

# Tendency, Coincidence & Joint Trials

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## INTRODUCTION

- [1] Tendency evidence and coincidence evidence are among the more complicated and controversial areas of evidence law in criminal cases.
- [2] The issues that may arise in connection with tendency and coincidence evidence are many and varied. An examination of the full range of issues is beyond the scope of this paper. This paper seeks rather to address the central elements of the tests for admissibility and use of tendency and coincidence evidence.
- [3] The High Court in *IMM v The Queen* (2016) 257 CLR 300 and *Hughes v The Queen* (2017) 92 ALJR 52 determined a number of important questions relating to the tests for admissibility and use of tendency and coincidence evidence. This paper therefore extracts a number of statements of principle in the judgments in these cases.
- [4] An appreciation of the processes of reasoning underlying tendency evidence and coincidence evidence is necessary for a sound understanding of the operation of the tests for their admissibility and use. This paper extracts a number of statements of principle from decisions of intermediate appellate courts regarding these processes of reasoning.
- [5] Some particular issues frequently arise in connection with questions of admissibility and use of tendency evidence and coincidence evidence. This paper attempts to summarise the ways in which appellate courts have approached some of the more commonly arising issues.
- [6] Finally, decisions regarding admissibility and use of tendency and coincidence evidence often have ramifications for whether trials of multiple counts will be joint or separate. This paper briefly addresses when joint or separate trials of multiple counts may be appropriate following determinations regarding the admissibility and use of tendency and coincidence evidence.

# TENDENCY

## Overview

- [7] Evidence known as tendency evidence under the *Evidence Act 1995* was known as propensity evidence at common law.
- [8] The provisions of the Act are the primary source in considering questions of *admissibility* of such evidence, rather than the pre-existing common law: see *IMM* at [35]. However, the reasoning process underlying use of tendency evidence under the Act is cognate with that underlying the use of propensity evidence at common law.
- [9] The common law treated propensity evidence as a form of circumstantial evidence: see *Pfennig v The Queen* (1995) 182 CLR 461 at 482-3.
- [10] In *Elomar v R; Hasan v R; Cheikho v R; Cheikho v R; Jamal v R* [2014] NSWCCA 303; 316 ALR 206 at [359]-[360], the Court (Bathurst CJ; Hoeben CJ at CL; Simpson J) described the reasoning process underlying the admission of tendency evidence as follows:

*“Tendency evidence is evidence that provides the foundation for an inference. The inference is that, because the person had the relevant tendency, it is more likely that he or she acted in the way asserted by the tendering party, or had the state of mind asserted by the tendering party on an occasion the subject of the proceedings. Tendency evidence is a stepping stone. It is indirect evidence. It allows for a form of syllogistic reasoning.*

*The process of reasoning is:*

- *on an occasion or occasions other than an occasion in question in the proceedings, a person acted in a particular way;*
- *it can therefore be concluded or inferred that the person had a tendency to act in that way;*
- *by reason of that tendency, it can therefore be concluded or inferred that, on an occasion in question in the proceedings, the person acted in conformity with that tendency.*

*Alternatively:*

- *on an occasion or occasions other than on an occasion in question in the proceedings, a person had a particular state of mind;*
- *it can therefore be concluded or inferred that the person had a tendency to have that state of mind;*
- *by reason of that tendency, it can therefore be concluded or inferred that, on an occasion in question in the proceedings, the person's state of mind conformed with that tendency.*

*Tendency evidence is a means of proving, by a process of deduction, that a person acted in a particular way, or had a particular state of mind, on a relevant*

*occasion, when there is no, or inadequate, direct evidence of that conduct or that state of mind on that occasion.”*

- [11] In *Hughes* at [16], the majority (Kiefel CJ, Bell, Keane and Edelman JJ) summarised the reasoning process as follows:

*“The trier of fact reasons from satisfaction that a person has a tendency to have a particular state of mind or to act in a particular way to the likelihood that the person had the particular state of mind or acted in a particular way on the occasion in issue.”*

- [12] Gageler J (in the minority) summarised it as follows (at [70]-[71]):

*“Applied to evidence of past conduct, tendency reasoning is no more sophisticated than: he did it before; he has a propensity to do this sort of thing; the likelihood is that he did it again on the occasion in issue.”*

*Tendency reasoning, as courts have long recognised, is not deductive logic. It is a form of inferential or inductive reasoning...”*

- [13] Authorities dealing with tendency evidence under the Act thus treat the underlying reasoning process as a form of inferential reasoning.

