



EVIDENCE

EXAM NOTES

MONASH SEM 2 2019

TOPIC 8 – TENDENCY/COINCIDENCE EVIDENCE

IN EXAM:

- Where there are multiple examples of SIMILAR misconduct
- E.g. multiple similar charges
- A charge, and previous proven convictions

POSSIBLE EXAM QUESTIONS

- Should multiple charges be tried together?
 - Obvs prosecution wants to put them all in same trial because this means more likely for jury to find guilt
 - Defence wants separate trials because more beneficial to the accused
 - First thing to say:
 - **In order for the charges to be tried together, they must be cross-admissible as tendency or coincidence evidence**
- If D is found guilty on one charge, is that evidence of other charges D faces?
 - Charges would have to be cross examinable as tendency or coincidence charges
- Is one charge admissible in respect of other charges?
- Can P adduce a prior conviction in examination in chief?

Tendency / Coincidence Evidence rules are within **Part 3.6 EA**

- Applies to both criminal and civil proceedings
- ✓ Effect of finding tendency / coincidence exception → **ev admissible**
 - Per s 94(1) EA, Part 3.6 (on TCE) does not apply to evidence relating solely to credibility of witness and nor does it apply to evidence of character, reputation, conduct or tendency if a fact in issue (s 94(3) EA)
- × Effect of finding tendency / coincidence rule applies → **ev inadmissible**
 - If evidence is deemed inadmissible under this Part, it may be used for another purpose if relevant but not for tendency or coincidence reasoning (s 95 EA).
 - See *res gestae* and *Jury Directions Act* section below

PRELIM ASSESSMENT – is the evidence relevant to TENDENCY or COINCIDENCE?

NB: it can be relevant to both → IN EXAM: you should address them both, starting with most relevant + if only to check everything off

TENDENCY	COINCIDENCE
<p>Pattern of behaviour of SPECIFIC ASSAILANT</p> <p>Look for:</p> <ul style="list-style-type: none"> • Emphasis on subjective qualities <ul style="list-style-type: none"> ○ COMMON FEATURES • Emphasis on proven facts e.g. prior conviction • Emphasis on what is DONE <p>PROS will use to prove that D has a tendency to behave in a certain way</p>	<p>The SPECIFIC CHARGES are so similar that it therefore improbable that they occurred coincidentally</p> <p>Look for:</p> <ul style="list-style-type: none"> • Emphasis on objectively improbable qualities <ul style="list-style-type: none"> ○ SPECIAL FEATURES • Emphasis on unproven facts e.g. claim unproven • Emphasis on what the accused likes to DO <p>PROS will use to prove that because the misconduct is so similar, it is improbable that it occurred coincidentally</p>
<p>IF ADDUCED → both prove that D is more likely to be guilty</p>	

TENDENCY

FIRST – **Identify the relevant tendency / pattern**

- Has to be really clear + as specific as possible
- Look for MOTUS OPERANDI
- Features to look at:

- Nature of victims
 - E.g. young women, children, middle-aged men
 - E.g. small businesses, banks
- Nature of crime
 - E.g. murder with a knife
 - E.g. tying people up
- Location of crime
 - Area in Melbourne
 - Specific places e.g. newsagency, casinos, 7/11, homes
- Timing of crime
- E.g. **Sexually offend + young female tennis players + in a private/secluded area + providing them with an intoxicating substance**
- E.g. **elderly people + living alone + walking inhibitions**
- E.g. **theft + in Southern Melbourne**
- Even if there is ONE OUTLIER (i.e. no real similarity), identify tendency for SIMILAR ONES (ignoring outlier) *to then rule out this one later*

[Prosecution] will seek to adduce [evidence of X] to prove that [accused] has a tendency to [insert tendency identified above: e.g. sexually assault minors] and that tendency makes it more likely he/she committed the offence now charged (s 97(1) EA)

- S 97(1) EA – The tendency rule

(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—

- 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
- 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**.

...

