

unfairness (EM). Its application is highly fact-specific and may take into account unreliability (though debatable: *IMM*), improper police conduct, forensic advantage, etc. (EM).

Tendency

- **Note:** unlike hearsay or opinion, evidence admitted for another purpose cannot be used for a tendency or coincidence purpose.
- **IF a question relates to tendency evidence:**
 - **IF it relates only to credibility** — the tendency rule does not apply (s94(1)).
 - **IF it relates to bail or sentencing** — the tendency rule does not apply (s94(2)).
 - **IF it relates to the character, reputation, conduct or tendency of a person that is a fact in issue** — the tendency rule does not apply (s94(3)).
- **Write:** under s97 EA 2008, tendency evidence is not admissible unless reasonable written notice was given to the other party of the intention to adduce it (s97(1)(a)) and the court is satisfied that the evidence has significant probative value (s97(1)(b)).
 - **s97(1)(a):** a failure to give reasonable notice of an intention to adduce tendency or coincidence evidence is not a minor matter (*Andelman v The Queen*). The need for the prosecution to give notice is greater where the accused is unrepresented, as the court cannot expect assistance from an unrepresented accused (*Andelman v The Queen*).
 - **However — s100:** the court may dispense with the notice requirements.
 - (1) on the application of a party, the court may direct that the tendency rule is not to apply to particular tendency evidence despite a failure to give notice under s97; and
 - (2) on the application of a party, the court may direct that the coincidence rule is not to apply to particular coincidence evidence despite a failure to give notice under s98.
 - **s97(1)(b):** in assessing significant probative value, the court has regard to the strength of the inference of the existence of the tendency, and the likelihood of the tendency proving a fact in issue (*Hughes v The Queen*).
- **Factors taken into account:**
 - reliability is not assessed (*IMM*);
 - the number of incidents;
 - the issue to which the evidence is relevant (*Hughes*);
 - time gaps between the incidents (*R v Watkins*);
 - the degree of specificity of the conduct (*CW v The Queen*);
 - the extent of the similarity between the conduct on the various occasions; and
 - the extent to which the circumstances in which the conduct occurred are similar.
- ***Concoction and contamination** — *R v Bauer*:* unless the risk of contamination, concoction or collusion is so great that it would not be open to a jury rationally to accept the evidence, the determination of probative value excludes consideration of credibility and reliability. Subject to that exception, the risk goes only to credibility and reliability, and is an assessment for the jury.
- *IMM* — it is possible that there are certain features of an uncharged offence that bear on probative value.

Coincidence

- **IF a question relates to coincidence evidence:**
- **Definition:** Schedule 2 (the Dictionary) defines “coincidence evidence” as evidence of a kind referred to in s98(1).
- **Write:** coincidence evidence is evidence of two or more events adduced to prove that a person had a particular state of mind, on the basis of the similarities in the events or the circumstances in which they

occurred (s98(1) EA 2008). Such evidence is not admissible unless reasonable written notice was given to the other party (s98(1)(a)) and the evidence has significant probative value (s98(1)(b)).

- **Significant probative value:** in contrast to tendency evidence, probative value under s98 is focused on the similarities between events (*PNJ*) — i.e. distinctive features common to each incident (*PNJ*).
- **Case examples:**
 - *PNJ* — failed; although there were 14 counts of sexual assault, there must be something distinctive about the way the accused allegedly took advantage of the setting or context.
 - *CW v The Queen* — fires lit on 3 commercial properties: lit with accelerant, commercial premises, same evening within a 4-hour period, in the same suburb.
- **When tendency and coincidence evidence passes ss97–98, consider the exclusionary rule under s101.**
 - **Write:** even where the court is satisfied that the evidence has significant probative value, tendency or coincidence evidence will still be excluded unless its probative value substantially outweighs any prejudicial effect it may have on the accused (s101(2)).
- **Examples of unfair prejudice:**
 - prejudice may arise where there is potential for the jury to underestimate the number of persons who share the tendency (*Hughes*); and
 - invoking an emotional rather than a rational response — i.e. appealing to the fact-finder's sympathies, arousing a sense of horror, provoking an instinct to punish, or triggering other mainsprings of human action (*Papakosmas*).

Credibility

- **IF a question relates to credibility evidence:**
- **Define:** credibility evidence is evidence that affects only the assessment of the credibility of a witness or person, or that is relevant to credibility and to some other purpose for which it is not admissible (s101A(a), (b)) (*Adams v The Queen*).
- **The credibility rule:** credibility evidence about a witness is not admissible unless an exception applies (s102).
- **IF the evidence is adduced in cross-examination (s103):**
 - **Write:** the credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence could substantially affect the assessment of the witness's credibility.
 - **The court may consider:**
 - (s103(2)(a)) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation while under an obligation to tell the truth; and
 - (s103(2)(b)) the period that has elapsed since the acts or events to which the evidence relates.
- **IF it relates to the accused (s104):**
 - **Write:** if the cross-examination is of the accused, the further protection under s104 applies in addition to s103.
 - Under s104(2), an accused must not be cross-examined about a matter relevant to the assessment of their credibility, unless the court gives leave.
 - Despite s104(2), s104(3) provides that leave is not required for cross-examination by the prosecutor about whether the accused:
 - (a) is biased or has a motive to be untruthful;
 - **Note:** the relevant interest is something beyond the normal interest in not being found guilty — e.g. protecting a relative or friend (*Robinson v The Queen*);
 - (b) is, or was, unable to be aware of or to recall matters to which their evidence relates; or
 - (c) has made a prior inconsistent statement.