

# Introduction

All references to legislation are to **Evidence Act 2008 (Vic)** unless otherwise specified.

**State the LEGAL CASE (elements of the legal cause of action),**

**then divide exam response into these 3 headings:**

***What do we have to prove in order to succeed?***

- I. **THEORY**: Development of a factual theory [ 700 words]
- Storytime! Your version of what happened.
  - But don't just *describe* the incident – provide the *why* (motive), and events before and after the incident that may be relevant to this.

***How do we go about proving this?***

- II. **PROOF**: The process of proving the case theory [ 2650 words]
- Identify 3-4 main arguments that you will use to prove the case, and explain the relationship between each of these and the legal case.
  - Identify the evidence you will use as a foundation for the main arguments.
  - Explain the inferences that connect the evidence to the main arguments.  
(Inferential reasoning: A form of reasoning that relies on generalisations that connect a series of related propositions, and is probabilistic).
- III. **LAWS OF EVIDENCE**: Application of the rules of evidence [ 2650 words]
- Consider the admissibility of the most important and problematic pieces of evidence.
  - No need to spend too long on unproblematic, *direct evidence*.

***In the exam, you will advise on the prosecution's chance of success. Remember we are advising rather than advocating for the prosecution on the strength of their case.***

## **Part III: Laws of Evidence**

### **EVIDENCE CAN BE ADMITTED IF:**

1. It is relevant to a fact in issue – ***note usually relevance already discussed at Pt II.***
2. No exclusion to admissibility applies: (\*rules that prohibit certain uses of evidence)
  - Admissions
  - Hearsay\*
  - Opinion\*
  - Tendency and coincidence\*
  - Credibility (we will rarely come across questions of credibility in our brief)
3. It would not be excluded under the discretionary or mandatory exclusions.

### **Exam tips:**

#### **General**

- In the exam, you will advise on the prosecution's chance of success. Remember we are advising rather than advocating for the prosecution on the strength of their case.
- Code 1 – **Strict 6,000 word limit** → Will need prioritise the issues you discuss.
- Use size 12 font, line spacing 1.5
- Create a timeline of significant events, including references to pieces of evidence.
- Identify from the outset: What will be the most different aspects of this case to prove?

### Section 101: Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.
- (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
- (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

### Section 95: Use of Evidence for Other Purposes

- (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.
- (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 for another purpose.

*This provision has the opposite effect to sections 60 and 77.*

### Does the Tendency or Coincidence Rule apply, rendering the evidence prima facie INADMISSIBLE?

#### 1. Does the Tendency or Coincidence Rule apply? If YES → prima facie inadmissible

#### The Tendency Rule: 97(1)

Evidence of the character, reputation, conduct or tendency of a person is not admissible to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind.

***\*Inference: Because a person had a similar state of mind or acted in a similar way in the past, they had a similar state of mind or acted in the same way in the current situation.***

- Tendency can be established by a single action.
- Applies also to tendencies to have a certain 'state of mind'
  - e.g. A tendency to be nonchalant about copyright law
- Only regulates inferences about the acts or state of mind of *the person who has the tendency in question* (see Step 2).
  - e.g. It would NOT be tendency reasoning to use evidence of a particular *customer's* tendency to seek counterfeit works to infer that *the exporters* had a reason to sell counterfeit machines to that customer.

#### The Coincidence Rule: 98(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, it is improbable that the events occurred coincidentally.

***\*Inference: The similarity between two or more events makes it improbable that these are mere coincidences (happened by chance).***

- Coincidence reasoning always involves evidence of *events*
  - Event is not limited to an action or occurrence, but can also include a *state of affairs* such as possession: *Townsend*
- Coincidence reasoning must be based on evidence of *at least two events*, and one of these events can be the event which is a fact in issue in the proceeding.

## **2. What are we using the evidence for?**

Evidence of events, conduct, character, reputation or tendency of a person that is relevant for purposes OTHER THAN tendency or coincidence reasoning, will be admissible for those other purposes whether or not the tendency and coincidence rules are satisfied.

- Like the hearsay and opinion rules, the tendency and coincidence rules are **rules of use**.
- **\*95:** BUT unlike the provisions on hearsay (60) and opinion (77), once evidence has been admitted for a different purpose, *it cannot then be used for a tendency or coincidence purpose* without satisfying 97 or 98.

## **3. Is the evidence admissible because it has 'significant probative value'? 97(1)(b), 98(1)(b)**

This is effectively a heightened relevance test. Three factors are considered (*Jacara*):

### **1. Cogency of the evidence that the conduct or event occurred.**

- The reliability or trustworthiness of the evidence.
- Evidence of conviction is more cogent than charges or allegations.
- Accused may have admitted to the conduct.

