Evidence Law Sample Exam Notes

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How to structure your responses in an e-exam

This is the recommended structure I followed for every type of question to effectively and clearly answer whether evidence is admissible. My notes are structured to reflect this structure. The examples provided along the headings match the heading on page 17-21.

TOPIC (Big HEADING - centred and underlined e.g. ‘Tendency & Coincidence’)

Question (Big HEADING centred e.g. ‘Q1. Does s97(1) apply so as to make this evidence admissible as tendency evidence?’)

Sub-heading 1 (Big HEADING e.g. ‘Is s97(1)(b) satisfied?’)

Sub-heading 2 (Medium HEADING e.g. ‘How is the tendency being used?’)

Sub-heading 3 (Small HEADING e.g. ‘1. Determine whether the offence was committed’)

Sub-heading 4 (BOLD e.g. ‘consideration of similarities’)

Topic 3: Competence and Compellability (Sample)

Summary of competence

- A witness is presumed to be competent.
- A competent witness is generally also compellable.
- Does the witness have the capacity to understand a question about a fact? (s13(1)(a))
  - If no, incompetent.
  - If yes, does the witness have the capacity to give an answer which can be understood? (s13(1)(b))
    - If yes, competent.
    - If no, incompetent.
- If competent, does the witness have the capacity to understand the obligation to give truthful evidence (s13(3))
  - If yes, sworn evidence
  - If no, may give unsworn evidence if informed of matters in s13(5).

Introduction

In order for [**witness**] to give evidence, he/she must be both competent and compellable. The EA provides two rebuttable presumptions that 'every person is competent to give evidence' (s12(a) EA) and that 'a person who is competent to give evidence about a fact is compellable to give that evidence' (s12(b) EA).

1) Competence – whether [witness] **can/is able to** give evidence 2) Compellability – whether an otherwise competent witness can be **excused from giving evidence/lawfully obliged to give evidence**

Who is the witness?

On these facts, the witness is [**insert witness**]. Therefore, the following requires consideration.

Different witnesses (see Q3. Are there additional considerations requiring discussion?)

1. the defendant
2. dead/ceases to be competent
3. a person with a cognitive impairment
4. a child

Q1. Can the presumption of competence be rebutted?

Introduction: To rebut this presumption, one of the limbs of s13(1) EA need be relied on to prove that [**witness**] is not competent to give evidence about [**insert relevant fact**], the relevant fact. Section 13(6) states '[i]t is presumed, unless the contrary is proved, that [**witness**] … is not incompetent because of' s13. This is to be determined on a voir dire (s189(1)(c) EA) and on the balance of probabilities (s142; *GW* at [14])

Applied here, [**witness**] is [**insert description e.g. old/female/dependent etc**]. There is nothing to indicate that [**insert witness**] 'does not have the capacity to understand a question about the fact' (s13(1)(a)) OR [**insert witness**] 'does not have the capacity to give an answer that can be understood to a question about the fact' (s13(1)(b)). As no such incapacity exists, where such an 'incapacity cannot be overcome' (s13(1)) does not require consideration. It is likely that [**witness**] is competent (SEE Q2 - if asked on question OR Q3 - if relevant OR Q4).

Child

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[**Witness**] 'is not competent to give evidence about a fact if ...

Q1.1 Does s13(1)(a) apply?

Yes—>See Q1.3

No/Perhaps—> Q1.2

- Address how [insert witness] processes answers
- LOOK FOR snippets of conversation from the facts previously which show the witness is OR is not making sense

Mention if relevant: On these facts, [**insert witness**] was asked '[**insert question e.g. how fast was the car going?]'.**

Option 1: Applied here, **yes**. [**Insert witness**] does not have the capacity to **understand this** question about a fact, that fact being [insert fact e.g. the speed of the car], because of [**insert reason e.g. a mental/intellectual/physical disability**]. Hence, the following need be asked.

Option 2: Applied here, **no**. [**Insert witness**] does have the capacity to **understand** a question about a fact, that fact being [**insert facts demonstrating W has capacity**] because [**insert reason** e.g. W does not appear possess any incapacity such as a mental/intellectual/physical disability / earlier in the facts she appears to be making sense]. Hence, the following need be asked.

Q1.2 Does s13(1)(b) apply?

