"**Ad hoc" experts** (experience-only expertise) - A person without formal qualifications can be an expert based on particular experience (e.g. repeatedly deciphering unintelligible audio, recognising handwriting). Caution: ensure it isn't purely subjective (see Honeysett)

- *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 6) (1996)* 64 FCR 79
  - Facts/Use (as described): fund manager permitted to give expert evidence on investor behaviour/financial markets from work experience; securities lawyer was not.
  - Illustrates experience-based expertise.
- *R v Leung (1999)* 47 NSWLR 405
  - Use: Appears both earlier (ID from 1990) as "fact" and here under ad hoc/experience topics; supports practical identification/experience themes.
- *Barker v R (1988)* 34 A Crim R 141
  - Facts/Principle (as described): Police officer with long drug paraphernalia experience. two forms the same testimony can take:
    - "In my experience, these chemicals/odours are found where speed is made" (can be treated as fact-type evidence) versus
    - "In my opinion, speed is being manufactured here" (opinion) – then must pass s 79.

S 80 - Evidence of an opinion is not inadmissible only because it is about—
(a) a fact in issue or an ultimate issue, or
(b) a matter of common knowledge.

Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd [2007] FCAFC

- Facts: Cadbury objected to Darrell Lea's use of purple in marketing; marketing/consumer behaviour academic evidence.
- Principle: Admissible notwithstanding that buying chocolate is within common knowledge - s 80 allows expert evidence if s 79 is satisfied.

Conflicting Expert Opinion

- Assess conflicting expert evidence is a question of fact; it cannot be excluded merely for being technical/difficult.
- Jury direction: They don't have to resolve conflicts beyond reasonable doubt; they choose the most acceptable version considering: (i) the expert's direct experience with similar facts, (ii) qualifications/experience, (iii) veracity, and (iv) how the expert's factual substratum aligns with facts found.
- Practical measures: Simplify evidence; consider independent/court-appointed experts or joint reports where appropriate (lecturer's policy discussion).

WEEK 10: TENDENCY AND COINCIDENCE EVIDENCE

- Tendency evidence = relevant evidence to showing a person is likely to have behaved or thought in a particular way because they have done so on previous occasions.
- Coincidence evidence is evidence that is relevant to showing that, because of the similarities between two or more events, one of the events is unlikely to have been mere coincidence and unrelated to the other event.

The tendency and coincidence rules are evidentiary rules guarding against drawing inferences based on our prior experiences, similar occurrences in the past, and people's perceived tendencies to act in certain ways. Evidence of tendencies and similar events is often unreliable. Tendency reasoning can have high probative value, but the situations need to be 'substantially and relevantly similar' for tendency reasoning to be more reliable.

Tendency/Coincidence Evidence Test (Prosecution Only) - s101(2) of the Evidence Act

R v Ellis (2003) 58 NSWLR 700

➔ Tendency/coincidence evidence is not to be admitted by the prosecution **unless the probative value of the evidence SUBSTANTIALLY OUTWEIGHS** any prejudicial effect it may have on the defendant.

S 94 – Application (of pt 3.6 – tendency and coincidence evidence)

(1) This Part does not apply to evidence that relates only to credibility.
(2) This Part does not apply to proceedings about bail or sentencing.
(3) This Part does not apply to evidence of: (a) A person's character, reputation, or conduct, or (b) A person's tendency, if that character/reputation/conduct/tendency is itself fact in issue.
(4) Any common law rules restricting propensity or similar fact evidence are irrelevant when applying this Part to tendency or coincidence evidence about a defendant.
(5) When assessing probative value under ss 97(1)(b), 97A(4), 98(1)(b), or 101(2), the court must not consider the possibility of collusion, concoction, or contamination.

S 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 matters 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

S 97 – The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency, 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.

S 99 – Requirements for notices

Notices given under s 97 and 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section. Regs 5 and 6 of the evidence regulations provide for the power to dispense with the notice requirements of s 100.

Significant Probative Value

The probative value has been expressed as being important or of consequence. A court may take certain factors into account. The similarity of the circumstances and the specificity of the conduct are to be considered.

