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§9. Tendency and Coincidence Ev.

1. **s94 - T&C ev. Exclusion does not apply to purely credibility evidence, nor if propensity is a fact in issue.**
2. **s95- not admissible through backdoor of another purpose.**
 - a. If admissible as necessary for jury to understand the context in which the alleged offence occurred the jury cannot use it for a tendency purpose.
3. **Criminal Procedure Act 1986 (NSW) s 161A**—jury direction that proof BRD req. for T&C ev. only to the extent the evidence is also adduced to prove an element of a charge or if there is a significant possibility that the ev. will be essential to jury's reasoning to a finding of guilt.
4. **Significant difference between convictions, charged, and uncharged acts.**
 - **Penny's case** (coincidence illustrative):

Prior uncharged allegations of poisoning of former partners and brother could not be adduced to use assumption of former guilt to prove later guilt

- **Makin's case** (coincidence illustrative) – remains of babies found at prior addresses cannot be a coincidence!

NB distinguishing tendency/coincidence can be tricky, may be able to argue both.

5. Case authorities significantly **distinguish between single complainant (e.g. Bower) vs multiple complainant cases (e.g. Hughes)**
6. **s97- The tendency rule**— For Ev. of the character, reputation or conduct of a person, or a tendency to act in a particular way, or to have a particular state of mind
 - a. reasonable notice must be given AND the ev. must have **significant probative** value.
 - i. —**don't consider evidence in isolation but together with other ev.** Incl. other T&C ev. (**hughes**) s97(1)(b)
 - **Notice must be precise** especially for tendency alleged: **greater specificity usually means greater tendency.** If notice not mentioned, don't waste too much time (e.g. 'assuming notice is given per s 97(1)(a)')
 - b. **Court may dispense with notice req.** ss(2); s 100; s 192 factors ;; **also not req if it responds to tendency ev. led by other party.**
7. **s97A —child sex offences** **Tendency (not coincidence)** Ev. of sexual interest in children **presumed significantly probative.**

- a. **Factors not to rebut** presumption **unless exceptional circ.:** >alleged act different from sexual interest; >circumstances of the sexual interest/act disconforms to tendency; >personal characteristics of subject disconforms; >relationship disconforms; >period of time between tendency and alleged act; > lack of distinctive features of tendency or act;> the level of generality of the tendency.
 - b. **Clarke**– erroneous rebuttal of presumption Neither the **degree to which some of those factors are exhibited** in the evidence nor **any other circumstance outside the range of those matters** could be **said to be exceptional**.
 - i. **it is difficult to see how the Court could ever evaluate the probative value side of the equation for the purposes of s 101(2).** Due to s97A(5)
 - c. **Davidson**–...tendency of sexual interest in step-daughter of common age and gender (15-17)with complainant
 - i. Even if sexual interest not distinctive or idiosyncratic, it was probative.
 - ii. Single incident may be tendency (beyond s97A)
 - iii. **Difference between grooming texts and ‘fleeting and discrete’ opportunistic physical touching not ‘exceptional’** per s97A(5)
 - iv. Danger of unfair prej mitigated by jury direction.
8. . s98 –**The Coincidence Rule-**. For ev. That 2 or more improbably coincidental events occurred to prove person did an act or had a particular state of mind
- a. Notice and **significant probative value req**, subject to s100 (s192) or to respond to coincidence ev. Led by other party. Notice should be precise. If notice not mentioned, dont waste too much time (e.g. ‘assuming notice is given per s x(a)’)
 - i. **(1A) e.g. similarity in acts alleged and their circumstance between claimed victims as witnesses– Modus operandi can count as coincidence ev.**
 - ii. **–dont consider evidence in isolation but together with other ev.** Incl. other T&C ev. **(hughes) s98(1)(b)**
9. **S101- For prosecution** the T&C ev. **Must have probity> unfair prejudice** (no ‘substantial’ req. cf. s135)**unless responding to ev. led by defendant.**
- a. **Clarke 2023 s101 probity>prej test still significant despite removal of ‘substantial’** test not met regarding the 2 lesser charges.-- **evidence of stronger charges would be too prejudicial to lesser charges as it might repulse the jury and turn their mind away from the possibility that there may not have been sexual touching.**

- b. NB Court tends now to let prejudicial evidence if the risk of its misuse can be adequately cured with a jury direction (**Sood; R v BD**)
10. **Multiple acts being charged at once? Issue joint or separate trial.** For joint—each incident cross-admissible as tendency ev. (**Hughes**)
11. **IMM—**
 - a. **Largely confined to its facts** (see **Bauer [53-55]**) 1 uncharged act, significantly lower gravity, much later in time than other charged acts, main issue in trial was credibility of witness ‘uncharged act led in ev by complainant would usually req. Independent source to be signif.’ --possible that there may be some special features of a complainant’s account which give it significant probative value. [62]
 - b. **Consider probative value of ev. By taking it at its highest.** (assume reliability and credibility)
12. **Bauer—** 18 charged incidents, ev. given by girl related to those and many other uncharged acts.
 - a. acts, of generally a similar kind to the charged acts, interspersed between the charged acts throughout the alleged period of offending.
 - b. **In a single complainant case—** ev of uncharged sexual acts ordinarily considered highly probative: does not matter that all evidence is given by complainant, nor that there is no special feature between the acts – **the common thread (Hughes) is the sexual interest in the complainant.**
 - c. **Tendency evidence cross-admissible** Jury can take into account all evidence when considering each charged incident. –Uncharged acts may be considered.
13. **Hughes—** 70s & 80s soap opera dad: high risk opportunistic predator.
 - a. Five women **Multiple complainant case**, each alleged very different scenarios of sexual assault. Tendency alleged: ‘to engage in predatory conduct when opportunity arose notwithstanding high risk of detection.’
 - i. **Common feature** quite specific here supports significant probative value notwithstanding quite broad tendency as a whole.
 - ii. **More specific the tendency the greater the probative value.**
 - iii. **Obiter:** in cases where the admissibility of tendency evidence is borderline, there may be risks if the actual evidence does not accord with the evidence as anticipated