Yes—>See Q1.3

No—> Witness is competent

- About how they give answers

Option 1: **Yes**. On these facts, [**insert witness**] 'does not have the capacity to **give an answer** that can be understood to a question about the fact' (s 13(1)(b)) because [insert reason]

Option 2: **No**…

Q1.3 Can 'incapacity … be overcome'? (s13(1))

…

Conclusion

On balance, [**insert witness**] [**will not be**/**will remain**] competent to give evidence relating to [**particular fact**] (s13(1)). [**Nevertheless**/**If found incompetent**], this finding will does not prevent [**witness**] from being 'competent to give evidence about other facts' (s13(2)). [**Assuming I am wrong**/**Therefore**], the following need be asked.

Q2. If [witness] is competent, can [witness] give sworn evidence?

Yes—>See Option 1 (sworn evidence)

No—>See Option 2 (unsworn evidence)

Child

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Assuming [**witness**] 'is competent to give evidence about' [**insert particular fact**], where the Court is 'affirmatively satisfied' (*GW* at [28]) [**witness**] does not have 'the requisite capacity' (*GW* at [31]) or 'the capacity to understand that, in giving evidence, [**he…/…she**] is under an obligation to give truthful evidence', [**witness**] is **NOT 'competent to give sworn or affirmed evidence** about th[is] fact' (s13(3); see *Seymour* at [57]). The obligation 'is to be understood in its ordinary, grammatical meaning as the condition of being morally or legally bound – in this case, to give truthful evidence' (*GW* at [26]).

• • •

To answer the above question, [**yes**/**no**]. Applied here **…..**

Option 1: Can give sworn evidence

Consequently, [**witness**] MUST 'before giving evidence' 'in a proceeding' give sworn evidence by 'tak[ing] an oath, or make an affirmation' (s21(1)). [**Witness**] 'may choose whether to take an oath or make an affirmation' (s23(1)). On these facts [**witness**] has chosen to give an

- oath (see Q1-Q3)
- affirmation (see Q1-2)

Q1. Has the appropriate oath/affirmation been given?

Option 1: Witness is NOT a child or a person with a cognitive disability

As [insert witness] is not a '[child/person with a cognitive disability]' (s21(6)), the oath [witness] must give is 'in Schedule 1 or in a similar form' to that in Schedule 1 (s21(4)). Section 21(5) states '[s]uch an affirmation has the same effect for all purposes as an oath'. On these facts, this [**has**/**has not**] occurred.

Option 2: Witness is a child or a person with a cognitive disability

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Oaths by witnesses (per Schedule 1) *I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that the evidence I shall give will be the truth, the whole truth and nothing but the truth.*
Affirmations by witnesses (per Schedule 1) *I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.*

Q2. Has s23(2) been satisfied?

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Q3. Are the requirements for an oath satisfied?

•••

Option 2: Cannot give sworn evidence

- Unsworn evidence is designed to give young children and adults with a cognitive impairment the ability to give evidence even if they are unable to show that they comprehend the obligation to 'give truthful evidence'

Consequently, [**witness**] 'may … be competent to give unsworn evidence or evidence that is not affirmed about [this] fact' if the court informs them of the matters in s 13(5) EA (s13(4)). Although **…**

Has the Court informed [witness] of the matters in s 13(5) EA?

Yes—>W is competent to give unsworn evidence/evidence that is not affirmed No—>W is NOT competent to give unsworn evidence/evidence that is not affirmed

If yes, then [**witness**] is competent to give unsworn evidence/evidence that is not affirmed.

1. Applied here, **yes**. The Court has informed [witness] of the matters under s13(5)(a)-(c).
2. Applied here, **no**. The Court has not **…**
3. Applied here, **no**. Even though **…**
4. Applied here, **no**. Even though **…**

Therefore, [witness] [**may**/**will not**] 'be competent to give unsworn evidence or evidence that is not affirmed about [this] fact' (s13(4)). Further, [**witness**] need not 'take an oath, or make an affirmation' (s21(1)) as s21(1) 'does not apply to a person who gives unsworn evidence' (s21(2)).

Q3. Are there additional considerations requiring discussion?

Option 1: No. This is because [**witness**] is not the defendant, a person with a cognitive impairment, a child nor has [**witness**] died or ceased to be competent. Therefore, the conclusion that [**witness**] is [competent/incompetent] remains.

