitted, given he died of arsenic poisoning, or would the jury be engaging in 'gap-filling' by ascribing guilt? Why is the barbiturate overdose include, knowing the de facto partner killed himself?

The barbiturate overdose was rejected by the Court for being 'too different' from the offence charged (i.e. it was not a poisoning; the fact she was a beneficiary was too removed from the overdose). The majority allowed in the arsenic poisoning where she was a beneficiary, but the Court was split on the brother.

Allowing in the one incident, which admittedly is probative, also presents a real danger that the jury will deduce Mrs Perry to be a 'husband killer' - which would lead to impermissible tendency reasoning.

Case: *R v AB & Baker*

Facts: There was a murder at a party. The 2 accused were on a balcony on a stairwell outside the building. The victim fell to his death. The Prosecution alleged he was thrown off the balcony.

The relevant adduced was that the 2 accused were randomly looking fights in the time leading up to the death.

Issue:

- *Should evidence the accused were picking fights be admitted?*

Held:

The jury cannot fully appreciate what was happening on the balcony when the man fell to his death, without first understanding the events leading up to it. The evidence provided an appropriate and relevant context that the 2 accused had been acting aggressively, which will help the jury in understanding what might have occurred on the balcony.

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Topic 9: Hearsay

Case: *Subramaniam v Public Prosecutor*

Facts: Mr S was convicted of being in possession of ammunition contrary to Emergency Regulations in Malaya during an insurgency. The penalty for being in possession of ammunition was death.

Mr S, facing the death penalty, argued he was in possession, but the reason for being so was because he was under duress: he claimed one of the insurgents threatened to kill him if he did not assist with the insurgency.

Hearsay is concerned with **out-of-court statements.** With the insurgent not being present, Mr S was rendered a lone witness telling the court what someone else told him. This offended the hearsay rule.

Held:

Hearsay evidence is only inadmissible if tendered to prove the statement was true (i.e. used 'testimonially', in substitution for the person being present and giving evidence as a witness). However, evidence is not hearsay if tendered to show, not that the statement was true, *but that the statement was made* (i.e. used as original evidence), and the fact the statement is made is *relevant*.

On the facts, Mr S, as a witness, may give evidence that the insurgent made the statement to him (i.e. can give direct evidence of the fact). However, this is different to giving evidence that the statement made to him was *true*. For it to be evidence attesting to the truth of the statement, it would be need to be adduced as 'the insurgent was going to kill me if I did not help.' That is, adduced as evidence to prove the insurgent was going to kill him. This would be using the evidence testimonially, in substitution for the insurgent being present, and therefore inadmissible.

However, Mr S is not attesting to the truth of the statement, using the statement as evidence the insurgent was going to kill him; he is merely attesting that the statement was said in his defence of duress. This is admissible.

Case: *Walton v R*

Facts: Walton was convicted of the murder of his former partner. Key evidence against Walton came from his then-partner, Bragg. Bragg's evidence was that she and Walton had hatched a plan to murder the former partner, partly for custody of Walton's child and partly to recover as a beneficiary under an insurance policy.

Bragg gave further evidence, stating that Walton had arranged to meet the former partner at the Elizabeth Town Centre in Adelaide, and came home later that night covered in blood from murdering the former partner in the countryside.

Walton vehemently denied these facts. The Crown, in trying to corroborate Bragg's evidence, furthered the question of whether Walton went to meet the former partner, or whether the former partner met Walton. The babysitter for the child, Rhonda, gave evidence of a conversation the former partner had had with a person on the telephone in which she was planning to meet that person at the Town Centre.

The Crown needed to make the connection that the other person on the phone was Walton. Rhonda gave further evidence that after making the plan to meet with the other person on the line, the former partner said to the child "daddy is on the phone." Rhonda then claimed that the child got on the phone and said "hello, daddy".

