LAWS2351 – CPEP

Table of Contents

Class 1 – Accusatorial Justice ***2***

Class 2 – Prosecuting, Adversarialism, Disclosure; Proof; The Defendant in Court ***10***

Class 3 & 4 – Introducing the Uniform Evidence Act (UEA or UEL) and Relevance ***22***

Class 5 – The Witness (& competence etc), Examination in Chief and Evaluating the witness) ***34***

Class 6 – Cross-Examination, The Credibility Rule and Credibility Exceptions ***46***

Class 7 – Exceptions to Credibility Rule Continued, Procedural rules of Witness Questioning, Completing XXN, Addressing Re-examination, Limits of Re-opening ***56***

Class 8 – Hearsay Rule ***62***

Class 9 & 10 – Hearsay Rule Continued ***65***

Class 11 – Character Evidence ***79***

Class 12 – Tendency Evidence ***86***

Class 13 – Coincidence Evidence ***93***

Class 14 – The Opinion Rule ***102***

Class 15 & 16 – Identification Evidence ***112***

Class 17 – Jury Directions ***121***

Class 1 – Accusatorial Justice

Readings – Moodle (4-7, 10-14, 15-17, 19-21)

Right to Fair Trial

- Common law trial – process which prosecution seeks to prove guilt BRD, and in various ways the presumption of innocence manifests
- For defence, gaps in prosecution case are focal points
    - No ultimate burden of proof but focus to raise reasonable doubt – focus on procedural truth (not objective truth) acknowledges that truth-seeking is an objective, but not a sole objective
- ***Pearse v Pearse*** – '[t]he discovery and vindication and establishment of truth are main purposes ... of the existence of Courts of Justice'
- Truth seeking is not without boundaries – truth is to be pursued with moderation, fairness and by fair means
- With adversarialism, the checks and balances created by parties' self-interest to test and challenge opposing evidence works well if power imbalances are appropriately moderated
    - Biggest threat is beguiling attraction for one (or both) of the 'two prejudiced searchers' being drawn into a battle vortex of win-at-all-costs
    - Judges expected to ensure rules of process and evidence are followed and may seek clarification of witness testimony through questions, but **cannot raise new issues or cross-examine witnesses**
- In AUS – civil litigation is often 'managed' by a judicial officer from early on, issues are more likely to be isolated and narrowed and hearings are likely to be akin to the episodic classic inquisitorial process than the 'main event' common law tradition

Human Rights

- **Presumption of innocence** – applies unless and until a person is convicted
- **Rights to privacy** – no one can just march into a suspect's house to search for evidence;
- **Rights to Silence –** no one can demand a suspect explain his or her whereabouts, motivations or feelings
- **Rights to liberty** – no one can detain or lock up a suspect because that is more convenient than allowing them to remain at large.
    - **Privacy, Silence and Liberty are not absolute rights**
- The evolved common law jurisprudence of the right to a fair trial differs in shape and lacks the Clarity of Article 14 ICCPR
    - 21st Century AUS very slowly made progress towards embracing legislated HR
- Article 14 ICCPR Incorporation in AUS – right to a fair trial
    - Accused has right to know charges with sufficiency particularity to meet those charges
    - Courts have an obligation to ensure that a fair trial is not impeded by the charging practices of the prosecution (for example, with inappropriate multiple or repetitive charges)
    - Common law provides defendants with disclosure rights of the prosecution case
    - No CL right to speedy trial but if delay prevents fairness it will be stayed
    - Right to judge that acts impartially, with detachment and appropriately, who assists unrepresented litigants (who are not otherwise entitled to legal representation); and who directs the jury appropriately, including with respect to assessing certain evidence, particularly unreliable evidence
    - Prosecution must act fairly in court, including putting the prosecution case fully
    - Where accused to be tries on serious offence, court will stay proceedings unless there is legal representation
    - Accused has right to interpreter if needed
    - in exceptional circumstances, a court will quash a conviction if defence counsel is flagrantly incompetent

- Article 14 and common law share fact that right to a fair trial pivots upon the obligation to **be fair to the accused**
    - Raises questions regarding witnesses and victims of crime – suffice to say that traditionally they have not been the beneficiary of procedural protections
    - However recent movement to recognise that community standards require greater respect afforded to witnesses treatment in court