Option 2: Yes. This is because [**witness**] is
Option 1: the defendant in a criminal proceeding
Option 2: [died/has ceased to be competent]
Option 3: a person with a cognitive impairment
Option 4: a child

Option 1: The witness is the defendant

As the witness is [D], an accused 'in a criminal proceeding', s17 applies (s17(1)). As a result, [D] 'is not competent to give evidence as a witness for the prosecution' (s17(2)). However, [**D**] is competent to give evidence for **his/her** own defence (i.e. [**D**] can elect to give evidence after prosecution has closed its case)

Option 2: D has died/ceased to be competent

...

Option 3: Person with cognitive impairment

[D] has a cognitive impairment in the form of a

- '[mental illness/intellectual disability/dementia/brain injury]' (s3 CPA non-exhaustive definition of 'cognitive impairment')
- [insert mental impairment] (which is beyond the **non-exhaustive** definition of 'cognitive impairment' in s3 CPA)

While [**witness**] is **competent**, opposing counsel will have grounds to seek an **unreliability warning** as the W's evidence is of a kind that may be unreliable (**CRIM**: ss 31(b); 32 JDA / **CIVIL**: s 165 EA).

...

Option 4: D is a child

...

Conclusion

On balance, it is [likely/unlikely] that [**witness**] will be competent to give evidence relating to [**facts**].

Q4. Can the presumption of compellability be rebutted?

...

Topic 5: Examination of Witnesses

Summary of this topic

Examination in Chief

1. Leading Questions - relates to EIC and RXN
2. Refreshing Memory
3. Is the prior consistent statement (PCS) made by [witness] admissible?
4. Unfavourable witnesses

Cross-examination

Preliminary issue: Has s40 been enlivened? (Witness called in error)

1. Cross-Examining Witness' Credit — See Credibility Evidence notes
2. Finality Principle
3. Rule in Dunn and the process for recalling witnesses when that rule is breached
4. Is there a breach of s41? (Improper Questioning)
5. Leading questions in cross examination
6. XXN [witness] re previous reps of other persons
7. XXN [witness] about

- [witness]'s PIS in [witness]'s documents
- previous representation of other person in a document

Re-examination

Does s192 support a grant of leave?

- Note at the beginning of the question who called the witness

1. If prosecution calls witness, P will do EIC with witness and defence will to XXN
2. If defence calls witness, defence will do EIC with witness and prosecution will to XXN with witness

The three different stages of examination of witnesses

1. Examination in chief of a witness is the questioning of a witness by the party who called the witness to give evidence, not being questioning that is re-examination.
2. Cross-examination of a witness is the questioning of a witness by a party other than the party who called the witness to give evidence.
3. Re-examination of a witness is the questioning of a witness by the party who called the witness to give evidence, being questioning …conducted after the cross-examination of the witness by another party.

4. Unfavourable witnesses

Red FLAG: Examination in chief (questioning own witness) and either (1) witness supports other side/undermines party who called witness (2) witness has knowledge of something but is not disclosing (3) witness makes a PIS
Red FLAG: Witness not doing, what the party who is calling them wants them to do
RED FLAG: Witness being called by a party but witness does not wish to give evidence and if required to do so, will say that she was mistaken about what they said prior

General note: If a prosecution/defence witness is unfavourable, the prosecution/ defence can apply for **leave** to the court to **switch to leading questions** because open ended questions are not going to get the prosecution/defence anywhere

For example: Making a PIS - where witness says one thing at trial different to **before trial** (includes statements made to police, at *voir dire* or committal)

Example of PIS:
PRE-TRIAL: 'I saw D sexually assault V' 'I can't remember now'
'The car was red'
AT TRIAL: 'I saw nothing' 'The car was green' 'I can't remember now'

[**Insert counsel that called W**] will seek '**leave** of the court' to question their own witness, [**witness**], 'as though [**insert counsel that called W**] were cross-examining the witness' (s38(1)), on the basis that [**witness**] is 'unfavourable' (s 38 EA). "Unfavourable" 'does not mean adverse or hostile', it means 'not favourable' (Curtin J at [24] in *McRae*). Section 38(2) states '[q]uestioning a witness under [s38] … is taken to be cross-examination for the purposes of this Act (other than section 39)'. If leave is granted [**insert counsel that called W**] can use leading questions in this XXN.