### **Evidence Act 1995 provisions**

- [14] The Dictionary to the Act defines tendency evidence as evidence of a kind referred to in section 97(1) that a party seeks to have adduced for the purpose referred to in that subsection.

- [15] The purpose for which the evidence is tendered therefore defines it as tendency evidence: *David L'Estrange v The Queen* [2011] NSWCCA 89; 214 A Crim R 9 at [59]; *CA v R* [2017] NSWCCA 324 at [81].

- [16] Accordingly, evidence that is tendered for a non-tendency purpose (for example, as context or relationship evidence) but which could also be used as tendency evidence, need not satisfy the conditions for admissibility of tendency evidence.

- [17] Section 95 of the Act provides that:

- 1) *Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter 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.*

- [18] Section 97(1) of the Act provides that:

*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 (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind 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.*

[19] Section 99 of the Act provides that:

*Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.*

[20] Section 101(2) of the Act provides that:

*Tendency evidence about a defendant ... that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.*

## **Notice**

[21] Sections 97(1)(a), 98(1)(a), 99 and 100 of the Act create a 'novel system requiring notice': *R v Ellis* (2003) 58 NSWLR 700; 144 A Crim R 1, [2003] NSWCCA 319 at [80].

[22] The purpose of the requirement for notice pursuant to s 97(1)(a) is not simply to ensure the other party is informed of the intention to adduce tendency evidence but to ensure the asserted tendency is properly articulated and the evidence proposed to be adduced in support of it is clearly identified.

[23] In *Hughes* at [105], Gageler J described the function of a tendency notice as follows:

*"Making the evaluative judgment required of a court in the implementation of the tendency rule is facilitated by the procedural requirement that a party must ordinarily give notice of an intention to seek to adduce tendency evidence. The utility of the tendency notice goes beyond providing procedural fairness to other parties. The tendency notice provides the court, at the critical time of assessing the admissibility of tendency evidence, with a statement of the particular tendency which the party seeking to adduce the tendency evidence seeks to prove by it. The importance of explicitly identifying in the notice the particular tendency that is asserted, as Howie AJ put it in *Bryant v R*, 'should be obvious: how else is the court going to be able to make a rational decision about the probative value of the evidence'. By identifying the particular tendency that the evidence is asserted to prove, the notice allows the court to evaluate the strength of the connection between the evidence and the tendency and the strength of the connection between the tendency and the fact in issue."*

## **Section 97 determination**

### Significant probative value

[24] The Dictionary to the Act defines the probative value of evidence as the extent to which the evidence could rationally affect the assessment of the probability of the existence of facts in issue in the proceedings.

[25] 'Significant probative value' has been interpreted as connoting "something more than mere relevance but something less than a 'substantial' degree of relevance": *R v Lockyer* (1996) 89 A Crim R 457 at 459; *DSJ v The Queen* [2012] NSWCCA 9; 84 NSWLR 758 at [58] and [60].

[26] The majority in *Hughes* adopted (at [40]) the following description of 'significant probative value' from Campbell JA's judgment in *R v Ford* [2009] NSWCCA 306; (2009) 201 A Crim R 451 at [125]:

*"[T]he disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged."*

[27] In *IMM* at [103], Gageler J observed that:

*"To the extent that similes can help elucidate the statutory measure of 'significant', the capacity of the evidence to contribute to the proof or disproof of the existence of the fact in issue does not need to be 'substantial' but does need to be 'important' or 'of consequence'."*

[28] The determination whether probative value is significant is an evaluative judgment about which minds may differ, as the majority in *Hughes* noted (at [16]):

*"[T]he open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means it is inevitable that reasonable minds might reach different conclusions."*

[29] The majority in *Hughes* made clear that the determination whether tendency evidence has significant probative value requires two separate evaluations: first, whether the evidence supports the asserted tendency; and secondly, whether the asserted tendency supports the elements of the offence.