Presuming innocence, the right to silence and accusatorial trials

- 2 core elements of the criminal justice system existing by virtue of the balance struck between the power of the state to prosecute and the position of the individual who stands accused – ***Lee* [2014]**
- Aspects of accusatorial trials
    - ***The Fundamental Principle*** – "that the accusatorial nature of a criminal trial means that, under the common law, *the onus of proof is upon the prosecution to prove its case*" (*CFMEU* Case [2015] HCA 21, [36])
    - ***Companion Rule –*** an accused person cannot be required to testify
- Major domain where accusatorial justice principles have been analysed involve criminal trials where the jury hear from a presiding judge or a prosecutor that an accused has an obligation that is in fact in breach of accusatorial principles
    - *That the accused, in the police station, acted on legal advice and refused to answer police questions*:
        - In ***Hogg*** – White JA held no adverse inference could be drawn from the appellant's refusal to answer police questions as the Crown did not cross-examine Hogg on his explanation (legal advice) for not answering police questions.
    - *The fact that the accused person failed to testify*:
        - In ***Azzopardi*** – the trial judge was held to have crossed the line into inappropriate comment that failed to acknowledge the accused's right to remain silent and to be presumed innocent when he told the jury that they might consider 'the fact that the accused did not deny or contradict evidence about matters which were within his personal knowledge.
    - *Suggesting to the jury to scrutinise the accused's testimony closely:*
        - In ***Robinson*** – the trial judge was ruled to have breached the presumption of innocence when he suggested to jurors that they 'might think that the greater the interest the more carefully you should scrutinise a witness's evidence', followed up by a direct reference to examine closely Robinson's evidence:
    - *Suggesting the accused would do anything you have to avoid conviction*
        - In ***Wise v The Queen*** – defendant's explanation for what motivated his statement to police (fear of the Rebels Motorcycle Gang - "what would happen if I did speak") and his inconsistent evidence in court where he was "on trial fighting – fighting for my life, really" was relied upon by the prosecutor in closing to the jury,
    - *Suggesting the accused failed to offer an explanation for the prosecution allegations*:
        - In ***Palmer*** – HC held that the following cross-examination by the prosecution distracted from the jury's fundamental task of deciding whether the prosecution proved the elements of the charged offence beyond reasonable doubt. It shifted the process from the prosecution bearing the burden of proof to a focus on the accused.
    - *Suggesting the accused failing to call a witness*:
        - in ***Dyers v The Queen*** – where the prosecutor said to the jury, *'My friends haven't called Wendy Tinkler ... You may think that whoever Wendy is, that person cannot assist the defence case.'* The High Court held this breached accusatorial justice principles because (Gaudron and Hayne JJ (Kirby J and

Callinan J agreeing) "**[n]ot only is the accused not bound to give evidence, it is for the prosecution to prove its case beyond reasonable doubt."**

- Second broad line of cases arise because the ideology of a commission inquiry, an inquisitorial-style process, is an investigative fact-finding body and as such clashes with the accusatorial ideology because a criminal defendant is forced to answer questions that traverse criminal charges awaiting trial
    - ***X7 v Australian Crime Commission (ACC)***
        - X7, who had been charged and was awaiting trial on drug-related conspiracy offences, sought a declaration and injunctive relief claiming that the exercise of the Commission's compulsory examination powers created an impermissible interference with his constitutional right to a fair trial under Chapter III, including s 80, of the Constitution. The High Court accepted the core of X7's claims
            - '[n]o longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according *only* to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination
    - ***Lee (No 1)***
        - Facing firearm and drug-related conspiracy charges
        - Lees resisted orders under the *Criminal Assets Recovery Act 1990* (NSW) made on behalf of the NSWCC, issued from the NSW Supreme Court required the Lees to be compulsorily examined on their financial affairs on oath before a Supreme Court Registrar.
        - The Lees unsuccessfully relied on ***X7 v Australian Crime Commission*** in their appeal to the High Court in ***Lee (No 1)*** – court rather considered different legislation from the X7 context – state rather than federal and personal examinations that were to be undertaken in the Supreme Court of New South Wales
        - Majority – the Court appeared to draw back from the breadth of their *X7* judgment – held the Supreme Court powers to prevent unfairness were sufficient to protect the Lees' accusatorial rights with Crennan J noting (at [151]) that the Supreme Court's powers to control the examination could "prevent the prosecution from obtaining an unfair forensic advantage."
            - Gageler and Keane JJ added (at [323]) that the impact of the compulsory examination should be assessed as a matter of "practical reality" and so while the 'legal representatives would, of course, be prevented from setting up an affirmative case inconsistent with the evidence ... they would not be prevented from ensuring that the prosecution is put to proof or from arguing that the evidence as a whole does not prove guilt'.
        - Minority – (Hayne, Kiefel and Bell JJ) found that the legislature authorising the Lee's compulsory examination had failed to express by words of clear intendment the abrogation or restriction of a fundamental right. Kiefel J added (at [212]) that to describe the effects of an examination as the loss of some forensic advantage in an accused person "tends to trivialise both them and the fundamental principle."
    - ***Lee (No 2)***