This is sought [**because/because it is anticipated** (*McRae*)] (pick one)

- [**witness**]'s evidence (i.e. [insert evidence]) 'is unfavourable' to [**insert counsel that called W**] since it
  - undermines [**insert counsel that called W**]'s case (s38(1)(a))
  - favours [**insert counsel that did not call W**]'s case (s38(1)(a))
- [**witness**]'s evidence is 'a matter of which [**witness**] … may reasonably be supposed to have knowledge' and 'the witness is not, in examination in chief, making a genuine attempt to give evidence' (s38(1)(b))
- [witness] 'has … made a **prior inconsistent statement'** (s38(1)(c)) (comparable to the two witness in *McRae*).

If leave is granted, the XXN is limited to being 'about' the matter in s38(1)[**(a)/(b)/(c)**] as appropriate (*Le* at [67]; see also *Hogan* at [4]).

[Witness] forgot / does not remember answer to question

•••

Q1. Will leave granted?

Yes—> [**Insert counsel that called W**] can question their own witness
No—> [**Insert counsel that called W**] CANNOT question their own witness

Section 38(6) EA provides specific (although non-exhaustive) matters the court must consider when granting leave under s 38(1) EA. Further, whether a Court will grant leave requires consideration of s192.

Q1.1 Did [insert counsel that called W] give 'notice at the earliest opportunity of [their] … intention to seek leave'? (s38(6)(a))

[**Yes**/**No**]. [**Comparable**/**Distinguishable**] to how in Curtin J at [34] in *McRae* held notice had been satisfied as the defence provided written notice to two parties, on these facts, [**insert counsel that called W**]

- did ...
- gave notice at [insert point in time]. This is not 'the earliest opportunity' ...

Q1.2 Consideration of 'the matters on which, and the extent to which, the witness has been, or is likely to be, questioned by another party' (s38(6)(b))

Applied here, it is [**unlikely**/**likely**] that [**insert witness**] would be questioned by [**insert counsel that did not call W**] (*McRae*). Therefore, leave [**should**/**should not**] be granted.

•••

Consideration of section 192

If, because of this Act, a court may give leave, the leave may be given on such terms as the court thinks fit (s192(1)). As **leave**

1. [**would not**/**would**] 'be likely to add unduly to … the length of the hearing' (s192(2)(a)), because the 'focus' of the trial [**will**/**will not**] 'shift from the witness' testimony as to what had occurred *to* matters collateral to the issue at trial' ([**comparable**/**distinguishable**] to *Hogan* at [75] emphasis added)
2. [**would not**/**would**] 'be likely to … shorten … the length of the hearing' (s192(2)(a)) …
3. [**would not**/**would**] be unfair to [insert party/insert witness] (s192(2)(b)), because there [**is**/**is not**] a significant risk of prejudice to [witness] (cf *Hogan*),
4. is being sought for evidence that [**is not**/**is**] important (s192(2)(c)) …
5. [**is**/**is not**] appropriate in light the nature of the proceeding (i.e. it is a [**criminal**/**civil**] proceeding (s192(2)(d)) …
6. Would be [**more**/**less**] appropriate than the Court
    - Adjourning the hearing (s192(2)(e)) …
    - Making another order (s192(2)(e)) …
    - Giving a direction in relation to the evidence (s192(2)(e)) …

… leave [**should**/**should not**] be granted under s38(1).

Conclusion

In consideration of s38(6)(a) and (b) and s192, the court is [**likely**/**unlikely**] to grant leave under s 38(1) EA for [**insert counsel that called W**] to XXN their witness [**witness**]. [**Thus**/**Assuming I am wrong**], the following need be asked.

If the leave is granted because of a PIS

- Assuming leave is granted for [**insert counsel that called W**] to XXN their witness [**witness**], [**insert counsel that called W**] also must comply with s 43 (see s43)

Q2. What are the consequences of leave being granted?

Firstly, the questioning is to take place before [**insert counsel that did not call W**] XXN's the witness (s38(4) EA). However, if 'the court otherwise directs' (s38(4) EA), 'the order in which the parties question the witness is to be as the court directs (s38(5) EA). *Secondly*, if [**insert counsel that called W**] can XXN their witness [**witness**], it must only be about the matters in s 38(1)(a)-(c) EA (*Le* at [67]; see also *Hogan* at [4]).

Option 1: [**Insert counsel that called W**] has NO proof of lies separate from matters in s 38(1)

If conducting a XXN in relation to credibility, it can only be about the matters in s38(1)(a)-(c) EA (*Le* at [67]; see also *Hogan* at [4]).