[30] The majority said (at [41]):

*"The assessment of whether the evidence has significant probative value involves consideration of two interrelated, but separate matters. The first is the extent to which the evidence supports the asserted tendency. The second is the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters. By seeing that there are two matters involved it is easier to appreciate the dangers in focusing on single labels such as 'underlying unity', 'pattern of conduct' or 'modus operandi'. In summary there is likely to be a high degree of probative value where (i) the evidence by itself or together with other evidence strongly supports proof of a tendency and (ii), the tendency strongly supports the proof of a fact that makes up the offence charged"*.

[31] The majority in *Hughes* also made clear that these evaluations must be made of the evidence in relation to each count (at [40]):

*"Of course, where there are multiple counts on an indictment, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible."*

[32] It is clear following *Hughes* that identification of the facts in issue in the proceedings is fundamental to a proper determination of the admissibility of tendency evidence. The majority said (at [16]):

*“The starting point requires identifying the tendency and the fact or facts in issue which it is adduced to prove. The facts in issue in a criminal proceeding are those which establish the elements of the offence.”*

[33] Nevertheless, the facts in issue in the proceedings should not be equated with the facts directly establishing the elements of the alleged offence.

[34] The majority in *Hughes* illustrated the manner in which an asserted tendency may bear on facts in issue (at [40]):

*“In the trial of child sexual offences, it is common for the complainant’s account to be challenged on the basis that it has been fabricated or that anodyne conduct has been misinterpreted. Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded.”*

[35] The Victorian Court of Appeal in *Dennis Bauer (pseudonym) v R (No 2)* [2017] VSCA 176 at [62] summarised the way in which the tendency evidence bore on the facts in issue in *Hughes*:

*“In essence, the tendency evidence in Hughes had significant probative value because it made probable that which would otherwise be regarded as improbable; that is, engaging in sexual conduct in circumstances in which the appellant ran a real risk of discovery by other adults.”*

[36] It should be noted that in the absence of agreed facts or admissions in the proceedings, the court may proceed on the assumption all facts are in issue in assessing the probative value of the evidence (cp. *Stubley v State of Western Australia* (2011) 242 CLR 374).

### Considerations

[37] A number of particular questions commonly arise in the context of the assessment of probative value of tendency evidence. Some of these are discussed below.

### *Similarities*

[38] Until the High Court’s decision in *Hughes*, controversy existed as to whether similarity between the conduct the subject of the tendency evidence and that the subject of the charged offence was necessary for the tendency evidence to have significant probative value.

[39] The controversy manifested in the differing approaches of the NSW Court of Criminal Appeal and the Victorian Court of Appeal.



[40] The NSW Court of Criminal Appeal approach was exemplified in *R v Ford* (2009) 201 A Crim R 451 and *R v PWD* (2010) 205 A Crim R 75, which rejected the contention that conduct the subject of the tendency evidence was required to be ‘closely similar’ with that the subject of the charged offence.

[41] The Victorian Court of Appeal approach was exemplified in *Velkoski v The Queen* [2014] VSCA 121; 45 VR 680. In *Velkoski* at [164], the Court (Redlich, Weinberg and Coghlan JJA) stated:

*“Section 97(1)(b) is intended to address the risk of an unfair trial through the use of tendency reasoning by ensuring a sufficiently high threshold of admissibility. We consider the approach currently taken by the New South Wales Court of Criminal Appeal to tendency and coincidence goes too far in lowering the threshold to admissibility. To remove any requirement of similarity or commonality of features does not in our respectful opinion give effect to what is inherent in the notion of ‘significant probative value’. If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible. This view, we think, clearly represents the present.”*

[42] The controversy culminated the majority’s statement in *Hughes* (at [39]) that:

*“Commonly, evidence of a person’s conduct adduced to prove a tendency to act in a particular way will bear similarity to the conduct in issue. Section 97(1) does not, however, condition the admission of tendency evidence on the court’s assessment of operative features of similarity with the conduct in issue. The probative value of tendency evidence will vary depending upon the issue that it is adduced to prove. In criminal proceedings where it is adduced to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence. Different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence.”*

[43] In *Dennis Bauer (pseudonym) v R (No 2)* [2017] VSCA 176 at [55], the Victorian Court of Appeal acknowledged the effect of *Hughes* for its previous jurisprudence regarding the significance of similarities in the assessment of the probative value of tendency evidence:

*“Much of the accepted approach to tendency evidence in this State — digested and explained in Velkoski — must now be significantly qualified in light of the treatment of the subject by the majority in Hughes.”*

[44] Nevertheless, the nature and extent of any similarities between the conduct the subject of the tendency evidence and that the subject of the charged offence remain relevant to the assessment of the probative value of tendency evidence: *Hughes* at [39].