NOTICE REQUIREMENT (minor)

- **[IF NOTICE GIVEN ON FACTS]**
 - *On facts, P/DC has given notice in writing that they seek to rely on [rel evidence] as admissible tendency evidence, therefore complying with s 97(1)(a) EA*
- **[IF NOTICE NOT INDICATED]**
 - *It is not clear whether P/DC has given notice in writing they seek to rely on [rel evidence] as admissible tendency evidence, however, this must be done for it to be adduced (s 97(1)(a) EA)*
- Notice may be waived by the court (s 100), so long as there is no prejudice (**Harker**)
 - Prejudice doesn't flow from the failure to give reasonable notice
 - LOOK FOR WHETHER:
 - 'respondent would not be in a position to meet the evidence because of the failure to give reasonable notice' (**Harker**)

STEP ONE: 'Significant probative value' (s 97(1)(b) EA)

[Accused] will argue this evidence is inadmissible per s 97(1)(b) EA as it doesn't have 'significant probative value' (SPV) (abolishing the prior 'no other rational view' test in Hoch and Pfennig). The onus is on the P to prove SPV.

- 'PV' is defined as the **extent** to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (Dictionary, Pt 1 EA)
- 'Significant' is not defined in EA, but it has been held to mean 'important' or 'of consequence', requiring 'far more' than 'mere relevance' (**Ford**, referring to **Lockyer**, at p.468 [51])

STRUCTURE FOR DISCUSSION IN EXAM (draw from table below)

- Evidence proving tendency → P's arguments
- Evidence not supporting tendency → D's arguments

✓ CASES/FEATURES PROVING TENDENCY	× CASES/FEATURES DISPROVING TENDENCY
An assessment of probative value requires <u>two</u> step process (McPhillamy , clarifying judgment from Hughes) <ol style="list-style-type: none"> 1) First, assessment of the extent to which the evidence supports the tendency <ul style="list-style-type: none"> ○ Look at the priors/other evidence ○ <i>The test for admissibility under s 97(1)(b) EA comes from Ford: "the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged"</i> 	

<p>2) Second, assessment of the extent to which the tendency makes more likely the facts making up the charged offence</p> <ul style="list-style-type: none"> ○ Compare tendency taken from priors AND apply to main offence ○ <i>H/e it is not necessary that the 'disputed evidence has this effect by itself. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the' charged offence (Hughes, HC at p.356 [40])</i> ○ Consider <i>Velkoski</i> (how it would be decided today) – sexual interest in young children at wife's day care centre significant; differences in type of offending and gender of children <ul style="list-style-type: none"> ▪ PER HUGHES: despite difference in offending and gender of victims, 'together with other evidence' i.e. the overall sexual nature of these offences AND their occurrence at his wife's work, it makes or more likely he committed the offence charged 	
<p>GENERALLY – looking for:</p> <ul style="list-style-type: none"> • Look for 'sufficient particularity' (<i>Hughes</i>, Kiefel CJ, Bell, Keane and Edelman JJ at p.355) <ul style="list-style-type: none"> ○ No necessity to show 'striking similarity' or other CL rules (their Honours in <i>Hughes</i> (p.347) commenting that this <i>Velkoski</i> approach was 'unduly restrictive') • Evidence showing D acts in a particular way (<i>Ford</i>) 	<p>GENERALLY – looking for:</p> <ul style="list-style-type: none"> • Key differences <p>NB: different charges MUST ultimately be severed (include line in conclusion)</p>
<p>Likelihood of offending via <i>motus operandi</i></p> <ul style="list-style-type: none"> • Evidence strongly points to the actual <i>identity</i> of offender being the same <p>e.g. Time intervals being close in time (<i>Pfennig</i>)</p> <p>e.g. <i>Pfennig</i> – MO to leave a false trail (bike on side of road + clothes folded upstream – when this was so unlikely to be the case)</p> <p>e.g. <i>Ellis</i> – NON-SEXUAL – burglary; stole case and cigarettes; panel of glass removed to effect entry into building</p> <ul style="list-style-type: none"> • HELD: so distinctive as a matter of tendency that they were all linked together <p>e.g. Opportunistic nature of offending with young girls (<i>Hughes</i> – once in driveway, once on set; also <i>RHB</i>)</p> <p>e.g. <i>Straffen</i> – S put in jail for murder of young girl via strangulation, no sexual interference, no concealment; S goes to mental facility – escapes for short period of time; during this time, another girl strangled, no sexual int and no concealment</p> <ul style="list-style-type: none"> • HELD: evidence of prior was admissible as nature of the two offences were so distinctly similar it provided evidence of the killer's identity <p>e.g. <i>RHB</i> – D charged with SOs against granddaughter; priors for SOs against first daughter when 6yo and 13yo; second daughter when 5yo</p> <ul style="list-style-type: none"> • HELD: sufficient particularity <ul style="list-style-type: none"> ○ Sexual acts against female lineal descendants ○ The acts were similar, even if 'commonplace'. ○ Committed in the home while in accused's care ○ Other adults were close by, and risk of detection was significant. 	<p>No <i>motus operandi</i></p> <p>e.g. Time intervals being spread out (e.g. <i>McPhillamy</i> – 10 years)</p> <p>e.g. Merely that D is the 'type of person' that would commit a particular crime (<i>Hughes</i>)</p> <ul style="list-style-type: none"> • E.g. P alleges tendency to commit murder, but only evidence is that accused got aggressive or violent in both instances → does nothing more than prove they are inclined to murder AND NOTHING ELSE UNODRDINARY