Option 2: [**Insert counsel that called W**] HAS PROOF of lies separate from matters in s 38(1)

...

Q3. Should a discretion to exclude the evidence be exercised (s135-6) or must the evidence be excluded (s137)?

...

Conclusion:

Option 1: XXN allowed

On balance, [**Insert counsel that called W**] will be able to XXN [**witness**] for being unfavourable under s 38(1)[**(a)/(b)/(c)**] as leave will be granted for reasons discussed above. Resultantly, counsel must observe the limits in *Le* and s 38(3) EA

Option 2: XXN not allowed

...

Topic 7: Tendency & Coincidence evidence

Does s97(1) or s98(1) apply so as to make this evidence admissible as tendency or coincidence evidence, respectively?

Note: Part 3.6 = tendency and coincidence
Note 2: Exam will likely tell you to consider either tendency or coincidence evidence
Note 3: Section 101 only applies to criminal proceedings
RED FLAG: 'Is this admissible under part 3.6?'

Acronyms
SPV = significant prohibitive value
Tendency = propensity evidence
Coincidence = similar fact evidence

Introduction: Part 3.6 should be viewed as a code; the common law principles are no longer binding (*Velkoski*). As the evidence is being adduced as evidence of guilt, there was no need to discuss issues of character or credibility. Sections 97(1) and 98(1) apply in both civil and criminal proceedings to prohibit admission of tendency and coincidence (T&C) evidence.

When does Part 3.6 not apply?

Part 3.6 does not apply to evidence relating solely to credibility of witness (s94(1)). Instead, the credibility rules under s101A will apply.

Part 3.6 does not apply to evidence of either

- **character, reputation, conduct** of a person (s94(3)(a)) or
- **tendency** a person has or had (s94(3)(b))

if that **character, reputation, conduct** or **tendency** **is a fact in issue** (example - defamation case). Part 3.6 does not apply 'so far as a proceeding relates to bail or sentencing' (s94(2)).

Q1. Does s97(1) apply so as to make this evidence admissible as tendency evidence?

- Relates to character, reputation or conduct of the accused

Tendency reasoning involves a jury relying on the fact that a person *has a tendency to* either *act in a certain way* or *have a state of mind* to infer a fact in issue (i.e. [insert FII e.g. that D knew V was younger than 16 years old]).

The prosecution will seek to adduce [**insert evidence**] (i.e. 'evidence of the character, reputation or conduct of [**D**], or a tendency that [**D**] has or had: s97(1)) to prove that [**D**] [**has/had**] a tendency to

- act in a particular way.
- have a certain state of mind.

Here the tendency [**alleged/likely to be alleged**] is [**D**] [**insert tendency**] ('**the tendency**'). Prima facie, this tendency evidence is inadmissible to prove the tendency (s97(1)), unless reasonable notice is given to [**D**] (s98(1)(a)) and the court finds that the evidence has significant probative value (s98(1)(b)). Application may be made to the court to dispense with notice requirements (s100). For the purposes of this analysis it is assumed [**Insert party seeking to adduce evidence**] has given reasonable written notice to [**insert other parties**] of their intention to adduce [**insert evidence**] (ss97(1)(a); 98(1)(a)).

Examples of tendency's:

- is 'a man of mature years [who] has a sexual interest in female children aged under 16 years…and a tendency to act on that interest by engaging in sexual activity with underage girls opportunistically, notwithstanding the risk of detection' (*Hughes* at [2])

• • •

- Tendency to assault male minors (**2019 S2**)
- Tendency towards violent rage when confronted with people promoting or being positive about eating meat (**2017 S2**)

Examples: Evidence may demonstrate a tendency

1. to have a particular state of mind [e.g. 'a mature man's sexual interest in young teenage boys': *McPhillamy at [26]*] or
2. to act in a particular way (e.g. sexually assault minors) (*McPhillamy* at [26])

Is s97(1)(a) satisfied?

Yes—> See 'Is s97(1)(b) satisfied?'
No—> See 'Does s97(2)(a) or (b) apply?'

• • •

Is s97(1)(b) satisfied?