Held:

A hearsay problem arose in the evidence given by Rhonda:

1. The evidence given of the former partner telling the child 'daddy is on the phone' is an *express* assertion, *intended* to assert that 'daddy was on the phone'. Adducing this statement to prove that daddy was on the phone is prohibited by the hearsay rule, as this would be used to prove the truth of the asserted fact (i.e. the former partner was trying to expressly convey to the child that the father was on the phone);
2. The evidence given of the child getting on to the phone and saying, 'hello daddy', *without first questioning whether Walton was on the phone*, was an *implied* assertion Walton was the phone. However, it was an *unintended* representation (as implied assertions usually are), as the child was not intending to assert to anybody that 'daddy' was on the phone. *This made the evidence fall outside the hearsay rule.*

Case: *Ratten v R*

Facts: Ratten was convicted of the murder of his heavily pregnant wife after she was shot in the kitchen of their country home. He claimed he was cleaning his gun at the time, and that it accidentally discharged when it killed her. Having guns in a country home was not wholly improbable at the time.

In those days, phone exchanges were manually conducted in the country: when a call was made, it would go through a central exchange. The person at the central exchange would ask where the connection was being made to, after which they would plug in the line to facilitate the call. The fact calls were made manually was relevant to the case, as the central exchange could reveal minute-by-minute records of calls made from the Ratten house prior to the accidental shooting. *This is akin to chat logs over the internet revealing a verifiable pattern of conversation at a point in time*.

The call logs from the Ratten home on the day in question revealed as follows:

- **1:09pm:** Ratten's father called from Melbourne. The father's evidence was that everything seemed normal, that there was nothing amiss.
- **1:15pm:** A hysterical 'woman' is alleged to have called the exchange screaming 'get me the police.'
- **1:20pm:** Police call Ratten's house. Ratten said his wife had been shot.

The key statement in respect of hearsay is the exchange operator's evidence that a hysterical 'woman' called asking for her to get the police. *'Woman' is inverted commas because there was an argument led that the 'woman' who called may have been Ratten himself, talking in a high voice due to his hysteria.* But for our purposes, we assume it was Mrs Ratten calling within 5 minutes of being 'accidentally' shot.

Held:

If Mrs Ratten's phone call is being adduced to prove the truth of an assertion that she was in danger, it is implicit but arguably *intended*: It could be reasonably inferred that she was intending to convey to the operator that she was in danger, and therefore needed the police.

The Prosecution could argue that they were not adducing the phone call to prove the truth of any assertion, but to prove that it was said. But then why is this in?

There is no assertion here, express or implied. It is a request, circumstantial evidence inconsistent with Mr Ratten's version of events. That is to say, the evidence of Mrs Ratten's telephone call was not hearsay evidence. In fact, it is evidence relevant to a fact in issue i.e. as evidence, contrary to Mr Ratten's assertion that the shooting was an accident, that a call was made by Mrs Ratten in close proximity to her death. It is also relevant as showing, if the jury sees fit to draw the inference, that Mrs Ratten was at the time in a state of fear.

Therefore, the evidence of Mrs Ratten's phone call is not tendered to prove the truth of any intended representation, but as proof of a fact in issue. It therefore falls outside the rule and is admissible.

Case: *R v Benz*

Facts: The accused, a mother and daughter, were charged with the murder of the mother's husband. The victim's body was found in a river in an isolated location, downstream from a single-lane bridge. Post mortem revealed he had drowned, but there was also evidence he had suffered extensive head and stab injuries.

The Prosecution alleged the 2 accused had beaten and stabbed the man at another location, before dragging him to and dumping him off the bridge. Part of the Crown case was establishing that the accused had a mother-daughter relationship.

To establish this, the Crown called a particular witness who was driving home from a late shift at work on the day in question. He arrived at this one-lane bridge to find the women standing there in the early hours of the morning. He pulled over to ask what the matter was to which, the witness stated, the younger woman said, **"it's all right, my mother's just feeling sick."** The witness drove off, noticed a small car nearby of the same type which was later found burned out nearby.

Here, there are 2 representations: an *express* representation in "my mother is sick", an *implied* representation that the elder woman is "my mother."

