

# LAWS2016

## Finals Scaffold

\*always establish relevance

### **Contents**

Tendency and co-incidence

Character of the accused

Opinion

Discretions

Admissions

Privilege against self-incrimination

Proof 2

## Topic 9: Tendency and Coincidence Evidence

- ☐ Always consider relevance
- ☐ Tendency Evidence
  - ☐ General Principle
  - ☐ Reasonable Notice
  - ☐ Significant Probative Value
- ☐ Coincidence
  - ☐ General Principle
  - ☐ Reasonable Notice
  - ☐ Significant Probative Value
- ☐ Is there discretion to exclude? – go to

NOTE: If evidence is admitted for a different purpose, you still cannot admit it as Tendency or Co-incidence evidence. **s95** if this is the case a anti-tendency direction should be given **BRS**

[e.g., if P adduces bad character evidence in rebuttal of D's good character evidence in CRL trial (see below) then cannot use this to establish a tendency: BRS v R [bad character evidence of another sexual assault of pupil]

### Tendency (where identity is known)

Evidence of a person's character, reputation, conduct or tendency being led for the purpose of proving the person has or had a tendency to act in a particular way or have a particular state of mind is prima facie inadmissible  
**s97(1)EA**

#### Does it fall into an exception

- 1) However tendency evidence may be admissible if:

##### [1] There is reasonable notice; and **s97(1)(a)EA**

- a. Unless the court has dispensed with notice requirements **s100EA**
- b. If introduced to explain or contradict tendency evidence of the other party is not required  
**s97(2)(b)EA**

##### [2] The court must be convinced it has significant probative value **s97(1)(b)EA**

[Generally]

- c. This requires that the evidence, could rationally affect the assessment of the probability of the fact in issue **EA Dictionary** to a **significant extent** **Hughes; IMM** this is a case by case inquiry
  - i. In sexual assault cases, there should be some feature which links the offending **Dennis**

- ☐ Is it criminal
- ☐ Is the evidence 'good character' – i.e., inherent moral qualities of a person.
- ☐ Is there cross examination – need leave
- ☐ Is it character of a co-accused?
- ☐ Is it rebuttal evidence?
- ☐ Has there been a direction?

NB: if civil go to credibility.

### Character of the accused (usually past convictions, reputation, conduct)

- 1) The defence may lead evidence as to the good character of the accused as an exception to the other exclusionary rules. [s110](#)
  - a. Only applies to criminal [s109](#)
  - b. Character evidence relates to the 'inherent moral qualities of a person' [Melbourne](#)
  - c. The prosecution cannot cross-examine the defendant in relation to this evidence without leave of the court [s112 having regard to s192 factors](#)
    - i. In [Stanoevski](#) it was held that it was fair to allow cross examination where the character of the accused was the core of the defendants case.
  - d. Denial of guilt is not good character evidence [Crabbe](#)
- 2) Examples
  - a. [Braysich](#) where the crime is one of dishonesty, good character evidence which supports the proposition that there was unlikely a 'dishonest purpose' and it could rationally affect the facts in issue.
  - b. [Zurita](#) The

### Character of the co-accused

- 1) The hearsay, opinion and tendency rule does not apply (NB: credibility does) where a co-accused provides evidence of [s111](#)
  - a. An opinion about the defendant, if they have specialised knowledge based on training, study or experience and the opinion is wholly or substantially based on that knowledge [s111\(2\)](#)

### Rebuttal evidence from the prosecution

- 1) The prosecution allowed to introduce evidence to rebut the good character evidence, as an exception to the other exclusionary rules [s110\(2\)-\(3\)](#)
  - a. If Defendant adduces evidence of his general good character then exception to exception to hearsay, opinion, tendency rule and credibility rule so Prosecution can adduce evidence adduced by Defendant's general bad character [s110\(2\)](#)

## Topic 12: Discretions

- ☐ General Power to Exclude s135
  - ☐ Probative Value
  - ☐ Unfair Prejudice
  - ☐ Misleading or confusing
  - ☐ Wasted time
  - ☐ Substantially outweigh probative value
- ☐ Criminal Power to Exclude s137
  - ☐ Probative Value
  - ☐ Unfair Prejudice
  - ☐ Misleading or confusing
  - ☐ Outweigh probative value
- ☐ Illegally Obtained s138
  - ☐ Is it illegal or improperly obtained?
  - ☐ Desirability outweigh undesirability?
- ☐ General Power to Limit s136
  - ☐ Are there two purposes of the evidence?
  - ☐ Can we limit as it is either
    - ☐ Unfair Prejudice
    - ☐ Misleading or confusing

### General Power to Exclude - Criminal and Civil Cases

The court has **may** refuse to admit evidence if its probative value is **substantially outweighed** by danger of (a) unfair prejudice, (b) misleading or confusing or (c) cause or result in undue waste of time. **s135**

[party seeking exclusion] must justify the use of the discretion.