[45] Basten JA explained in *Saoud v R* (2014) 87 NSWLR 481; (2014) 156 A Crim R 308; [2014] NSWCCA 136 at [44] that the nature of the similarities required for tendency evidence “will depend very much on the circumstances of the case”.

- [46] The significance of similarities for the assessment of the probative value may be less where the fact in issue is the occurrence of the offence rather than the identity of the offender (*Hughes* at [41]).

#### *Other evidence*

- [47] The terms of section 97(1)(b) make clear that the probative value of the evidence must be considered having regard to other evidence adduced or to be adduced.
- [48] The majority in *Hughes* emphasised that in considering whether tendency evidence has significant probative value it should not be viewed in isolation but rather in conjunction with other evidence adduced or to be adduced (at [40]):

*“The only qualification to this is that it is not necessary that the disputed evidence has this effect by itself. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged...”*

- [49] However, while the other evidence adduced or to be adduced must be taken into account, it may be productive of circular reasoning to take into account other evidence in support of the alleged offence in considering whether the asserted tendency exists if this is then relied upon as proof of the same alleged offence.

#### *Generality & particularity*

- [50] The generality or particularity with which an asserted tendency is stated may have ramifications for the assessment of the probative value of tendency evidence. A tendency stated with a high degree of generality may be compromised in its capacity to achieve significant probative value having regard to the facts in issue in the case: *Sokolowskyj v Regina* (2014) 239 A Crim R 528; [2014] NSWCCA 55 at [40]; *Ibrahim v Pham* [2007] NSWCA 215 at [264].

- [51] In *Hughes* [40], the majority said:

*“The particularity of the tendency and the capacity of its demonstration to be important to the rational assessment of whether the prosecution has discharged its onus of proof will depend upon a consideration of the circumstances of the case...”*

- [52] In *Hughes* at [64], the majority said:

*“A tendency expressed at a high level of generality might mean that all the tendency evidence provides significant support for that tendency, but it will also mean the tendency cannot establish anything more than relevance. In contrast a tendency expressed at a level of particularity will be more likely to be significant.”*

#### *Reliability & credibility*

- [53] Until the High Court’s decision in *IMM*, controversy existed as to whether issues of reliability and credibility were to be taken into account in the assessment of probative value of tendency evidence.

- [54] The controversy manifested in the differing approaches of the NSW Court of Criminal Appeal and the Victorian Court of Appeal. The Victorian Court of Appeal approach exemplified in *Dupas v The Queen* (2012) 40 VR 182; [2012] VSCA 328 contrasted with that of the NSW Court of Criminal Appeal exemplified in *R v Shamouil* (2006) 66 NSWLR 228; [2006] NSWCCA 112 and *R v XY* (2013) 84 NSWLR 363; [2013] NSWCCA 121.
- [55] In *Dupas*, the Victorian Court of Appeal held that questions of reliability but not credibility were to be taken into account in the assessment of probative value.
- [56] In *Shamouil*, Spigelman CJ held that questions of reliability and credibility were not to be taken into account in the assessment of probative value. A five-judge bench of the NSW Court of Criminal Appeal in *XY* effectively approved *Shamouil* (although there were some differences of opinion among members of the bench).
- [57] The controversy culminated in the High Court's decision in *IMM*. The judgments of the members of the court differed significantly regarding this question. French CJ, Kiefel, Bell and Keane JJ in a joint judgment held that questions of reliability and credibility were inseparable and neither was to be taken into account in the assessment of probative value (at [51]-[52], [54]):