Held:

The assertion that the elder woman was the younger woman's mother was an implied assertion. It is also an unintended representation in that it was a spontaneous response without much thought. Thus, it falls outside the hearsay rule because it is not being used to prove the truth of an asserted fact, but rather to prove it was said. The evidence of this statement is therefore reliable.

Case: *Kamleh v R*

When statements are relevant because they are said, not because they are true…

Facts: Kamleh was convicted of the murder of a 16-year-old prostitute. His co-offender, Zappia, was convicted of manslaughter. The killings alleged to have happened between 1:16am and 4am on 3 April. However, Kamleh and Zappia asserted as an alibi that they were at a nightclub between 11pm on 2 April until 4am on 3 April.

The Crown sought to adduce a number of statements intended to address the accused's alibi:

Statement 1

The first of these was a conversation between Zappia and a Mr Simoniuk on the evening of 3 April (*the evening after the shooting*). Zappia had told Mr Simoniuk about the shootings, and that he had **turned the TV up while in the room**.

Statement 2

Various telephone calls occurred between Zappia and Kamleh *after Kamleh was interviewed by the police*. The Prosecution sought to tender the record of interview in which Zappia **gave details of his movements, which were almost identical to that given by Kamleh.**

The Crown argued that they were not adducing the interview records to prove the truth of any statement made in those records, but to prove the statements were a fabrication. The relevance of the interview records were sought to be adduced so that the jury could infer, from the intervening telephone call between the interviews, evidence of collusion between the 2 accused.

Statement

The Crown sought to adduce a conversation between Zappia and Simoniuk prior to the alleged offence stating that he and Kamleh planned to catch up with the deceased because **'he owed them something, or they had something to settle with him'.**

Held:

Ruling 1

The conversation was not tendered to prove the truth of the asserted conversation i.e. that he had turned up the television, but to prove the state of knowledge by Zappia, which was consistent with crime scene. This is an example of esoteric knowledge not known to the public: only a person who found the deceased, or was otherwise present at the crime scene, could have expressed such information. The accused's esoteric knowledge may be used to confirm that he was present at the crime scene.

Ruling 2

The interview records are not hearsay, as they are not being adduced for the purpose of proving truth but rather to prove that Zappia and Kamleh's statements were made in concert, and therefore may reasonably be false.

Ruling 3

The statement is sought to be adduced as evidence of motive i.e. intention. Evidence of intention is normally inadmissible under the hearsay rule. Thus, the statement is sought to be adduced as evidence of an asserted fact, and therefore inadmissible, but it may be subject to the exception under *Evidence Act,* s 66A, rendering it admissible.

Case: *Lee v R*

Facts: Lee was convicted of assaulting Patricia Jones with intent to rob her. Cailin was arrested in the company of Lee a short time later, and he told police he had been asking Lee for $80 he owed him, to which Lee had said "I did a job." Cailin repeated that in a written statement prepared for him by police, and signed it. Cailin's statement to police contained:

a) An account of what Cailin had done (i.e. 'he was walking on the street');
b) An account of What Cailin had seen (i.e. he saw Lee 'walking fast' and was 'sweaty'); and
c) An account of conversation Cailin had with Lee about a debt. During this conversation, Lee said "leave me alone, cause I'm running because I fired two shots… I did a job and the other guy was with me bailed out."

There is a hearsay issue here. Cailin is giving evidence of a previous representation by Lee (i.e. that Lee committed the robbery). Adducing the representation to prove that Lee committed the robbery would fall foul of the hearsay rule. *However, first hand admissions are an exception to the hearsay rule.*

When he was called as a witness at the trial, Cailin testified to asking Lee for money, but could not recall anything else that was said. The prosecution cross-examined Cailin (*pursuant to ss 38 & 43*) about his previous statement to the police, but Cailin denied those statements were his.