### What is the probative value?

- 1) Probative value refers to the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue **EA Dictionary**
  - a. You take the evidence at its highest meaning, there is no consideration of reliability or credibility **IMM** although this position has attracted criticism **Dickman**
  - b. The court should not take into account competing explanations **Sood** it is for the jury to determine if there is a risk of collusion or contamination that goes to reliability **Bauer**
- 2) However, probative value may be decreased in two circumstances **IMM**
  - a. [1] Where it is inherently fanciful

- i. For the reasons already given, evidence which is inherently incredible or fanciful or preposterous would not appear to meet the threshold requirement of relevance *IMM*

**b. [2] Where it is simply unconvincing**

- i. Identification evidence
  - 1. **In foggy weather:** Identification made very briefly in foggy conditions by a witness who did not know the person identified was unconvincing *IMM*
  - 2. **Old Facebook photo:** purported identification from Facebook was ‘simply unconvincing’ as the eyewitness identification was made 12 years after the sexual assault took place and the photo was taken 11 years after the assault. *Bayley*

**(a) Is there unfair prejudice?**

- 1) The evidence must be ‘unfair’ it is **not enough that evidence strongly proves the opposing case** *Ainsworth* it is **not mere prejudice, but unfair prejudice** *Orduyaka*

Is the evidence ‘untestable, or difficult to test’

- a. An inability to challenge or test evidence may amount to unfair prejudice *Ordukaya* this includes:
  - i. inability to cross examine evidence, is not prima facie unfair prejudice, there must be something more. [i.e., must be severe]
    - 1. [here a 92 year hold, was unable to attend and wrote a stat-dec to be admitted as evidence.] *Ordukaya*
  - ii. There must be **compelling reasons** to exclude the evidence. Merely evidence without documents (or reasons) to substantiate and imperfect recollection is not prejudicial *La Trobe*
- 2) In summary, unfair prejudice, is damage to an accused’s case, in some unacceptable way by provoking some irrational emotional response or giving evidence more weight than it should have *ALRC, RPT No 26*

**(b) Is it misleading or confusing? [can link to unfair prejudice]**

- 1) Evidence which would cause the fact finder to place more weight than should be likely unfair *Ainsworth*
  - a. Emotional Evidence
    - i. Evidence that appeals to the fact-finder’s sympathies, arouses a sense of horror or provokes an instinct to punish, may cause the fact-finder to base his decision on something other than the established propositions in the case.
    - ii. Evidence that the defendant engaged in other crimes, may invoke an instinct to punish.
  - b. DNA Evidence, Expert or Confusing statistics.
    - i. In *Aytugrul* use of DNA exclusion percentage (99.9%), which may lead jury to unfairly infer basically 100%. In this case it was not unfair as the expert had explained what it meant.

## Warnings for delay and significant forensic disadvantage [CRIMINAL ONLY]

### Warning for delay and significant forensic disadvantage

- 1) Is it a **criminal proceeding with a jury?** this is covered by **s165B** and not **Longman**
- 2) **Is there a delay, Is there a forensic disadvantage?**
  - a. A delay refers to – the gap between the offence and it being reported. **s165B(6)**
  - b. A forensic disadvantage refers to **s165B(7)**
    - i. the **fact that any potential witnesses have died** or are not able to be located,
    - ii. the fact that **any potential evidence has been lost** or is otherwise unavailable.
    - iii. It is **not established merely due to a delay** **s165B(6)(b)**
  - c. **Robbins** set out 8 propositions
    - i. Origins are found in Longman.
    - ii. The forensic disadvantage must arise as a consequence of delay (c.f., delay itself)
    - iii. Must be forensic in nature – disadvantage in challenging, adducing or giving evidence.
    - iv. Must be satisfied suffered a significant disadvantage. A little is not enough.
    - v. Some disadvantages of delay do not warrant a warning. These can be dealt with in counsel's address.
    - vi. The accused has the onus of establishing forensic disadvantage.
    - vii. It is incumbent on the accused to identify the particular risks of prejudice which constitute disadvantage.
    - viii. E.g., A loss of opportunity to get evidence of a contemporaneous medical examination (**Pate**), medical or scientific investigations (**Jurj**) of expert medical opinion (**Greensill**) could possibly constitute a forensic disadvantage.
- 3) If the **court is satisfied**, at the **defendant's request** that that they have suffered a **significant forensic disadvantage due to delay** then the judge **MUST**
  - a. inform the jury of the nature of that disadvantage; and
  - b. the need to take that disadvantage into account when considering the evidence.
- 4) The judge **must not** suggest that convicting the defendant is '**unsafe or dangerous**' solely due to the delay **s165B(4)**
- 5) [Exception] The judge **need not comply if there is good reason for doing so** **s165B(3)**

### **Pell** example

- 1) The court was satisfied that there had been a forensic disadvantage, of crimes from 20 years prior because
  - a. There were lost opportunities – to promptly investigate and acquire missing evidence to support the accused's case or cast doubt on the complainants case.