

**Coincidence Evidence (requires similarities) → If tendency argument fails, argue coincidence.**

**1. STATE the coincidence reasoning P would allege:**

- General coincidence reasoning: Based on prior convictions/charges, and that the [Ev/misconduct] is similar, it is improbable that it occurred coincidentally/ offence were committed by more than one (*Makin; Perry; CW*).
- Improbability of similar lies reasoning (more than one complainant/ W in a case): The Witness's [allegations] on the facts are so similar, and it bear such an 'unusual common feature', that they must all be telling the truth and there was no concoction (*Broadman; Hoch*).

**2. Apply s.98 – coincidence evidence is inadmissible unless it has significant probative value:**

**RULE:** Coincidence evidence is inadmissible unless notice is given to the other party (**s.98(1)(a)**) and the evidence has significant PV (**s.98(1)(b)**)

**NOTE: s.98(2):** s.98(1) does not apply if evidence is adduced to explain or contradict coincidence evidence adduced by another party.

- **S.98(1)(a)**: has reasonable notice been given in writing to the [Opp] by [person seeking to adduce] the CE?
- **S.98(1)(b)**: Does the [Ev] have significant probative value?
  - **STATE: Probative value** is the extent to which the evidence could rationally affect the probable existence of the fact in issue. It will be **significant** if the evidence is important or of consequences requires more than mere relevance (*Pfennig; Ford; Lockyer; s.55*).
  - Step 1: There must be 'touchstone' similarities to support coincidence evidence (PNJ)
    - **STATE:** In order to make out s.98, [Ev] must be somewhat similar, there must be 'touchstone' similarities (*PNJ*). P will point to similarities in conduct on different occasions and this may reveal a patten to infer that the conduct occurred was not an accident (*Broadman*).
      - **APPLY:** point out to some similarities on the fact and suggest if it will pass the threshold of significant PV due to uncanny similarities of each offence.
      - Insufficient that the evidence merely raises a suspicion the accused may be guilty of similar misconduct (*Perry*)
        - **Broadman:** headmaster was taking on a passive role when committing buggery against victims.
        - **Ellis:** where offence was committed by removing glass panel.
  - Step 2: Single out outlier charges (Perry)
    - **APPLY** if relevant: If one charge is very different to the other ones, [P] can single them out, and hear that charge in a separate trial (*Perry*).
      - E.g. 4 charges of murder, and 3 of them is of a young girls, and one is of an elderly, then the elderly case should be singled out.
  - Step 3: Assuming all charges are true (IMM Majority; Bauer)
    - Per *Bauer* and *IMM*, we are to assume that all allegations/ charges are true as we take evidence as its highest and credibility/reliability is irrelevant.

**3. Application of s.101 (applies to s.98 in criminal proceedings ONLY):**

**STATE:** Given that [P] is adducing the [Ev] as coincidence evidence, the probative value must substantially outweigh its prejudicial effect: **s.101(2)**.

- This section does NOT apply to tendency/ coincidence evidence that Prosecution adduces to explain/contradict tendency/ coincidence evidence adduced by Accused: **s.101(3)/(4)**.
- a) Balancing probative value factors:
  - (1) The surrounding circumstances
    - Events/circumstances must be similar that it is improbable that they occurred coincidentally.
      - **CW:** fire lit against business owners in dispute
      - **Perry:** would be contrary to ordinary experiences to have so many poison related death in the circle of people with which the person is associated.
  - (2) The way that Accused took advantage of the setting (PNJ)
    - Especially for people who has responsibility/ power over children, offence occurred in a specific place/ specific setting, where A took advantage of it.
  - (3) Stock in trade similarities lowers the probative value (AE; CGL)
    - Stock in trade are features that are similar to this type of crime.
      - **Ellis:** window/ removing glass panel when robbing – no stock in trade
      - **CGL:** Sexual offence by touching the vagina – stock in trade

- (4) Number of incidents (Makin)
  - The higher the no: of incidents, the higher the probative value.
    - **Makin**: 12 instances of babies found in the backyard of the Makins.
- (5) Time gap between the incident (Perry)
  - The closer the incidents took place the higher the probative value it is.
    - **Perry**: the time gaps of poisoned husbands were between 1, 8 years, only the first one was admissible as it had striking similarities to the one she was charged for.
- (6) incidents are disputed
  - Prior convictions have a higher probative value as opposed to allegations
- (7) Similarities that bear on irrelevant things are irrelevant:
  - Minor similarities or irrelevant similarities
    - **LSS Tutorial**: 4 murder and in three instances a cigarette was only found in 3 cases but not in the 4<sup>th</sup>.

b) What is the prejudicial effect of the Evidence?