This presented issues of prior inconsistent statement and unfavourable witness. The prior inconsistent statements in particular could be proved in 2 forms:

a) By the police officer stating, "Cailin told me that Lee told him that he had 'done a job"; or
b) By submitting into evidence Cailin's signed witness statement that Lee told him he had done a job.

Both are prior inconsistent statements.

The police officer who prepared the statement gave evidence of the taking of the statement. The police statement that Cailin had signed was tendered in evidence by the Prosecution as a prior inconsistent statement (i.e. was relevant to discrediting Cailin), meaning s 60 applied.

The Defence sought to have evidence of Cailin had told police and his statement as inadmissible or excluded in the judge's exercise of discretion. It argued that adducing evidence from the police officer would be problematic, as it ***amount to adducing second-hand hearsay,*** for which no exception to the hearsay rule would apply. Further, when Cailin wrote the statement and signed it, the representation in the document was his. However, the representation was still being brought before the court by the document - a further 'person' removed.

If Cailin gave evidence as expected, Cailin would be giving evidence of first-hand hearsay (i.e. not adducing it to prove it was said, but adducing to prove it was true), which would ordinarily fall foul of the rule. *However, an exception applies.*

The trial judge let the evidence in, instructing the jury that if they accepted that Cailin had told police that Lee had admitted to 'doing a job', that was evidence of the fact Lee had said those words and in effect was a confession by Lee.

The High Court found that this direction would have been understood by the jury as an instruction to use Cailin's - previous representation as a confession by Lee. The Court considered the effect of s. 60 and the application of hearsay principles -

Held:

By allowing for the prior inconsistent statement to be adduced in this instance in either form (officer or signed statement) and the hearsay rule not applying, it would effectively allow for a second-hand admission to be included. Parliament could not have intended for s 60 that broadly.

Case: *R v Conway*

Facts: Conway was convicted of the murder of his ex-wife, via an overdose of heroine. The Crown case was that the murder was done as a conspiracy with co-accused. It alleged that the several accused planned to give her doses of heroine in the time leading up to the murder so that her death would be consistent with an overdose.

The relevant hearsay evidence related to statements the ex-wife made to neighbours that she was feeling "really unwell" after her ex-husband had been around to visit, saying something to the effect of "I think John put something in my tea."

In terms of **(b):** There is some debate as to how shortly after the wife made the statements to neighbours: is not about whether it was fresh in the memory, but a time issue. The next day would be pushing it, but an hour or two after would most likely be fine.

In terms of **(c):** The Court was prepared to accept that the ex-wife's statements were unlikely to be fabrications eventhough they were made sometime after. However, it was *not highly probable* that her statements were reliable, given her heroine-affected state.

Thus, the Court was prepared to accept the ex-wife's evidence under (b), but not under (c). **(b) has a lower standard, but must be closer in time; (c) has a higher standard, but time is not a factor.**

NOTE: *Trial judges will commonly go through all 3 - so argue for all of them.*

Case: *Williams v R*

Facts: Williams was charged with armed robbery. It was alleged he had buried the rifle in the backyard of an acquaintance, a Mr Stewart. Mr Stewart became a declarant in the case, participating in a taped interview with police. However, he died before the trial. There was a question of whether Mr Stewart's interview with police was admissible.

NOTE: A tape or other recording is a document. When police are adducing a taped record of interview, such is first-hand hearsay (i.e. the tape contains the statements by the accused: out-of-court representations adduced to prove the truth of the representations).

Issue:

- *Was his statement to police admissible under s 65(2)(b)(c)?*

Held:

'Shortly after' does not require strict contemporaneity. It is used in its ordinary sense. Although there may be differing perceptions of what 'shortly after' means, once it passes an hour or two, it will unlikely be considered 'shortly after'.

The rationale is not whether the events may easily be recalled, but whether they are likely to be a fabrication. They must be made during ('when') or under the proximate pressure of ('shortly after') the event.

The test is not whether the representation is reliable, but whether the *circumstances* make it unlikely to be a fabrication/highly probable to be reliable (i.e. where there is an acrimonious situation in which the declarant has a motive to lie, such will be relevant to whether the representation was a fabrication).