*“At a practical level, it could not be intended that a trial judge undertake an assessment of the actual probative value of the evidence at the point of admissibility. As Simpson J pointed out in R v XY, the evidence will usually be tendered before the full picture can be seen. A determination of the weight to be given to the evidence, such as by reference to its credibility or reliability, will depend not only on its place in the evidence as a whole, but on an assessment of witnesses after examination and cross-examination and after weighing the account of each witness against each other.*

*Once it is understood that an assumption as to the jury's acceptance of the evidence must be made, it follows that no question as to credibility of the evidence, or the witness giving it, can arise. For the same reason, no question as to the reliability of the evidence can arise. If the jury are to be taken to accept the evidence, they will be taken to accept it completely in proof of the facts stated. There can be no disaggregation of the two – reliability and credibility – as Dupas v The Queen may imply. They are both subsumed in the jury's acceptance of the evidence.*

...

*The view expressed in Dupas v The Queen, which reserved a particular role for the trial judge with respect to the reliability of evidence, did not have its foundations in textual considerations of the Evidence Act, but rather in a policy attributed to the common law. The Evidence Act contains no warrant for the application of tests of reliability or credibility in connection with ss 97(1)(b) and 137. The only occasion for a trial judge to consider the reliability of evidence, in connection with the admissibility of evidence, is provided by s 65(2)(c) and (d) and s 85. It is the evident policy of the Act that, generally speaking, questions as to the reliability or otherwise of evidence are matters for a jury, albeit that a jury would need to be warned by the trial judge about evidence which may be unreliable pursuant to s 165.”*

[58] Gageler J considered that questions of reliability but not credibility were to be taken into account in the assessment of probative value (at [94]-[96]):

*“Having laboured the point that the difference between the competing approaches is not often likely to be of great consequence, I turn squarely to address the underlying issue of statutory construction. My conclusion, like that of Nettle and Gordon JJ, is that the view of McHugh J is to be preferred to the view of Gaudron J.*

*Unlike Nettle and Gordon JJ, I gain no assistance in reaching that conclusion from construing the Evidence Act against the background of the common law. As Spigelman CJ observed in R v Ellis in a passage which was given prominence in the report of the joint review of the Uniform Evidence Acts in 2005:*

*“It is ... noteworthy that the Act provides a definition of 'probative value' ... Although the definition could well have been the same as at common law, the fact that such a term was defined at all suggests an intention to ensure consistency for purposes of the Evidence Act for the words, which appear in a number of different sections ... This suggests that the Act, even if substantially based on the common law, was intended to operate in accordance with its own terms.”*

*The common law did not employ the concept of probative value with statutory precision, and the common law developed no general rule to the effect that reliability (in the sense now used in the Evidence Act) was or was not to be assumed in assessing probative value for all purposes of determining admissibility. For some purposes, such as determining the admissibility of tendency evidence or of coincidence evidence, it came to be established that the assessment of probative value was required to proceed on the assumption that the truth of the evidence would be accepted. For other purposes, such as considering the discretion to exclude prosecution evidence, the probative value of which was outweighed by the risk of unfair prejudice to the accused, it has been acknowledged that considerations indicating evidence to be unreliable might on occasions be sufficient to deprive the evidence of probative value.*

*Together with Nettle and Gordon JJ, I consider the view of McHugh J – that an assessment of probative value necessarily involves considerations of reliability – to be a view that is compelled by the language, structure and evident design of the Evidence Act. To think of evidence that is relevant as evidence that has some probative value and to go on to think of probative value as a measure of the degree to which evidence is relevant is intuitively appealing. It is elegant; it has the attraction of symmetry. For many purposes, it may not be inaccurate. But it is not an exact fit for the conceptual framework which the statutory language erects. The statutory description of relevance requires making an assumption that evidence is reliable; the statutory definition of probative value does not provide for making that assumption. The conceptual framework which the statutory language erects therefore admits of the possibility that relevant evidence will lack probative value because it is not reliable.”*

[59] Nettle and Gordon JJ considered that questions of reliability and credibility were both to be taken into account in the assessment of probative value (at [182]):

*“The admission of the complaint evidence involves different considerations because it was contended that the complaint evidence should have been excluded under s 137. In light of what has been said about the proper construction of s 137, it follows that the judge erred in the application of s 137 by*