Hughes v The Queen (2017) 263 CLR 338

In assessing whether evidence has significant probative value, two interrelated but separate matters must be considered:
1. The extent to which the evidence supports the tendency; and
2. The extent to which the tendency makes more likely the facts supporting the charged offence

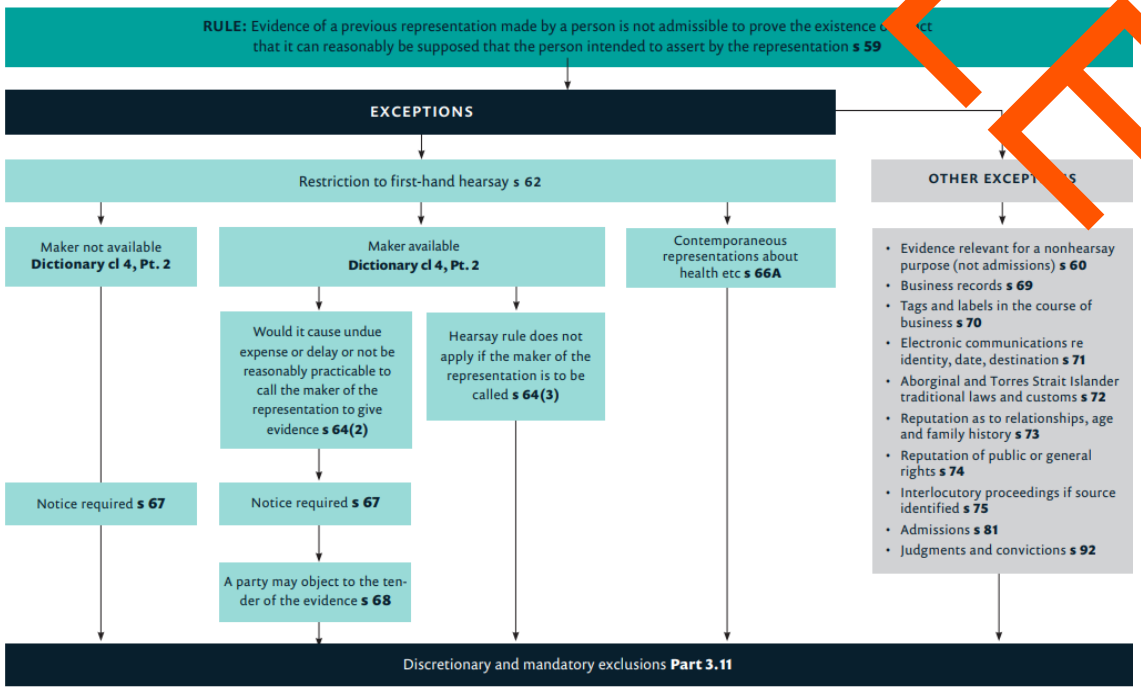
Single Complainant

The Queen v Dennis Bauer (2018) 359 ALR 359

A complainant's evidence of an accused uncharged acts may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant whether or not the uncharged acts have about them some special or unusual feature of the kind described in Hughes.

SAMPLE ONLY


RULE: Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed s 76
EXCEPTIONS
Summary of voluminous or complex documents s 50(3)
Evidence relevant for a purpose other than as opinion evidence s 77
Lay opinion s 78
Specialised knowledge (expert opinion)
Admissions s 81
Exceptions to the rule excluding evidence of judgments and convictions s 92
Character evidence s 110 and s 111
Discretionary and mandatory exclusions Part 3.11


RULE: Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation s 59
EXCEPTIONS
Restriction to first-hand hearsay s 62
Maker not available Dictionary cl 4, Pt. 2
Maker available Dictionary cl 4, Pt. 2
Contemporaneous representations about health etc s 66A
Would it cause undue expense or delay or not be reasonably practicable to call the maker of the representation to give evidence s 64(2)
Hearsay rule does not apply if the maker of the representation is to be called s 64(3)
Notice required s 67
Notice required s 67
A party may object to the tender of the evidence s 68
OTHER EXCEPTIONS
Evidence relevant for a nonhearsay purpose (not admissions) s 60
Business records s 69
Tags and labels in the course of business s 70
Electronic communications re identity, date, destination s 71
Aboriginal and Torres Strait Islander traditional laws and customs s 72
Reputation as to relationships, age and family history s 73
Reputation of public or general rights s 74
Interlocutory proceedings if source identified s 75
Admissions s 81
Judgments and convictions s 92
Discretionary and mandatory exclusions Part 3.11

SAMPLE ONLY