- [Party seeking to adduce Ev] would argue prejudicial effect is the undue impact of the evidence on the jury, adverse to the accused, over and above the evidence's probative value (*Pfennig*)
  - If the misconduct is distasteful- where jury sees multiple instances of that conduct, they may have an emotional reaction which clouds its judgement (*Pfennig*)
    - E.g. sexual offences against children, murder, violence against woman, family violence
  - If the misconduct consists of multiple similar allegations (not prior convictions) – risk of jury getting overwhelmed and assuming that they are all true (*Pfennig*)
  - If lots of evidence spanning across many years apart, the jury may be overwhelmed (*AE*)
    - E.g. 7-8 charges and spanning across 1970-2000 then there is a high risk that jury will be overwhelmed.
- [P] would argue that prejudice is crucible by a stern judicial direction on 'other misconducts': s.27 *Jury Direction Act*. On this basis, the PV of the allegations (adduced as coincident evidence) is likely/ unlikely to substantially outweigh the prejudicial effect of the evidence due to the pattern of behavior they appear to establish.

<p><b>R v Ellis (2003)</b></p> <p><i>Consideration s.101 in determination</i></p>	<p>E convicted on 11 counts of breaking and entering in small commercial premises in rural region of NSW. Unique feature: entry gained by removing entire panel of glass removed from the seal. Issues arose re: admissible due to type of shops targeted, goods stolen (cash and cigarettes), and unusual means of entry.</p>	<p>Held that tendency = if jury is satisfied of one offence, can infer tendency of breaking/entering with modus operandi that makes it more likely E committed other offences. Coincidence= if jury/ satisfied of at least one of the offence, consider whether distinctive that it is improbable offence was committed by someone else.</p>
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4. Possibility of concoction/ collusion when you have: testimonies/ uncharged acts/ allegations (Velovski)

- APPLY: where you have multiple witnesses & can be used to render coincidence evidence inadmissible.
- This may be the case where [W] has a sufficient contact with another; or that they have a motive to concoct (*Hoch; PNJ*)
  - **Broadman**: the headmaster took on a passive role when committing buggery, unlikely concocted.
  - **AE v R**: sisters were both complainants thus the possibility of concoction cannot be eliminated.
- Collusion/ concoction considerations do NOT arise if [D] admitted having committed the offence previously or was convicted.
- HOWEVER, this argument is arguably irrelevant under s.98 and s.101; as this relates to credibility and reliability which are question for the jury to determine (*IMM; Bauer*). Unless, the [Ev: given by W] is so blatant that it could not rationally affect the assessment of a fact in issue, then it is unreliable (rare exception unless cognitive impaired) (*IMM; Bauer*)
  - POLICY: *Bauer* is critiqued, and per *Broadman*, concoction was discussed in admissibility, thus it is for the TJ to determine rather than the jury.

5. s.137 Evidence Act:

- The court must refuse to admit evidence of Prosecutor if the probative value is outweighed by unfair prejudice to the Accused: s.137

- However, question the relevance of s.137 when s.101 is a high threshold test. It is for the Defence to raise s.137 whereas for the Prosecution to satisfy s.101.

