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# COINCIDENCE

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- **Coincidence evidence:** evidence that 2 or more events occurred to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally.
  - o \*Note: can also be applied for persons other than the accused.
- s 98 was implemented for the purpose of precluding a particular mode of inferential reasoning. The relevant inference to be drawn is that a person did a particular act or had a particular state of mind.
  - o To engage in a probabilistic reasoning, it necessarily follows that the assessment of whether there is significant probative value requires a consideration of the combined effect of all the relevant similarities.

## s 95 (use of evidence for other purposes)

<i>Evidence Act 1995</i> s 95 – use of evidence for other purposes
(1) Evidence that under this Part (coincidence and tendency) 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.

- s 95(1) – finds that unless coincidence evidence meets the requirements of s 98, cannot be admissible, even if it could be admitted into the proceeding for some other purpose.
- s 95(2) – if a piece of evidence is admitted for another purpose, then it must be limited to that purpose.
  - o Court must give specific instructions stating that the jury cannot take the coincidence evidence into account. If this is not possible (i.e. if the jury may still take it as coincidence evidence), then it is nonetheless excluded.

## s 98 (the coincidence rule)

<i>Evidence Act 1995</i> s 98 – the coincidence rule
(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless: <ul style="list-style-type: none"><li>(a) the <u>party</u> seeking to adduce the evidence gave reasonable notice in writing to each other <u>party</u> of the <u>party's</u> intention to adduce the evidence; and</li><li>(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the <u>party</u> seeking to adduce the evidence, have significant probative value.</li></ul> Note: One of the events referred to in <u>subsection</u> (1) may be an event the occurrence of which is a fact in issue in the proceeding. <ul style="list-style-type: none"><li>(2) <u>Paragraph</u> (1)(a) does not apply if:<ul style="list-style-type: none"><li>(a) the evidence is adduced in accordance with any directions made by the court under section 100; or</li></ul></li></ul>

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

- Similar to s 97, there are two requirements for the admissibility of tendency evidence (one procedural and one substantive)
  - o Procedural requirement: reasonable notice in writing must be given. s 98(1)(a)
    - Notice may be dispensed with under s 100.
  - o Substantive requirement: requires 'significant probative value'. s 98(1)(b)
    - Must also give regard as to whether the jury is likely to assign the evidence of the 'related evidence' significant probative value. *Ceissman*.

## s 100 (court may dispense with notice requirements)

### *Evidence Act 1995*

#### s 100 – court may dispense with notice requirements

(1) The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under section 97.

(2) The court may, on the application of a party, direct that the coincidence rule is not to apply to particular coincidence evidence despite the party's failure to give notice under section 98.

(3) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.

(4) In a civil proceeding, the party's application may be made without notice of it having been given to one or more of the other parties.

(5) The direction:

- (a) is subject to such conditions (if any) as the court thinks fit; and
- (b) may be given either at or before the hearing.

(6) Without limiting the court's power to impose conditions under this section, those conditions may include one or more of the following:

(a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party;

(b) a condition that the party give such notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence;

(c) a condition that the party give such notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.

## s 101 (further restrictions on tendency evidence and coincidence evidence adduced by prosecution)

### *Evidence Act 1995*

#### s 101 – further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about 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.

- s 101 applies a balancing test for admitting prosecution tendency or coincidence evidence about the accused and requires a judgement to be made, rather than a discretion to be exercised. *DSJ and NS v R*.
  - o Difference with s 137:
    - s 101 has ‘substantially outweigh’ while s 137 has ‘outweigh’
    - s 101 has ‘probative value > unfair prejudice = admit’, while s 137 has ‘unfair prejudice > probative value = do not admit’.
    - This means that s 101 places a strong emphasis on the probative value being high, rather than the unfair prejudice being high.
  - o \*Note: however, *R v IMM* has equated s 101 and s 137, so even if not excluded by s 101, almost certainly not excluded by s 137.
- s 101(2) requires that the coincidence evidence adduced by the prosecution have probative value to be greater than its prejudicial effect to be admitted. This requires balancing that is similar to the considerations in s 137.
  - o In considering prejudicial effect, the trial judge must consider whether any directions to the jury may reduce its effect. *Dao*.
  - o Evidence that merely establishes the prosecution case is not unfairly prejudicial.
  - o Rather, the prejudice must be the real risk that the evidence will be misused by the jury in some unfair such as by provoking some irrational, emotional or illogical response, or by giving the evidence more weight than it truly deserves. *IMM*.
  - o This section will ‘apply with much greater force’ when the evidence is admitted for no other purpose than to support a charge through tendency or coincidence reasoning.
- *Pfennig*:
  - o Finds that the only circumstance where tendency/coincidence evidence can be admitted is where there is no alternative explanation for this evidence. Otherwise, it should be excluded (i.e. ‘no rational explanation consistent with innocence’ test).
- *Ellis*:
  - o Insists that the express words of s 101 need to be applied to the facts of the case, rather than the common law standard of admissibility – that is, the ‘no rational explanation consistent with innocence’ test.
  - o Finds that ‘substantial’ can only be determined on a case by case basis and only means something when it is practically used in a case.
  - o Disagrees with *Pfennig* test which was too easy and allowed judges to avoid what needed to be done in s 101 – the need to balance probative value and unfair prejudice.
    - Finds that probative value should be assessed, then prejudicial effect assessed, and then compared.
    - The continued application of a ‘no rational view’ test is not consistent with a statutory test which expressly requires a balancing process. s 101(2)
- *Folbigg*:
  - o The concept of ‘significant probative value’ is meaningless unless it is related to the facts or facts in issues towards the proof of which the coincidence evidence is being tendered at all.
    - The fact in issue is that the accused did a particular act or had a particular state of mind.