Sections – ss 55 & 56

55 Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could **rationally affect** (directly or indirectly) the assessment of the probability of the existence of a **fact in issue** in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to—

(a) the credibility of a witness, or

(b) the admissibility of other evidence, or

(c) a failure to adduce evidence.

56 Relevant evidence to be admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.

"probative value" of evidence means the **extent to which** the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

- Information may be relevant and potentially admissible if in applying s 55(1) '[i]t may explain a statement or an event that would otherwise appear curious or unlikely. It may cut down, or reinforce, the plausibility of something that a witness has said. It may provide a context helpful, or even necessary, for an understanding of a narrative'. (**HML v The Queen**)
- S 55 is the common law equivalent of 'logical relevance'
- Relevance is yes or no, whereas probative is 'to the extent' – **must have capacity to affect to be relevant**

Facts in Issue

- Initially defined by the prosecutor's pleadings which contain the legal and factual matters that are in dispute

HML

- Depending upon the way in which the prosecution seeks to prove its case, or the way in which the defence is conducted, it may appear, as a matter of fact, that an element of the offence charged will not be established beyond reasonable doubt unless some subsidiary fact, **relevant to a fact in issue**, is proved to that standard
- [the language of s 55(1)] directs attention, to the elements of the offence charged, the particulars of those elements, and any circumstances which bear upon the assessment of probability
- The prosecution may set out to establish that an accused had a motive to commit an offence charged. Motive may rationally affect the assessment of the probability of the existence of one or more of the elements of an offence.
- Evidence that tends to establish motive, therefore, may rationally affect such assessment – If so, it is relevant.
- If it is established, motive may support (sometimes powerfully) the prosecution case, but juries are often told that failure to establish motive does not mean the case must fail

Mundarra Smith

- [b]ehind those ultimate issues [where] there will often be many issues about facts relevant to facts in issue
- The question is whether the evidence, if it were accepted, could rationally affect (directly or indirectly) the assessment by the tribunal of fact ... of the probability of the existence of a fact in issue in the proceeding'

Cornwel

- (Hypothetical showing the impact of narrowly confining s 55)
  - Assume that a man's body is found in a locked room. The cause of death is a single bullet fired into his head. One 'fact in issue' on a defendant's trial for murder is whether the defendant shot the deceased. Evidence that the defendant was outside the room just before the time of death in possession of a fully loaded revolver is, *on the accused's construction*, not evidence of a "fact in issue". Nor is evidence that the defendant was outside the room just after the time of death in possession of a revolver fully loaded save

that one shot had been fired. Nor is evidence that the defendant was the only person possessing a key to the room. Nor is evidence that the defendant had a motive for killing the deceased.

- But, and rejecting the defence submissions, ***all of these matters of fact other than the actual shooting are matters of fact relevant to the material 'fact in issue', being the shooting by the defendant, but are not themselves 'facts in issue'***. *They are items of circumstantial evidence tending to establish that the defendant had the opportunity, the means and the motive to shoot the deceased*.