- iv. [16] significant probative value test requires significant extent of relevance.

[41] two limbs:

1- **the extent to which the evidence supports the tendency.**

2- **the extent to which the tendency makes more likely the facts making up the charged offence.**

14. **McPhillamy**—**Multiple complainant case**— historic sexual abuse 20 yrs delayed complaint.

- a. 6 charged acts single boy, 2 other boys alleged abuse 10 yrs later (uncharged)
- b. Relevant tendency: 'sexual interest in teenage boys under his supervision'
- c. No sig. Prob. val. where the **incidents of 'very different kinds' and no ev. of intervening conduct in the 10 yr gap.**
 - i. The tendency to take advantage of young teenage boys who sought out the appellant in the privacy of his bedroom is to be contrasted with "A" 's account that the appellant followed him into a public toilet and molested him
- d. **(CF. Now under s97A outcome would be different) BUT**
- e. **Authority [31] multiple complainant case usually requires common feature which links the events together strongly enough.**

15. **TL**— **murder of 2 yr old by stepfather, or nephew, or mother**

- a. Tendency: 'TL had a tendency to inflict serious physical harm on this child'
 - i. she had been scolded in hot bath 10 days prior under his care
 - ii. She had complained that TL had hurt her arms, neck and face
- b. Regarding [39] in Hughes, **distinguish between when perpetrator could have been anyone c.f. Here where few had opportunity [30]**
 - i. Half-walking back Hughes [29] —**no general rule as to close similarity of conduct with the offence.**--blunt trauma to abdomen.--probative value increased with **close proximity of all violent conduct within a month.**

16. **s94(5)**--**Cannot infer collusion** 'all girls saying same story' when weighing probative value of tendency or coincidence ev.

17. **DSJ**—insider trading- the insider and the stooge— 2 defendants. Both defendants making exactly the same trades, coincidence!?

- a. Crown Wanted joint trial for cross-admissibility

- b. Appeal allowed [8-9], [80] **wasnt for trial judge to consider the defence case's competing inference from tendency.** Implicit in s97(1)(b) party specificity—**sig. Prob. val. only to be considered in light of the ev. led by the party.**
 - i. But court *should* consider alternative hypotheses arising from the ev. When considering sig. Prob. val. —just not those raised by other party [10] ie is there another causal factor explaining the improbable consistently with innocence which undermines the significance of the coincidence to the crown case?
18. **Clarke**—multiple complainant two categories of tendency ev. 2 offences when 7, 8 offences when teen.
- a. Tendency: 'to have a sexual interest in the complainant (LB) and act on that opportunistically in his home'
 - b. 2nd & 3rd complainant tendency: 'to have sexual interest in children aged 6-15yrs and to act on this through relationship with their parents'
 - c. Conduct different: intercourse v mere touching weren't exceptionally different so could not rebut presumption of sig. Prob. val under s97A (a)(b)(f). [34-6]
19. **O'Leary**— **Evidence not adduced for a tendency purpose which looks like it: transactional ev.**
- a. 14hr booze up ending in killing man with bottle. O'Leary had assaulted other people throughout the pub crawl.
 - i. **Transactional ev:** Ev. of facts and matters that formed constituent parts of the transaction— a connected course of conduct: the alleged act could not be understood without the whole picture (s55, s137). Ev. of facts that form an integral part of a connected series of events.
 - ii. **Transactional ev. (Res Gestae) survives the EA (Mostyen)**
20. **LJW**—drive with boy, had engaged in sexual conduct in his presence.
- a. Lapse of time between car trip and alleged assaults at house (12hrs) meant not res gestae since there was no prosecution case of some **plan (relevant transaction to connect the events)** to groom the boy
 - i. Still could be admitted as relevant to **continuing state of mind—Not tendency ev. All within one day**
21. **Trifunovski**—employees or independent contractors?
- a. Tendency to treat like an employee (time off without medical certificate) can be sig. Prob. val.
 - b. **S97 'person' can be a corporation.**

22. **Jacara**— dispute about sale of shopping centre ‘you lied about x’ common kind of case.
- a. Ev. of seller’s representations to prospective tenants not sig. Prob. val. Too many differences between the representations made to different people at different times in the project’s development to establish that the person had the tendency to make claims of the kind alleged by the plaintiff.