#### Concoction, unreliability and probative value:

- *Hoch*:
  - o Applied the *Pfennig* ‘no reasonable explanation consistent with innocence’ test to a situation where D claimed that sexual assault complainants concocted their allegations.
  - o The court concluded that where there was a reasonable possibility of concoction based on factual foundation the evidence would lose its probative value sufficient to justify admitting the evidence under the similar fact rule.
- Concoction appears to only be raised in sexual assault allegations.

- Where complainants are from the same family, school or social group, the real chances of concoction are easy to assert and difficult to refute and, without more, lacks the necessary factual foundation.
- But this is particularly problematic as this is usually where sexual predators operate.
- The *Hoch* qualification involves the assessment of credibility for the purpose of deciding on ‘significant probative value’ under ss 97098. This is contrary to what *R v XY* in NSW said was the general rule for assessing probative value under s 137. Or as stated in *Dupas v R* in Victoria that in assessing ‘probative value’ under s 137, the judge must ‘assume that the jury will accept the evidence to be truthful’.
- *Saoud* finds that any issue of collaboration or contamination is not a matter of admissibility, but is to be assessed by the jury to determine the weight of the evidence.
  - Concoction should usually be a matter for the jury, as recommended by the UKLC.
  - This is a logical consequence of NSW’s approach to ‘probative value’.
- Arguments have been made, however, that sexual assault allegations should be treated differently to other offences as:
  - Sexual offenders have a particular psychology that sets them apart from other offenders
  - They pose a particular danger to vulnerable people and society generally
  - They pose special problems when it comes to gathering evidence and prosecuting them.
  - However, this suggestion was rejected by the UKLC as sexual misconduct is prone to inflame emotions, and thus be more prejudicial than other conduct.

## s 136 (general discretion to limit use of evidence)

<i>Evidence Act 1995</i>
s 136 – general discretion to limit use of evidence
The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might: <ul style="list-style-type: none"> <li>(a) be unfairly prejudicial to a <u>party</u>; or</li> <li>(b) be misleading or confusing.</li> </ul>

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## CHARACTER

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- **Character evidence** is only concerned with the accused.
- The prosecution cannot lead evidence of the accused’s good character. This can only be introduced by the defence, who will do this with care as this will open the door to cross-examination as to bad character.
  - This is limited by s 110 where cross-examination is either for a general, or for a particular purpose.
- Distinction between character and credibility:
  - Character: can be similar to tendency and coincidence as it can go towards the reasoning process of the jury (it is more probable for A to have...). Can actually be used to reason towards guilt.
    - i.e. this person is more or less likely to commit this offence.
    - It is a more direct form of evidence than credibility which is just about truthfulness/reliability.
  - Credibility: is more indirect – it can be used to accept somebody’s believability/truthfulness.
- *DeSilva v R* (‘oath against oath’ trial)

- If the defence does not seek to raise good character evidence when it is available, then this could give rise to a re-trial as it could lead to a miscarriage of justice to the defendant.

## s 110 (evidence about character of the accused)

<i>Evidence Act 1995</i> s 110 – evidence about the character of the accused
<p>(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.</p> <p>(2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.</p> <p>(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect.</p>

- s 110(1) – effect of s 110 on other exclusionary rules:
  - These rules don't apply:
    - The hearsay rule (s 59)
    - The opinion rule (s 76)
    - The tendency rule (s 97)
    - The credibility rule (s 102)
  - These rules still apply:
    - Relevance (s 55, s 56)
    - Mandatory and discretionary exclusions (s 135-137)
    - s 95 (evidence not admissible for tendency/coincidence cannot be used to prove tendency/coincidence even if relevant for some other purpose – probably still applies.
- s 110(2): if defendant has admitted evidence that they are generally of good character, then the prosecution can adduce evidence that they are not generally of good character
  - Unlimited scope
- s 110(3): if defendant has admitted evidence that they are of good character in a particular respect, then the prosecution can adduce evidence that they are not of good character in that respect.
- \*Note: emphatic denials (*Gabriel, Hughes*) tend to be reactive rather than proactive.

## s 111 (evidence about character of co-accused)

<i>Evidence Act 1995</i> s 111 – evidence about character of co-accused
<p>(1) The hearsay rule and the tendency rule do not apply to evidence of a defendant's character if:</p> <ol style="list-style-type: none"> <li>the evidence is evidence of an opinion about the defendant adduced by another defendant; and</li> <li>the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and</li> <li>the opinion is wholly or substantially based on that knowledge.</li> </ol> <p>(2) If such evidence has been admitted, the hearsay rule, the opinion rule and the tendency rule do not apply to evidence adduced to prove that that evidence should not be accepted.</p>

s 112 (leave required to cross-examine about character of accused or co-accused)

<b><i>Evidence Act 1995</i></b>
s 112 – leave required to cross-examine about character of accused or co-accused
A defendant must not be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives <b>leave</b> .
Note: <b><i>Identification evidence</i></b> is defined in the Dictionary.

- Consider s 192.