Probative Value and Unreliability

IMM [2016] HCA 14

Facts

- Appeal arose from a trial following allegations of child sexual assault occurring in 2002, 2004 and late 2004/early 2005 and 2011 when the complainant (C), IMM's step-grand-daughter was aged approximately 4 years, 5 years, 6 years and 11 years of age.
- C 's complaint evidence was admitted to prove the allegations. The complainant's testimony was the only direct evidence of the offences – her evidence of 'The massage incident' was admitted as relevant to prove IMM's tendency to have a sexual interest in C
- IMM was found guilty of three counts.
- Main focus of the judgment is on the admissibility of tendency evidence

Held:

- **In assessing the probative value of evidence to determine its admissibility, a trial judge must assume that the jury will accept the evidence. Questions relating to credibility or reliability are matters for the tribunal of fact (ie, the jury). They are not relevant to admissibility**
- Definition of Probative Value
  - ***Probative value*** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue
- Highlighting rationality in s 55 – *The reference to its "rational" effect does not invite consideration of its veracity or the weight which might be accorded to it when findings come to be made by the ultimate finder of fact*
- Because evidence which is relevant has the capability to affect the assessment of the probability of the existence of a fact in issue, it is "probative". Therefore, evidence which is relevant according to s 55 and admissible under s 56 is, by definition, "probative".
  - But neither **s** 55 nor s 56 requires that evidence be probative to a particular degree for it to be admissible – Evidence that is of only some, even slight, probative value will be prima facie admissible, just as it is at common law.
- ***The 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, which is to say how it might be used, be taken at its highest.***
- *Within the framework imposed by the statute and, in particular, the assumption that the evidence is accepted, the determination of probative value is a matter for the judge.*
- It will be up the tribunal of fact (jury) to determine what actual use - and weight - it gives the evidence.

Logic and Relevance

- Trial judges are obliged to exclude irrelevancies 'to maintain proper limits upon the extent to which the parties and their lawyers will be permitted to raise and investigate matters that are of only marginal significance' (***Goldsmith v Sandilands***)
- In both ***Graham*** and ***Papakosmas*** a complainant in a sexual assault case 'complained' (that is, told) someone of that she had been assaulted by the defendant. That 'complaint' had two potential purposes in court:
  - to assist with enhancing the *complaints' credibility* by revealing to the jury that the complainants' in-court account was consistent with what she had told witnesses just after the alleged assault (or in the case of the complainant in *Graham*), some 6 years later; and

Class 9 & 10 – Hearsay Rule Continued

Non-Hearsay Representations

- The previous representation made by a person may be intended to asset a fact. If one were to adduce it to prove that fact, it would be hearsay. But if you try and adduce it to prove a different fact, it will be non-hearsay and not subject to the hearsay exclusionary rule.

Evans
- An out-of-court statement which is admitted for the truth of its contents is hearsay. An out-of-court statement offered simply as proof that the statement was made is not hearsay, and is admissible as long as it has some probative value.

- **Note: the representation will only be admissible if:**
  - **It is relevant in this particular way AND**
  - **If this non-hearsay interpretation of the evidence is available on the evidence.**
- Non-hearsay examples
  - Transactions words and words having operative legal effect: representations that create contracts, trusts, deeds or wills are not hearsay – ***R v Macraild*** (unreported, 1997), (even when those representations are criminal***: R v Suteski*** *(No 4)* [2002] NSWSC 218).
  - Representations whose making is relevant to their makers' credibility - i.e. the representations are made to reinforce or undermine the witness's credibility
  - Evidence of previous representations to show the basis for an expert's opinion: ***Welsh v R* (1996)** 90 A Crim R 364
  - Evidence of representations to establish a person's state of mind – ***Re van Beelen***. Covers representations made to a person that might produce an effect on their state of mind and statements made by a person from whose making their state of mind and feelings might be inferred.
  - Examples – threats of physical harm can explain that a witness was acting under duress: ***Subramaniam v Public Prosecutor*** [1956] 1 WLR 965
  - ***R v Matthews*** (1990) 58 SASR 19: accused denied rape on the basis that it was consensual. Evidence of the victim had made statements to friends before the incident about her fear of the accused and her desire to not see him was held relevant to show that she had not consented to sex
  - ***R v Matthews*** (1990) 58 SASR 19: the use of a previous representation to show the maker's esoteric knowledge of an event and so link him//her to it. Here, the accused had written in his diary on the day of the incident, "Liz dead", which was used to show that the accused knew of the wife's death before it became public knowledge. It might be inferred that his knowledge derived from his involvement in her death.