Evidence may be given of inconsistent/consistent statements or conduct of the declarant at other times, but only to the extent they affect the reliability/credibility of the declarant at the time of the making the statement (i.e. if previous false statements were made, they would be adduced not for their truth but to affect whether it was likely they were fabricating on this occasion).

In this case -

1. The statements sought to be adduced were made several days after the event. This would not fall within the definition of 'shortly after', eventhough its likely Mr Stewart remembered details of the event. Therefore, the statements would not be admissible.

2. Furthermore, the Court finds that Mr Stewart was the kind of man who would assist a friend who had 'done a rort' by making equipment available for the destruction of evidence (i.e. as someone willing to help others in committing criminal offences). He was also apparently a drug addict living on the 'fringe of existence', and had a variety of reasons to tell the police what he perceived they wanted to hear. Based on this, *even if his statements had been made shortly after the event,* it cannot be said that his statements were unlikely to be a fabrication and were therefore highly probable to be unreliable.

***

Case: *Harris v R*

Facts: Harris was convicted of the manslaughter of Mr Wright. Wright was leaving Hurstville RSL when Harris asked for a cigarette. Harris became aggressive and punched Wright in the head. Wright was taken to hospital, but not admitted.

The next day, Mr Wright attended a police station and made a statement, but approximately one week later he died from traumatic brain injury. Mr Wright's statement was admitted at trial under s 65(2)(b) & (c), the court finding that Wright's statements were made 'shortly after'.

Harris appealed. The basis for Harris's appeal was that Wright's statement ought not to have been admitted as it was not made 'shortly after' the events described, and the circumstances in which it was made were such that it did not render it unlikely that what was said was a fabrication.

Held:

'Shortly after'

No attempt has been made in the decided cases to prescribe the words 'shortly after' by the passing of any defined period of time. Each case has to be considered having regard to its own particular circumstances. For example, it could be said that a statement made by a person recovering consciousness several days after the event (eg. because they were in an induced coma) may be considered to have made their statement 'shortly after' the event.

It was open to the judge to determine that what the deceased told the police was conveyed 'shortly after' the incident described.

Case: *Munro v R*

Facts: Munro was convicted of an armed robbery and inflicting grievous bodily harm. Both offences were alleged to have happened on 10 May 2004. There was evidence that 2 offenders waited for a Chubb security vehicle at a bus shelter. DNA was found on cigarette butts located at the bus shelter that correlated with the DNA of Munro.

In 2004, Mr Grace was a cleaner who cleaned the relevant area. In February 2010, Mr Grace provided a statement to police. The statement detailed that he did not remember specifically 10 May 2004, but he gave evidence that he regularly cleaned the area in a routine system using a blower vacuum. The blower vacuum moved all paper, cigarette butts and leaves. Due to regularity with which Mr Grace cleaned the area, it could be inferred that the relevant cigarette butts were dropped that day, and had not been left over from a previous day.

At the time he provided his statement, Mr Grace was 74 years old and had retired. Subsequent to making the statement, but prior to Munro's trial, Mr Grace died. His statement was admitted into evidence at trial pursuant to s 65. The evidence of Mr Grace was important to the Crown case because it could establish that the cigarette butts found to contain the DNA were deposited in the vicinity of the bus shelter on the day of the robbery.

The Prosecution argued that because the statement was made to police, it was as close to a guarantee of reliability as is possible, as such statements carry the possibility of prosecution for giving false information.

Held:

s. 65(2)(c) does not apply to a statement *simply because* it was made to a police officer, or because it was made under the understanding that a false statement could lead to prosecution (i.e. the fact a statement is made to the police is not in itself a guarantee of reliability). Nonetheless, on the facts statement highly probable to be reliable because:

- Mr Grace was describing a system of work he had done for many years, making it likely it would be well-remembered;

- Mr Grace had no personal interest in the subject matter, participants or outcome of the trial; and
- Any inclination to exaggerate his cleaning proficiency was likely to be outweighed by the need to avoid prosecution for giving false information.