The four HC decisions discussing SPV: *IMM* (2016), *Hughes* (2017), *Bauer* (2018), *McPhillamy* (2018)

For s97(1)(b) to be satisfied, the evidence (i.e. [**insert evidence**]) – 'by itself or having regard to other evidence adduced or to be adduced' by [**insert party seeking to adduce**] – must 'have significant probative value' **('SPV')** to prove the commission of the alleged offence. 'Significant' is not defined in the Act. Significant has been held to mean 'important' or 'of consequence' (*Lockyer*). To be significant **…**

Uncharged acts (against single complainant) for sexual offences

• • •

If the tendency relates to a sexual interest

Proof of [**D**]'s '**sexual interest** … is **not capable** of **meeting** the requirement of **significant probative value** for admission as tendency evidence'. Instead, 'it is **the tendency to act on the sexual interest** that gives tendency evidence in sexual cases its probative value' (*McPhillamy* at [27]). On these facts, there

- …
- …

Therefore, [D] [**can**/**cannot**] 'be shown to have had a particular state of mind, amounting to a tendency, towards taking a sexual interest in' [**insert group**], 'and in acting upon that sexual interest' (*Cano* at [73])

Multiple complainant sexual offences cases

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McPhillamy: 'The evidence did little more than insinuate that because the appellant had previously sexually offended against B and C ten years prior, under different circumstances, it was more likely he committed the offences alleged by A'. Thus, The tendency evidence did not have SPV, did not have the special feature and was not sufficiently linked to past offending

How is the tendency being used? To establish conduct occurred or identity of offender?

On these facts, the tendency evidence is being used to

1. determine whether the offence was committed
2. prove the identity of the offender

1. Determine whether the offence was committed

Whether evidence has SPV requires a consideration of, *firstly*, 'the extent to which the evidence supports the tendency', and *secondly*, 'the extent to which the tendency makes more likely the facts making up the charged offence' (*Hughes* at 356 [41] confirmed in *McPhillamy*). Where the question concerns 'whether the offence was committed, it is important to consider both matters' (*Hughes* at [41]).

In relation to the first matter,

•••

Consideration of similarity

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On these facts the similarities between the 'conduct evidencing the tendency and the offence' are [**insert similarities e.g.** the relationship of control D has over the victim]. However, there are differences in the form of [**insert differences**]. On balance, the 'degree of similarity [to the alleged offending]' [**is/is not**] very close. Therefore, the evidence [**more/less**] significant and probative. The evidence [**is/is not**] of 'importance or of consequence' (*IMM* at [46]) in establishing the facts of the alleged offending.

Cases:

Ford: Minor differences in how the accused sexually and indecently assault young women was not detrimental to PV as the issue was whether the accused committed the conduct, not who committed the conduct (relates to identity). SPV present in evidence.

PWD: Despite differences in how the accused took advantage of their position of authority over young male boarders to gratify his sexual interest in young male boarders, SPV present in evidence.

Velkoski: Despite differences in the manner of offending and also the gender of the children, SPV present as this relates to conduct.

2. Proving the identity of the offender

…

Conclusion

…

Q2. Does s98(1) apply so as to make this evidence admissible as coincidence evidence?

- Coincidence involves <u>comparing events directly</u>

RED FLAG: Multiple examples of D's misconduct (i.e. similar charges unproven *but so similar*)

<u>Introduction</u>: Coincidence reasoning involves a jury relying on the improbability of events occurring other than in the way suggested to infer a FII (i.e. [**insert FII e.g. D had knowledge V was under 16**]). The prosecution will seek to adduce evidence of

- [**insert prior event/s**] and the alleged offence
- [**insert prior event 1**] and [**insert prior event 2**]
- the location data
- the use of the diamond knot

to prove [**D**] '[did a particular act …/had a particular state of mind] on the basis that'

- the alleged offending and the [**insert prior event/s**]
- [**insert prior event 1**] and [**insert prior event 2**]

are so similar or distinct that it is improbable that

- the [insert number e.g. 3] events occurred coincidentally (s98(1)).
- anyone else committed the offences.

It is 'by reason of similarities between the events and/or the circumstances in which [the events] occurred' that it is considered 'improbable that the events occurred coincidentally' (*CGL* at [20]; s98(1)). From this coincidence evidence the jury will infer …

…

Example of coincidence:

- It is improbable that the phone would be in the vicinity of the fires of three separate occasions
- the use of the diamond knot is so distinct that its improbable that anyone else committed the offences
- It is highly improbable that two different offenders carried out the same type of robbery in the same location

Cases:

Straffen: Evidence of the similar circumstances of the killings made it improbable that the killings were by different persons. Similarities: (1) all victims were young girls, (2) how each had been killed (each was manually strangled), (3) none had been sexually assaulted, (4) no evidence of a struggle, (5) no attempt to conceal the bodies, even though that could have occurred.