Walton v The Queen
- **Principal authority on non-hearsay prior representations on the maker's state of mind:** - "When a person's state of mind is relevant, evidence tending to prove that fact is admissible. That evidence may, of course, take the form of conduct on the part of the person whose state of mind is in question from which the state of mind might be inferred. But it might also take the form of statements made by the person or by another from which a similar inference might be made.

Hearsay – The Exceptions to the Rule

Exceptions for First Hand Hearsay

Identifying a potential applicable exception

62 Restriction to "first-hand" hearsay

(1) A reference in this Division (other than in subsection (2)) to a previous representation is a reference to a **previous representation** that was made by a **person who had personal knowledge of an asserted fact**.

(2) A person has personal knowledge of the asserted fact if his or her **knowledge of the fact was, or might reasonably be supposed to have been, based on something that the person saw, heard or otherwise perceived, other than a previous representation made by another person about the fact**.

(3) For the purposes of section 66A, a person has personal knowledge of the asserted fact if it is a fact about the **person's health, feelings, sensations, intention, knowledge or state of mind at the time the representation referred to in that section was made**.

- Example: X tells Y that he robbed a bank. Y gives statement to police. Police statement is second hand hearsay. BUT can call Y to the witness stand. Simply x to Y is firsthand.

Lee

- Accused made comments (I've just done a job, I've fired two shots) to witness who made statement to police. When witness couldn't testify, the police officer attempted to give evidence. This was second hand hearsay and therefore inadmissible to prove the facts asserted by the accused.
- The Crown attempted to adduce **evidence of the witness's previous representations through the police officer** to whom they were made in order to establish the accused's involvement in the crime
- That evidence was second-hand hearsay, and inadmissible to prove the facts asserted by the accused
- Gleeson, Gummow, Kirby, Hayne and Callinan observed that the situation would've been different if the witness himself had given evidence of the accused's admissions.

R v Vincent

- A witness claiming "I've got the car rego" – can reasonably be supposed to be based on her own observations. 'The very short lapse of time from robbery to conversation, the circumstances of the conversation and the words actually used do make it more probable than not that what was asserted was something the witness had herself observed'
- **'he/she might reasonably have been supposed to have had such knowledge'**
- Where, for example the maker of the representation disappears...
    - Hodgson JA: 'the **very short lapse of time from the robbery to the conversation** [conversation was what
- was being discussed – i.e. whether its first or second hand hearsay], the **circumstances of the conversation and the words actually used** to make it more probable than not that the woman was asserting something that she herself had observed. It is of course possible that she was merely reporting something told to her by someone else, but the categorical assertions 'I've got the car number" and "it's a red car" are to my mind more suggestive of her own observation of the matter'

An Accused's Character – Guilt and Credibility

The Good Accused

***Attwood v The Queen* (1960) 102 CLR 353**
The expression "bad character" in relation to a witness has no technical or legal meaning. The expression "good character" has of course a known significance in relation to evidence upon criminal trials; for it denotes a description of evidence in disproof of guilt which an accused person may adduce. He may adduce evidence of the favourable character he bears as a fact or matter making it unlikely that he committed the crime charged. … What does concern us is that the reasons of the judges show clearly enough that evidence of good character is regarded as really bearing on the probability or improbability of guilt. As Cockburn C.J. said: "The fact that a man has an unblemished reputation leads to the presumption that he is incapable of committing the crime for which he is being tried" (1865).

***Melbourne v R* (1999) 164 ALR 465**
McHugh J: [36] For more than a century, the common law has drawn a distinction between the admissibility of evidence of good character and the admissibility of evidence of bad character in a criminal trial. Evidence of good character is readily admitted because it is regarded as tending to prove that the accused is unlikely to have committed the crime in question. Evidence of bad character is admitted only in exceptional circumstances even where the courts regard it as tending to prove that the accused is likely to have committed the crime in question. [47] The unconditional right of an accused person to tender good character evidence must be regarded as an indulgence granted to the accused which continues to be maintained for historical reasons. The basis of the rule for admitting evidence of good character is not logic but the "policy and humanity" of the common law. McHugh J: The preferable position is that the trial judge must retain a discretion as to whether to direct the jury on evidence of **good character** after evaluating its probative significance in relation to both: (a) the accused's propensity to commit the crime charged; and (b) the accused's credibility. The judge may conclude that the good character evidence adduced is of probative significance in relation to (a) only, (b) only, both (a) and (b) or neither (a) nor (b), and can direct (or not direct) the jury accordingly. Whether the discretion has miscarried in a particular case will depend upon the facts of that case. But Australian courts should not now introduce a rule that a direction on character is always required once the accused has adduced evidence of good character.