*assuming that the complaint evidence would be accepted and, therefore, by failing to have regard to the credibility and reliability of the evidence in determining whether it was of such probative value as not to be outweighed by the danger of unfair prejudice to the appellant.”*

- [60] In essence, *IMM* approved the approach of the NSW Court of Criminal Appeal in *Shamouil* and *XY*, and rejected that of the Victorian Court of Appeal in *Dupas*.
- [61] In assessing the probative value of evidence following *IMM*, a trial judge must assume the jury will accept the evidence, and it is not the function of the trial judge to assess its credibility or reliability, or to predict how the jury may treat it.
- [62] However, questions remain following *IMM* as to the extent to which a trial judge may consider competing inferences arising from the evidence in the assessment of probative value (see *Shamouil* at [61]-[65]; *DSJ v R*; *NS v R* (2012) 84 NSWLR 758; [2012] NSWCCA 9 at [98] and [132]; and *XY*).

### *Concoction & contamination*

- [63] The question whether the possibility of concoction or contamination may be taken into account in the assessment of probative value of tendency evidence is also unsettled.
- [64] Basten JA explained the terms ‘concoction’ and ‘contamination’ in *McIntosh v R* [2015] NSWCCA 184 at [46]:
- “The concept of “concoction” suggests a deliberate fabrication of the evidence. By contrast, the term “contamination” may involve an unconscious process of suggestion being adopted.”*
- [65] A line of NSW Court of Criminal Appeal authority continues to support the proposition that the possibility of concoction or contamination may be taken into account in assessing the probative value of tendency evidence.
- [66] In *Jones v R* (2014) 246 A Crim R 425; [2014] NSWCCA 280 at [88]-[90], Bellew J (Gleeson JA and Schmidt J agreeing) stated that while it was not the function of the trial judge to make assessments of credibility or reliability, or to predict how the jury would treat the evidence, it was conceivable there may be cases where the issue of concoction or contamination may give rise to competing inferences relevant to the determination of probative value, and that the trial judge may take into account, without determining acceptance or rejection of, such competing inferences as arise from evidence.
- [67] In *DJW v R* [2015] NSWCCA 164 at [41]-[42], RA Hulme J (Simpson and Bellew JJ agreeing) noted *Jones* and accepted that the possibility of concoction or contamination might be taken into account in assessing probative value.
- [68] In *McIntosh* at [47], Basten JA (Hidden and Wilson JJ agreeing) rejected the proposition that the possibility of concoction or contamination could be taken into account in determining whether tendency evidence has significant probative value:

*“Whilst, in determining probative value as a question of capability to affect the assessment of a fact in issue, the court is not required to disregard inherent implausibility, on the other hand, contestable questions of credibility and reliability are not for the trial judge, but for the jury. Accordingly, the suggestion that the possibility of concoction is a factor which must be taken into account in determining whether particular evidence has significant probative value should not be accepted.”*

[69] The judgment of the plurality in *IMM* endorsed this approach (see [59] and the reference in footnote 45 to the judgment of Basten JA in *McIntosh*).

[70] Authorities since *IMM* have differed on this question.

[71] In *R v GM* [2016] NSWCCA 78 at [100], Hoeben CJ at CL (Hall J agreeing; and Button J agreeing in separate reasons), referred to *Jones, DJW* and *McIntosh*, and concluded that competing inferences arising from the possibility of concoction or contamination may, but contestable questions of credibility and reliability may not, be taken into account in evaluating the probative value of the evidence.

[72] In *Abbott (a pseudonym) v R* [2017] NSWCCA 149 at [16], Basten JA (McCallum J agreeing; Fagan J agreeing in separate reasons) referred to *IMM* at [59], and stated there was “no reason” for the possibility of concoction or contamination to be taken into account in evaluating the probative value of the evidence.

#### *Sole complainant source*

[73] In *IMM*, the High Court also considered the question whether tendency evidence could have significant probative value where its source was the evidence of a sole complainant.