Makin: **FACTS**: Evidence of the 13 baby bodies was found in backyards of homes where the defendants had resided. **HELD**: It was improbable that the deaths of these 13 babies occurred from natural causes.

CW v R: **Facts**: 3 fires within 4 hours in Rosebud, victims of the fires were all business associates of the applicant, and each was in a current dispute with him. Coincidence argument is coming from the circumstances of the offence.

Pfennig: Evidence D subsequently abducted another young boy using the same method (combi van and leaving the clothes neatly behind)

Perry: **FACTS**: Victim here poisoned by wife. Evidence of 3 men whom wife had close relationship adduced.

1. H died of arsenic poisoning and had insurance - admissible because of striking similarity (Gibbs CJ, Wilson & Brennan JJ)
2. Brother died of arsenic poisoning and no benefit - admissible (Wilson & Brennan JJ)
3. Defacto died of overdose of barbiturates and benefit from insurance - inadmissible as it felt too far removed (4 justices)

Boardman: **FACTS**: Two 17-18 year old boys were sexually assaulted in headmaster's study & both times headmaster requested to be passive partner. **HELD**: Striking similarity here – improbable that two victims would come up with same story unless true. **SPV.**

Is s98(1)(b) satisfied?

…

Conclusion

I opine the coincidence evidence [**does**/**does not**] sufficiently bolster proof of the 'elements of the offence. The coincidence [**does**/**does not**] 'rationally [affect] the assessment of the probability of the existence of a material fact in issue to a *significant* extent' (*Hughes* at 349 [16]; dictionary 'probative value).

Q3. Does Section 101 apply? If yes, does it weigh toward admission?

Yes. Section 101 'applies in addition to sections 97 and 98' As this is 'a criminal proceeding' (s101(1)) and the [tendency/coincidence/T&C] evidence 'is adduced by the prosecution' (s101(2)). If s101 applies, s135 and s137 do not require discussion. The following balancing exercise in s101 requires consideration.

No. Section 101 does not apply 'in addition to sections 97 and 98' as …

No. This is because s101 …

QUESTION. Does 'the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused'? (s101(2))

The prosecution bears the onus of showing that the evidence does this. This balancing exercise abolished the prior 'no other rational view' test in *Hoch* and *Pfennig* (*Velkowski*; *Ellis*). The section 101(2) assessment involves a 'balancing exercise which can only be conducted on the facts of each case' (*Ellis* at [95]). It requires …

…

3.1 Probative Value

For reasons above, the probative value has been described as [**significant**/ **insignificant**]. In addition to above discussion, '[t]he degree of significance [of the Prior Incidents] is relevant for the s[ection] 101(2) weighing exercise' (*Taylor* at [125](xii), Bell P). In assessing the degree of significance, it is necessary 'to identify … the strength of the features of the acts relied upon' (*Velkoski* at 719 [171] citing Odgers, *Uniform Evidence Law* at 466–7)

Factor 1: Number of occasions particular conduct relied upon occurred

…

Factor 2: Time gap between occasions

- the 'very close temporal proximity' of the [**insert prior incidents**] to the alleged offending (*Taylor* (n 16) [122](xiv) (Bell P); *Velkoski* at [166](ii)))
- the large time gap between the [insert prior incident] and the alleged offending (cf the 10 year gap in *McPhillamy* at [30]; *Velkoski* at [166](ii)))
- if more than one occasion: the gaps in time between the offending are varying, perhaps indicating [D] is not the offender

Factor 3: Existence of other evidence

…

Factor 4: Degree of similarity

…

Factor 5: Is the tendency evidence proving conduct or identify - tendency specific

…

Factor 6: Is this tendency evidence being adduced in criminal or civil proceedings - tendency specific

…

Factor 7: Degree of specificity - tendency specific

…

Factor 8: 'Whether the tendency evidence is disputed' (*Velkoski* at 166(v)) - tendency specific

- the existence of [**charged**/**uncharged**] acts, not acts that were [**uncharged**/ **charged**]

Conclusion

Therefore, the degree of significance is [**high**/**low**]. This is arguably [**a**/**not a**] distinctive tendency or coincidence.