Adducing Evidence of Good Character and the Consequences

- There are no *special* rules of relevance applying solely to character evidence. It is a matter of applying UEA, s 55.
- Good character can be proved without the restrictions of the hearsay, opinion, tendency and Credibility Rules – Thus, an inexpert opinion, based on hearsay, of weak probative value to the accused propensity of their credibility will not be excluded because it fails to meet these requirements elsewhere required by the Act
- The prosecution, or a co-accused, possesses equal evidentiary benefits for proving character evidence led in rebuttal under s 110
- The common law view of the indivisibility of character (or the 'all or nothing' attitude) is jettisoned. By s 110, character evidence is categorised in two ways – either character 'generally' or in a 'particular respect'. Rebuttal evidence must match good character evidence either 'in that respect' or 'generally'.
- The rile of character evidence in Part 3.8 is complex
    - Evidence of good character is potentially relevant to the unlikelihood of guilt and potentially to support the accused's credibility (when testifying or out of court);50

Class 13 – Coincidence Evidence

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**—

(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**.

Note. One of the events referred to in subsection (1) may be an event the occurrence of which is a **fact in issue** in the proceeding.

(1A) To avoid doubt, subsection (1) includes the use of evidence from 2 or more witnesses claiming they are victims of offences committed by a person who is a defendant in a criminal proceeding to prove, on the basis of similarities in the claimed acts or the circumstances in which they occurred, that the defendant did an act in issue in the proceeding.

(2) Subsection (1) (a) does not apply if—

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(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.

Coincidence Evidence

- Coincidence evidence is adduced to **negate** or **disprove coincidence** as an **explanation** for the D's association or involvement in **previous events AND the offence(s) in question**.
- THE **PROBATIVE VALUE** of coincidence evidence arises via **improbability reasoning:** the **degree of improbability** that coincidence provides **an innocent explanation** for the D's involvement.
- Coincidence evidence gains its probative value by demonstrating the **objective improbability** of the events occurring accidentally (or by coincidence).

Perry

- Murphy J cautioned against **danger of assuming the importable cannot occur innocently**.
  - The presumption of innocence and the strict standard of proof required in criminal cases tend to be indirectly and subtly undermined from the outset by reference to a sequence of events which according to common human experience, would not occur unless the accused were guilty.

El-Haddad

- **Facts**: Whether the evidence in the most serious count was sufficiently lacking in points of connection to satisfy the coincidence rule. Evidence showed activities said to relate to drug importation transactions where similar (but not the same) email, dates of birth and names connected the counts.
- Leeming JA concluded that evidence satisfied ss 98 and 101.
- Assessment of whether the evidence of the relevant events has either probative or significant probative value requires a consideration of the combined effect of all the relevant similarities.
- S 98 is a provision concerning the drawing of inferences – inference is that a person did a particular act or had a particular state of mind: *R v Gale; R v Duckworth* [2012]

A2 Case

- CCA in the *A2* case in the supp reading (p.39) distinguished between the relevance test **and** the significant probative value. test which is another test of relevance but it imposes a higher threshold for admissibility.
  - in **DSJ v The Queen**, a five-judge Bench of this Court held that s 98(1)(b) requires a trial judge to determine whether the evidence is capable, to a significant degree, of rationally affecting the assessment (ultimately by a jury) of the probability of the existence of a fact in issue Their Honours emphasised that the trial judge makes no evaluation of the actual weight of the evidence

- Turning to the present case, it is not in dispute that the evidence of each of C1 and C2 was relevant; the question is whether it rose to the level of "significant" probative value for the purposes of s 98(1)(b). On the assumption (required by IMM v The Queen) that C1 and C2's evidence were to be accepted by the jury, it would clearly be influential and important in the context of fact-finding.
- Even accepting the appellants' argument that the relevant similarities in C1 and C2's accounts (given the limited scope of the facts in issue) were effectively reduced to the assertion that there was a cut and that there was hurting, nonetheless those similarities were in our view capable, to a significant degree, of rationally affecting the assessment (ultimately by a jury) of the probability of the existence of a fact in issue in the context of the other evidence led at the trial.
- Section 98(1)(b) required the trial judge to consider whether the evidence would "either by itself or having regard to other evidence adduced ... by the [Crown] have significant probative value".