Cf. Williams - Mr Stewart was complicit and clearly someone who could not be relied. Here, Mr Grace was merely a member of the community performing good, honest work, who gave evidence with no motive to lie. But even as remote his motivation to lie might have been, it is highly unlikely he would have fabricated his statement and risk prosecution for making a false statement to police.

NOTE: Under s. 65(2)(c), statements made do not have to be connected in time to the asserted fact. However, subsection (b) could not be used here, as the statement was made a long time after the event (6 years).

Case: *Van Beelen*

Facts: Van Beelen was convicted of the rape and murder of a teenage girl in South Australia. Police had interviewed a man named Mr Sandercock, who had come forward and admitted to the crime. Mr Sandercock later withdrew his admission, claimed he was insane and sought treatment. The police did not pursue the admission.

At trial, Van Beelen sought to adduce Mr Sandercock's admission to raise the reasonable possibility that someone else committed the crime.

Case: *Baker v R*

Facts: This was an appeal from the Supreme Court before the *Evidence Act* was enacted.

Baker and LM, a juvenile, were jointly tried for murder. The death occurred at a party where, after an altercation on the landing, the victim fell through a closed window to his death. Baker, LM and several witnesses were present. LM admitted in a police interview that he had pushed the deceased, and also made statements to witnesses capable of being viewed as an admission of responsibility for the deceased's fall.

The Prosecution alleged that Baker and LM were acting in concert, or one was aiding and abetting the other. Baker sought to rely on LM's out-of-court statements as evidence exculpating himself. However, the trial judge ruled that LM's statements were inadmissible at trial.

Baker was subsequently convicted, and LM was acquitted. Baker appealed on the ground that LM's out-of-court statements were wrongly excluded. Baker argued that an exception to the hearsay rule should be allowed for joint trials where a co-accused's admission is reliable, arguing that LM's admissions were reliable because they were made against LM's penal interest.

LM's admissions could only be used against him and no one else. However, Baker sought to adduce LM's admissions to exculpate him on the charge alleged. This would offend the hearsay rule, as he sought to use LM's previous representation, an express, intended assertion, to prove its truth. But since it was not Baker's admission, it does not fall within the **s. 65(8) exception.**

Held:

Whether LM's previous representations would meet the conditions of s 65(2)(b), (c) or (d) need not be addressed. **S. 65(8) provides a broad exception to the hearsay rule with respect to first hand hearsay adduced by a defendant in criminal proceedings. The only condition for the admission of evidence of a previous representation by a person who saw, heard or otherwise perceived it being made when adduced by an accused is for the provision of reasonable notice.** If Baker's broad contention were upheld, it would have no consequence for any new trial at which the admission of LM's statements, if he were unavailable to give evidence, would be governed by the *Act*.

Case: *Graham v R*

Facts: Graham was convicted of multiple counts of sexual assault of his daughter when she was between 9 and 10, between June 1987 and July 1988. The charges were laid after the complainant told a girlfriend in August 1994 that she had been sexually abused by her father when she was a child - 6 years after the alleged incidents.

At the trial, evidence of the complainant's complaint was admitted over objection. The trial judge directed the jury that the evidence of prior complaint could be considered in assessing the complainant's credibility. *The admissibility of the evidence was argued and determined by reference to common law, although the Act had come into force the previous year.*

The accused appealed, but it was dismissed at first instance. The matter was then appealed to the High Court.

Held:

'Fresh in the memory' means 'recent or immediate'. There is a temporal requirement for complainants to adduce previous complaints. The temporal relationship required is measured in hours or days, not years. The previous statements are not admissible.

The Law Reform Commission reviewed this provision. They argued that s. 66 did not import a temporal requirement; if it did, it would have been expressed (eg. 'shortly after'). The measure of reliability is not temporal, but whether it is 'fresh in the memory'.