<p><b>DSJ v R (2012)</b></p> <p><i>Want to trial 2 case together- cross admissible evidence is coincidence reasoning</i></p>	<p>DSJ and MS charged with insider trading under the Corps Act. Appealed pre-trial order dismissing application to have charges tried separately against them. Crown intended to lead each charge as coincidence evidence in respect to each other counts.</p>	<p>Held that must take into account alternative explanation consistent with innocence when determining probative value associated with coincidence reasoning. This does not involve weighing and assessment of the alternative.</p>
<p><b>DPP v Broadman [1975]</b></p> <p><i>Improbability of similar lies is now overruled. Concoction and collusion is matters that goes to reliability and credibility and for the Jury to determine (Bauer)</i></p>	<p>Headmaster at UK boarding school convicted on 2 counts of buggery against 2 children. Tried separately, and court needed to be satisfied that evidence from S and H were admissible at each other's trial for it to be tried together (cross-admissible). S claimed D offered him money to engage in buggery. H claimed D returned to D's sitting room after disco and asked to partake in buggery. Evidence had special feature as D wanted to take a passive role in buggery (and nocturnal visits) and both boys independently stated this.</p>	<p>To be admissible, it must be an affront to common sense to exclude the evidence. Improbability of similar lies was considered as was possibility of contamination given that the boys knew each other. Unlikely to have lied as both said passive role. Concoction and collusion relates to admissibility and is for the TJ to determine and not for the jury (contrary to <i>Bauer</i>).</p>
<p><b>Perry v R (1982)</b></p> <p><i>Time period and the no: of incident feeds into probative value of the coincidence evidence</i></p>	<p>P charged with attempting to murder 3<sup>rd</sup> husband via arsenic poisoning to benefit from life insurance. First husband died of arsenic poisoning in 1961 and P would benefit from his death. P's brother died from acute arsenic poisoning in 1962, but P had nothing to gain from this. P's de facto partner died of barbiturates poisoning in 1970 and P was also to gain financially.</p>	<p>To be admissible, evidence must have a strong probative force and not merely raise suspicion of guilt. 1<sup>st</sup> husband's death was admissible as there was clear connection, motive, striking similarities. Brother's death was inadmissible as pair were not living together and P has no opportunity to administer poison, nor were there striking similarities. De facto's death also inadmissible as it was not prove that he had ingested any poison.</p>
<p><b>Makin v AG for NSW [1894]</b></p> <p><i>Foundation for coincidence evidence – it was improbable that it could be merely a coincidence</i></p>	<p>12 dead babies found in the years of property owned by Makins. Defence claimed baby number 13 died of natural causes. Only circumstantial evidence, never charged with death of other children. Evidence that several other babies had been received by the accused, AND the bodies of other babies found buried in a similar manner in the garden was relevant.</p>	<p>It was beyond the possibility of coincidence that there were 12 babies buried in the backyard and the Makin's had nothing to do with it. It could be reasoned that these are the type of people who killed children for money.</p>
<p><b>CW v R [2010]</b></p> <p><i>Surrounding circumstances was the distinctive feature (same)</i></p>	<p>CW charged with arson of three Rosebud properties in one night. Each property was a carpet/real estate owner to which the accused was in a dispute with – motive was the distinctive feature.</p>	<p>Held that judge was entitled to conclude that it would be contrary to ordinary experience that this was a coincidence.</p>
<p><b>AE v R [2008]</b></p> <p><i>D took advantage of the setting as the C was in his care, there was a possibility of concoction as the complainants were sisters</i></p>	<p>D charged with 15 accounts of sexual offences, 13 against stepdaughter and 2 against daughter. Appealed against admitting tendency and coincidence evidence for cases regarding the daughter.</p>	<p>TJ found <b>no possibility of conspiracy</b>. Similarities were that both C's were of similar age, assaults occurred in bedroom of home, when residing with D in family unit, girls told not to say anything or they will get in trouble. Held similarities were unremarkable, and possibility of concoction cannot be eliminated as girls were sisters.</p>
<p><b>PNJ v R [2010]</b></p> <p><i>Factors outside a person's control are generally irrelevant → prison circumstances were not relevant similarities. It was simply where the opportunity arose</i></p>	<p>Boys detained in youth training center on detention were victims of buggery. The Crown alleged that the conduct was a patter of distinctive behavior.</p> <p>The boys were held captive, were of similar age and the accused initiated contact. The offences took place in the same period of time, at the same location.</p>	<p>Held their <b>detention is not a similarity</b> as it was beyond D's control. Argued their <b>age should also be dismissed as it is the reason they are located into prisons</b>. If there was contamination, it would lower the probative value. <b>If there is a possibility of contamination, then the TJ is to take into account in assessing the probative value of the evidence.</b></p>