Gilham's case
- *murder of parents and Christopher (the brother).* - "similar stabbing patterns" - found that this had probative value as it could affect the jury's assessment of whether one person stabbed each of the deceased...**the court did not question whether the evidence had significant probative value, but** the evidence concerned stabbings to the chest that can be accounted for by the use of the same knife (as opposed to by the same attacker) - **McClellan CJ**: The Crown effectively asked the jury to find that it was improbable that stabbings which exhibited such similarities were coincidently, or "just so happened", to be inflicted by more than one person. The coincidence rule **requires that the court admitting the coincidence evidence be satisfied that the evidence has, either by itself or in conjunction with other evidence, "significant probative value."** - Inappropriate for the prosecution to raise this evidence in such a way without probing its significant probative value

<u>To Apply s 55 and s 98</u>

- **To assess relevance and significant probative value, list the features** of each of the <u>two or more events</u> (using a table is a good idea)
- **Include the event(s) which led to the charges against the D.**
- **Compare the similarities** of the **events** and/or **the circumstances** in which they occurred e.g. *Ellis*.
- ***Ask:*** do the **similarities** in the events or the circumstances in which they occurred, or **any similarities** in <u>both</u> the events and the circumstances in which they occurred, make it **improbable** that the events occurred **coincidentally**?
- <u>It's a judgement call.</u>
- **E.g.** is it **just coincidence** that Milat is charged with the murder of 7 backpackers whose bodies were found in Belanglo State Forest **and** Paul Onions gives evidence he was picked up by someone who looked like Milat and threatened with a gun at the Belanglo State Forest turn off?

<u>But beware: a simple e.g. of coincidence evidence?</u>

Shoplifting case:	**Answer**
- the defendant was **accused** of placing <u>a packet of bacon</u> in his shopping basket then hiding it in his bag before leaving a grocery store without payment. - **the coincidence evidence**: a store detective testified that he had witnessed **a previous occasion** in which the defendant had placed bacon in his shopping basket and did not see the bacon in the basket later on. - <u>BUT *there was no evidence the defendant had not paid for it.*</u> - The prosecution adduced the detective's evidence to show that the defendant had <u>a particular modus operandi</u> when it came to the question of disappearing packets of bacon.	- Because there was no evidence that the D shoplifted on the previous occasion, the jury was invited <u>to assume guilt on this previous occasion</u> because the defendant was up on a charge of shoplifting. - But because that charge was <u>a fact up for proof</u> in the trial, the use of the previous bacon occasion necessarily involved CIRCULAR REASONING — because there was no act of shoplifting witnessed by the store detective the jury <u>had to assume shoplifting in the previous case</u> (based on the present

- **Is this evidence relevant as coincidence evidence?** - **Or does it merely create a 'halo' effect?**	charge for shoplifting) which then allowed the store detective's evidence to appear to be relevant to the charge of shoplifting.

Directions to Avoid Improper Use

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.

ATM

- Where the relationship evidence is admitted only to give context to, or by way of explanation of, the allegation contained in any charge in the indictment, the trial judge should direct the jury against using the evidence as proof that the accused committed any offence on the indictment.
    - This may require trial judge to direct jury they must not use evidence as proof of any propensity on part of the accused.
    - Generally, it will be necessary for the judge to give warnings that they should not substitute the evidence of any other sexual activity for the specific activity which is the subject of any charge in the indictment, or reason that because the accused may have done something wrong to the complainant on some other occasion that he must have done so on an occasion which is the subject of any charge.

Roach

- the CL requires clear and comprehensible direction on the use and misuse of evidence that may show propensity, but is admissible only for a non-tendency purpose (such as to probe a relevant relationship or context when adducing transactional evidence).