Case: *Clay (A Pseudonym) v R*

Facts: Clay was convicted of sexual offences against 3 children. Clay was aged between 15 and 18 at the relevant time. The complainants were his first cousins: BM (a boy born in 1974); MW (a girl born in 1976); and TM (a boy born in 1978).

The Crown case was that between 1 July 1982 and 9 January 1985, Clay sexually abused each of the 3 complainants. The trial took place in 2013. Clay appealed on several grounds, one being that the previous representations were 'not fresh in the memory' of the person who made the representation.

Held:

After the introduction of s. 66(2A), a 'court is **no longer confined** to focusing primarily, still less exclusively, on the **lapse of time** between an event, and the making of a representation about it'. The '**amount of detail and any striking or unusual aspects would be a very significant factor in considering admissibility**'.

However, in this case, a period exceeding 20 years was 'so far beyond what the legislature could ever have contemplated' that it cannot be fresh in the memory.

Case: *Lancaster v R*

Facts: Lancaster was convicted of sexual offences against 2 children under 16 years (CA & CB). Each of the complainants had files maintained by the Department of Human Services ('DHS'). The files were produced on subpoena at the request of the Defence, and the Defence commissioned a consultant neuropsychologist (Dr Gibbs) to read the documents produced by DHS to opine on the mental state of each complainant and the effect of the mental state of the reliability of the complainant's testimony.

The Defence sought to cross-examine both complainants on the documents produced by DHS. However, the trial judge upheld the prosecution's objection that the documents were hearsay and inadmissible as business records. The trial judge also ruled that Dr Gibbs' opinion was inadmissible as it was based on the DHS records that were inadmissible.

Lancaster appealed on a number of grounds; in particular, on the exclusion of the DHS records and Dr Gibbs' opinion.

Held:

'Business' includes 'an activity engaged in by the Crown in any of its capacities'. The term includes 'activities engaged in or carried on by the DHS, other analogous social welfare agencies, hospitals, medical practices and kindred health care providers'. **Individual patient records may therefore be 'business records', even though not concerned with the running of the business, but recorded in the 'course of the business'.**

'Directly or indirectly' provided is not limited to first or second-hand hearsay. Therefore, information taken by an employee (second-hand) from the mother of a child (with first-hand knowledge) describing certain behaviour may be included, **so long as the nature and context of the recorded representation allows the relevant inference to be drawn in relation to the person's knowledge, the evidence is admissible** (i.e. as long as there is a representation of someone who might reasonably be supposed to have had personal knowledge, it does not matter how many intermediary person's there are - *eg. a teacher who tells a mother about their child's behaviour, who then relays that behaviour on to a DHS employee: DHS employee has third-hand hearsay, but as long as the representation can be traced back to the teacher, who had personal knowledge, it falls within the section*).

However, this exception may be subject to exclusion under ss. 135 (*criminal proceedings*)/137 (*all proceedings*).

Case: *Lithgow City Council v Jackson*

Facts: Jackson commenced civil litigation against Lithgow City Council after Jackson was found unconscious and injured in a drain. Jackson conceded that the Council was only liable if he fell from a vertical retaining wall, but Jackson could not remember how he fell.

A document called a "Patient Healthcare Record" recorded the following under the heading "Patient History":

"Found by bystanders-parkland?

Fall from 1.5 metres onto concrete

No other Hx (*history*)"

The record was signed by 2 persons: J Goodwin (described as driving) and M Penney (described as officer treating). Both were ambulance officers, but neither gave evidence at trial.

The record was admitted at the hearing pursuant to s. 78 as an opinion that Jackson fell from the vertical retaining wall. The appeal to the High Court was based on the admissibility of the document.

Held:

The patient record was presumably a 'business record', as it was made in the course of the ambulance business.

But is the previous representation that he fell 1.5m onto concrete admissible?

If the asserted fact was the Jackson had fallen 1.5m onto concrete, it did not fall within s. 69:

a) Ambulance officers did not have personal knowledge;
b) Even if information supplied by bystanders, they did not have personal knowledge as the incident occurred before they arrived.