[74] French CJ, Kiefel, Bell and Keane J jointly stated (at [62]-[64]):

*“In a case of this kind, the probative value of this evidence lies in its capacity to support the credibility of a complainant’s account. In cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met. That is not to say that a complainant’s unsupported evidence can never meet that test. It is possible that there may be some special features of a complainant’s account of an uncharged incident which give it significant probative value. But without more, it is difficult to see how a complainant’s evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value.”*

*Evidence from a complainant adduced to show an accused’s sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant’s account of the charged offences is true. It is difficult to see that one might reason rationally to conclude that X’s account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.*

*For these reasons the tendency evidence given by the complainant did not qualify as having significant probative value and was not admissible under s 97(1)(b)."*

[75] Gageler J stated at [105]-[108]:

*"Provided the jury could rationally find the complainant to be credible, her tendency evidence was of some probative value: if the jury were to find the complainant to be credible, the evidence provided a basis on which the jury could go on rationally and indirectly to infer that there was an increased probability that the appellant committed one or more of the sexual offences against the complainant with which he was charged. The real question is whether that probative value was capable of warranting the label of significant.*

*The difficulty of concluding that the complainant's testimony about the massage incident was capable of having significant probative value was not just that the testimony was uncorroborated. Her testimony about the massage incident was uncorroborated within a context in which the credibility of the whole of her testimony was in issue. There was nothing to make her uncorroborated testimony about that incident more credible than her uncorroborated testimony about the occasions of the offences charged. There was no rational basis for the jury to accept one part of the complainant's testimony but to reject the other. The increased probability of the appellant having committed the offences which would follow from the jury accepting that part of the complainant's testimony which constituted tendency evidence could in those circumstances add nothing of consequence to the jury's assessment of that probability based on its consideration of that part of the complainant's testimony which constituted direct testimony about what the appellant in fact did on the occasions of the offences. The probative value of the tendency evidence could not be regarded as significant.*

*For that reason, in my view, the tendency evidence was improperly admitted in the present case, and application of the correct test of probative value could not have resulted in the tendency evidence having been properly admitted."*

### *Unusual features*

[76] It is not a condition of admissibility of tendency evidence that the evidence relate to conduct of the accused involving unusual features; commonplace features may be significant in the context of the facts in issue in a given case: *BC v R* [2015] NSWCCA 327.

[77] However, where the evidence discloses conduct of the accused involving 'striking similarities', 'unusual features', 'underlying unity', 'system' or 'pattern', this may increase the probative value of the evidence: *R v Fletcher* (2005) 156 A Crim R 308; [2005] NSWCCA 338 at [60], [165]; *Saoud* at [39], [42].

[78] In *Hughes* the majority illustrated the manner in which conduct that was considered 'unusual' was of significance in the context of the facts in issue in the case (at [57]):

*"An inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination are unusual as a matter of ordinary human experience. Often, evidence of such an inclination will*

*include evidence of grooming of potential victims so as to reveal a 'pattern of conduct' or a 'modus operandi' which would qualify the evidence as admissible at common law. But significant probative value may be demonstrated in other ways. In this case the tendency evidence showed that the unusual interactions which the appellant was alleged to have pursued involved courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by. This level of disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience. The evidence might not be described as involving a pattern of conduct or modus operandi — for the reason that each alleged offence involved a high degree of opportunism; but to accept that that is so is not to accept that the evidence does no more than prove a disposition to commit crimes of the kind in question."*

### *Offence or misconduct*

- [79] It is not necessary that tendency evidence relate to the accused's commission of an offence or some other form of misconduct but rather that the evidence makes significantly more likely the facts making up the charges: *Hughes* at [41].
- [80] Conversely, the fact that tendency evidence discloses merely the commission of another offence of the same kind may not make significantly more likely the facts making up the charged offences.

### *Number of instances*

- [81] The fact that tendency evidence relates to a single instance of conduct of the accused will affect its probative value but may not be such as tonecessarily entirely deprive it of the capacity to have significant probative value: *Aravena v R* [2015] NSWCCA 288 at [89]; *R v F* (2002) 129 A Crim R 126; [2002] NSWCCA 125.