Victoria

- Victoria passed *Jury Directions Act 2015* (Vic) (JDA)
- A key element in determining how different the JDA 2015 (Vkc) is from UEA s 95 will lie on extent to which appellate courts and trial judges interpret the obligation expressed in s 16 for trial judges to give direction if they consider there are substantial and compelling reasons for doing so: s 15
- Other misconduct includes; coincidence evidence, tendency evidence or evidence of other discreditable acts and omissions of an accused: s 26.
- Trial judge must not give a direction that is not requested by a party, and trial judge need not give the direction where there are good reasons not to do so: s 14.
    - Where a party adduces other misconduct evidence that is not tendency evidence, the judge must warn the jury not to use it as tendency evidence. A good reason not to warn is if trial judge considers that there is no substantial risk that the jury might use the evidence as tendency evidence: s 29
    - Where the prosecution adduces other misconduct evidence, the judge must direct the jury: s 27
        - On its relevance, indirect or direct, to the existence of a fact in issue
        - Not to use the evidence for any other purpose
        - Where relevant, regarding the partial role of the other misconduct evidence in the prosecution case; and
        - To avoid prejudice-based reasoning
    - For other misconduct evidence adduced by a co-accused the judge must direct the jury: s 28(2)
        - On this relevant, indirect or direct, to existence of fact in issue
        - Not to use evidence for any other purpose
        - Avoid prejudice-based decision-making from what the jury has heard about the co- accused
    - For situation (1) and (2), judge need not: s 28(3)

- Explain further what jury could consider in deciding to use other misconduct evidence
- Identify impermissible use of other misconduct evidence
- Refer to any other matter

COINCIDENCE EVIDENCE ss 98/101	TENDENCY EVIDENCE ss 97/101
1st step - identify the "particular act of a person" or the "particular state of mind of a person" that the party tendering the evidence seeks to prove;	1st step - identify the "particular act of a person" or the "particular state of mind of a person" that the party tendering the evidence seeks to prove;
2nd step - identify the "two or more events" from the occurrence of which the party tendering the evidence seeks to prove that the person in question did the "particular act" or had the "particular state of mind";	2nd step - determine whether "reasonable notice" has been given of the intention to adduce the evidence (or, if reasonable notice has not been given, whether a direction under s 100(2) ought to be given, dispensing with the requirement);
3rd step - identify the "similarities in the events" and/or the "similarities in the circumstances in which the events occurred" by reason of which the party tendering the evidence asserts the improbability of coincidental occurrence of the events;	• **3rd step** - evaluate whether the evidence will, either by itself or in conjunction with other evidence already given or anticipated, "have significant probative value", that is, will it be influential: - The probative value in terms of the number of events/acts; - The probative value in terms of the links, connection, similarities of the acts; - The probative value in terms of the links, connection, similarities of circumstances; - Are there other characteristics that are linked (e.g. same victim, same nature of relationship) - The probative value in terms of the links, connection, similarities by time - e.g. close in time, or links over a long time. - The probative value in terms of the links, connection by way of particularly distinctive features. - Is the identified tendency general? - Are the acts/events indisputably or disputable linked to the defendant, and consider, is there circular reasoning (remember Perry's case)? - Note that while common law language is not to drive applying s 97(2), notions like a 'pattern of conduct' (or 'underlying unity') can be useful to show how influential the tendency evidence can be in terms of its probative force.
4th step - determine whether "reasonable notice" has been given of the intention to adduce the evidence (or, if reasonable notice has not been given, whether a direction under s 100(2) ought to be given, dispensing with the requirement);	
5th step - evaluate whether the evidence will, either by itself or in conjunction with other evidence already given or anticipated, "have significant probative value", that is, will it be 'influential'?	
in a criminal proceeding, if it is determined that the evidence would have "significant probative value", **6th step** is the determination whether the probative value of the evidence " outweighs" the danger of unfair prejudice to the defendant (s 101(2)). This step necessarily involves some	• in a criminal proceeding, if it is determined that the evidence would have "significant probative value", **4th step** is the determination whether the probative value of the evidence " outweighs" the danger of unfair prejudice to the defendant (s 101(2)). This step necessarily involves some analysis both of the probative value of the

analysis both of the probative value of the evidence in question and any prejudicial effect it might have, and a balancing of the two.	evidence in question and any prejudicial effect it might have and a balancing of the two