<ul style="list-style-type: none"> ○ Significant time period between offences (BUT explicable given age of different victims) ○ Relevant to rebut accused's suggestion of 'accident' • NB: also would be used as coincidence case given <i>continuous proven conduct</i> <p>e.g. acting on 'guilty passion' (<i>Velkoski</i>)</p>	
<p>Committing different acts but of a similar nature (<i>Hughes</i>)</p> <p>e.g. <i>Hughes</i> - involved accused that engaged in various types of sexual offending with young complainants, including that involving penetration, touching and exposing</p> <p>e.g. <i>Ford</i> – involved sexual assault AND indecent assault of young women who had fallen asleep at his home after drinking alcohol</p> <p>e.g. <i>R v PWD</i> - Sexual interest in young male boarders, taking advantage of position of authority, significant despite differences in offending</p> <p><u>Familial cases</u></p> <p>e.g. <i>Hamben</i> – D charged with sexual offences against daughter; P sought to adduce explicit photos D had of her</p> <ul style="list-style-type: none"> • HELD: photos adduced and requisite charge brought as showed tendency to have sexual interest in daughter, therefore more likely to have committed the sexual offences <p>e.g. <i>RHB</i> – grandfather with granddaughter, also his two daughters</p>	<p>Committing acts with differing natures (c.f. <i>Hughes</i> – sexual offending type)</p> <p>e.g. murder w/o sexual interference VS rape</p>
<p>Allegations - must be sufficiently similar to have SPV</p>	<p>Allegations – fundamentally different OR unproven</p> <p>DIFFERENCE = <i>McPhillamy</i></p> <ul style="list-style-type: none"> • Church choir boys, charge brought for sexual misconduct (including penetration) • P sought to adduce evidence of <i>allegations</i> some 10 years prior involving <i>touching</i> • No further evidence within this decade (i.e. no pattern) • HELD: allegations NOT accepted

Some civil examples of tendency (unlikely to come up on exam)

- Evidence of previous business practices used to demonstrate a company's likely practices to argue that it performed certain business practices with another company
 - *Trylow v CoT*
- Evidence of emails was capable of being used not only to demonstrate knowledge (non-tendency purpose) BUT also to show a tendency of respondents to act in a way dealing with articles that infringed copyright of the applicants and willingness to assist serial counterfeiters in South America
 - *Aristocrat Technologies Aus v Global Gaming Supplies*
- Evidence that an agent of a shopping centre owner made representations to prospective tenants to infer the agency had a tendency to make such representations
 - *Jacara Pty Ltd v Perpetual Trustees WA*
- Evidence that parties seeking enforcement of a written guarantee had engaged prior acts of fraud to infer the parties had a tendency to falsify documents
 - *Zaknic v Svelte Corp Pty Ltd*

CONCLUDE