### **2. Strength of the inference that a pattern of human behaviour exists.**

- \*The strength of the inference that can be drawn from the evidence, that a tendency exists or that a coincidence is unlikely.
- Tendency (*Velkovski*)
  - \*Be careful when defining the tendency. The greater the degree of generality with which the tendency is expressed, the less likely to meet the threshold.
  - Relevant considerations include:
    - Degree of specificity of the conduct/alleged tendency: *Ibrahim*
    - Number of occasions upon which it occurred
    - Unusualness of the conduct or event
    - Time gap between occasions, inc. age at which events happened
      - Will need to show *continuity* if there has been a significant break.
    - Escalation of acts
    - Degree of similarity between the conduct on those occasions
    - Degree of similarity of the circumstances in which that conduct occurred: *Milton, Fletcher*
    - Whether the tendency evidence is disputed; possibility of concoction or contamination: *AE, Ibrahim*
- Absence of coincidence
  - \*The similarities between the events must be such that any alternative possibility would strike the fact-finder as being *too much of a coincidence*.
  - Relevant considerations include:
    - Proximity in time of the events
    - Extent to which the events are similar in detail
    - Number of occurrences of events
    - Circumstances surrounding or relating to the events
    - Any distinctive features unifying the events
    - Any intervening events
    - Factors that tend to support or rebut the underlying unity of the events.
    - Alternative explanations of the coincidence evidence

### **3. Significance of the pattern to the fact in issue (main argument).**

- The extent to which the tendency or absence of coincidence increases the likelihood that the fact in issue occurred. Consider whether proof of the alleged pattern really contributes to resolving the particular factual dispute in the proceedings.

- **\*There must be sufficient similarity of features between the prior acts and charged conduct, so that the prior acts cogently increase the likelihood the charged conduct occurred:** *Velkovski*
  - \*Degree to which the occasion the subject of the charge conforms to the tendency or previous events.
  - May depend on the unusualness of the event or conduct
  - For tendency, we want to prove that there is a *continuing tendency*.

**4. For criminal proceedings: Is evidence adduced by the prosecution about the defendant admissible, because its probative value '*substantially outweighs any prejudicial effect*'? 101(2)**

**101(2):** Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence *substantially outweighs any prejudicial effect* it may have on the defendant.

- **101(2):** This applies *in addition to* sections 97 and 98 and augments their probative value tests.
- **\*Note that this section effectively renders the general exclusionary discretions in 135–7 redundant (so far as they relate to unfair prejudice):** *Lock*
- \*Only applies to tendency/coincidence evidence *about the defendant*. So it does not apply to evidence used to support other circumstantial reasoning in support of the prosecution case.

**\*Section 101(2) augments the probative value test:**

- **Probative value:** **See the 3 Jacara factors above.**
- **Substantially outweighs:** **See the general discretion to exclude in 135.**
  - Favours exclusion since the threshold is so high ('*substantially outweighs*')
  - A value judgment rather than a mathematical calculation.
  - The cases on 101(2) have failed to address this part of the test.
- **Prejudicial effect:** **See discretionary & mandatory exclusions for definition.**
  - *Moral Prejudice* – Fact-finder may react emotionally to tendency/coincidence evidence and make a finding against the defendant *for the wrong reasons*.
  - *Reasoning Prejudice* – Fact-finder may overestimate the probity of the D's supposed characteristics, underestimate the significance of context in predicting the D's behaviour.
    - *Perry*: Highly improbable sequences and combinations are constantly occurring. Although it is extremely improbable that any particular ticket will win a large lottery, it is certain that one will.
  - Examples of prejudicial effects include:
    - Jury inclined to punish for conduct not subject to the current charge
    - Jury inclined to overestimate the probative value of the evidence
    - Jury may be distracted from the central issues in the trial.
    - Andrew: Inclination to flawed reasoning.

**\*Exceptions to 101(2): Where the heightened probative value requirement will NOT apply.**

- **101(3) / 101(4):** It does not apply to tendency/coincidence evidence that the prosecution adduces to explain or contradict tendency/coincidence evidence adduced by the defendant ('tit-for-tat').
  - (?) Though note 110, which provides for the rebuttal of tendency evidence of the defendant's good character.
- It does not apply to evidence that falls within 94 (i.e. where the tendency and coincidence rules don't apply – credibility only, fact in issue).

**(See also explicit exceptions to the tendency and coincidence rules →)**

**Tendency example – *Fletcher***

A priest was accused of grooming and assaulting young male parishioners. P alleged a tendency of the accused to behave in the following ways:

1. Meet the family of the subject child through his position in the church
2. Involve the family of the subject child in the church
3. Develop a special relationship with the family of the subject child