3.2 Prejudicial effect

I opine, the tendency/coincidence evidence [**will**/**will not**] 'be misused by the jury in an unfair manner, such as by provoking some irrational, emotional or illogical response' (*Bauer* at [73]) as it [**will**/**will not**] have a powerful subconscious effect on a jury (*Hughes* [71]-[74]).

- Generally, 'tendency evidence is inherently prejudicial' (*SK* at [64]) as 'a jury will conclude that a person with an established tendency will yield to the tendency whenever the opportunity arises' (*RH* at [69]).

Option 1: Nature of the offence

'[P]rior illegal acts', [are] ... prejudicial' (*Taylor* at [122](xxi) (Bell P)). [**Further**/**However**], the characterisation of [**insert offence** e.g. 'intimate partner violence on previous occasions'/sexual offence/offences against children or old people/theft] [**involves**/**does not involve**] inherent prejudice as it is [**likely**/**unlikely**] 'to arouse emotion in some jurors' (*Hughes* at [15]). This emotional arousal [**will**/**will not**] further be exacerbated by the fact that [**D**] [**is**/**is not**] a serial offender. Therefore, there [**is**/**is not**] a real danger that the jury may be persuaded to

- convict in order to punish [**D**] for conduct other than that charged, rather than considering whether the evidence proves the alleged offence.
- <u>if multiple charges:</u> not carefully consider each charge separately,

Option 2: Interpretation of similarities and differences

In addition/Nevertheless, given the similarities in the prior events and the alleged offending, there is a 'risk that the jury will use the evidence … in a way that the law does not permit' (McHugh J at 528 in *Pfennig*). More specifically, the jury may exaggerate the similarities in the prior events and not sufficiently scrutinise the differences. Resultantly, the PV of this evidence will be overestimated.

• • •

<u>If different uncharged acts are being adduced to prove another uncharged act was committed</u>

• • •

<u>Evidence tied [D] to one not all offending</u>

The [**insert evidence e.g. DNA evidence**] only tied [**D**] to [**insert number offence e.g. 4th offence**]. Impermissibly, the jury might perceive [**D**] as being equally tied to the other offences through this argument.

<u>Another proceeding</u>

• • •

3.3 Conclude

If Criminal:

- As this is a balancing process (*Ellis*; *Sutton*), it appears that the probative value [**will**/**will not**] substantially outweigh prejudicial effect. Thus, the charges [**are**/**are not**] admissible as [**tendency**/**coincidence**] evidence (s 97(1)(b)/98(1)(b)). If this evidence is admissible as tendency evidence (s101A(b)(ii)) and this evidence also 'affects the assessment of the credibility of the witness or person' (s101A(b)(i)), this evidence is not deemed credibility evidence, meaning the credibility rule will not apply and the evidence is admissible.

Note: Last part of response here addresses the lack of applicability of the credibility rule

If Civil:

• • •

3.4 Jury directions

• • •

Ultimate conclusion

It should not 'be inferred that [**D**] ... acted in the same way, or had the same state of mind' (*Dempsey* at [57]) on [**insert date of alleged offence**] as a basis to find facts founding the charge are more likely

4. Circumstances where such tendency or coincidence evidence is admitted for a purpose other than proving tendency or coincidence

Introduction: The prosecution will submit, if not admissible as tendency or coincidence evidence, the evidence of the prior incidents should be admitting 'to help explain the context' of the alleged assault pursuant to the doctrine res gestae. If the tendency or coincidence rules render evidence inadmissible, but that evidence is admitted for a res gestae purpose it cannot be used to prove a tendency or coincidence (s95). If the evidence is admissible for a res gestae purpose but inadmissible for tendency or coincidence purposes, the jury will usually need to be warned to only use the evidence for permissible purposes and not for any impermissible purposes (*R v AH* at 708-709 per Ireland J).

The res gestae doctrine enunciated in the High Court case of *O'Leary and the King* remain authoritative (*R v Adam and the Queen; Parkinson and The Queen*). McHugh J did suggest that cases like *O'Leary* 'should now properly be regarded as cases dealing with circumstantial evidence and not as *res gestae* cases' in *Harriman* (*AB & Baker* at [29]), however 'the other members of the High Court in *Harriman* did not deal with this issue, or dealt with it in a much less extensive manner than did McHugh J' (*AB & Baker* at [30]). Given the lack of consensus of the High Court, this doctrine has continued to be applied by Courts such as the VSCA in *AB & Baker.*

.....