## **Section 101 determination**

### Prejudicial effect

- [82] Section 101(2) refers to the prejudicial effect the evidence may have on the accused. Notably, the provision omits use of the adjective 'unfair' (in contrast to s 137 which refers to 'unfair' prejudice).
- [83] Authorities on s 101(2) have consistently equated its reference to prejudicial effect with the concept of 'unfair' prejudice in s 137: see e.g. *Hughes* at [69].
- [84] 'Unfair prejudice' in the context of s 137 has been described as a real risk that the evidence would be misused by the jury in some unfair way that is logically unconnected with the purpose of its tender: *Papakosmas v The Queen* (1999) 196 CLR 297 at [91]; *R v Shamouil* at [72]-[73].
- [85] Prejudicial effect of tendency evidence cannot be equated with any prejudice to the accused; all tendency evidence is prejudicial to the accused.
- [86] Tendency evidence may have a prejudicial effect on the accused in various ways. The majority in *Hughes* outlined a number of ways in which tendency evidence may have a prejudicial effect (at [17]):



*“The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury’s emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.”*

- [87] Other circumstances in which tendency evidence has been recognised to have a potentially prejudicial effect on the accused include where it may provoke an irrational or emotional response in the jury: *R v MM* [2014] NSWCCA 144 at [43].
- [88] Tendency evidence may also have a prejudicial effect where it is liable to cause confusion or distraction of the jury from the primary issues in the trial: *Saoud* at [59].
- [89] Tendency evidence may also have a prejudicial effect where the jury may use the evidence in impermissible ways despite directions to the contrary: *DJV v R* (2008) 200 A Crim R 206; [2008] NSWCCA 272 at [31].
- [90] Tendency evidence may also have a prejudicial effect where it discloses bad character of an accused person in a context separate from the issues in the trial: *Derwish v The Queen* [2016] VSCA 72 at [77].
- [91] The question whether the possibility of concoction or contamination should be taken into account in assessing the prejudicial effect of tendency evidence remains unsettled following *IMM*.
- [92] In *IMM*, the plurality noted (at [59]) that the approach in *Hoch v The Queen* (1988) 165 CLR 292 was inconsistent with determinations for admissibility of tendency evidence pursuant to provisions of the Act:
- “...The premise for the appellant’s submission – that it is “well-established” that under the identical test in s 98(1)(b) the possibility of joint concoction may deprive evidence of probative value consistently with the approach to similar fact evidence stated in Hoch v The Queen – should not be accepted. Section 101(2) places a further restriction on the admission of tendency and coincidence evidence. That restriction does not import the “rational view ... inconsistent with the guilt of the accused” test found in Hoch v The Queen.”*
- [93] However, the plurality went on to acknowledge that the question whether the possibility of concoction or contamination should be taken into account in assessing the prejudicial effect of tendency evidence may need to be addressed when it arose in a concrete factual setting (at [59]).
- [94] In evaluating the extent to which the evidence may have a prejudicial effect on the accused, directions that would be given to the jury must be taken into account.

[95] It is necessary that the prejudicial effect be precisely identified for the purpose of the weighing exercise and consideration of whether directions may ameliorate it: *BC v R* [2015] NSWCCA 327 at [107]-[110].

[96] It is conventional to presume directions to the jury will be an effective safeguard against the potential prejudicial effect of evidence on the accused. *Gilbert v The Queen* (2000) 201 CLR 414 is commonly cited as authority for this presumption. In *Gilbert* at [31], McHugh J said:

*“The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was rejected or disregarded, no one – accused, trial judge or member of the public – could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves a jury trial. If it was rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian state. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.”*

[97] However, a number of authorities have acknowledged that it cannot be presumed directions to the jury will necessarily be effective to neuter any and all prejudicial effect that tendency evidence might have: *Sokolowskyj* at [52]-[56]. It has been recognised that directions may not be effective entirely to confine the purposes for which the jury might use tendency evidence in some circumstances: *DJV* at [31].

[98] In considering the potential prejudicial effect of tendency evidence on the accused arising from the possibility of concoction or contamination, directions that would be given to the jury should be taken into account: *R v GM* [2016] NSWCCA 78 at [123].

[99] Directions to be given to the jury would stress that the jury must be satisfied there is no reasonable possibility of concoction or contamination of the evidence of the witnesses concerned before the jury may use their evidence for tendency purposes: *R v GM* [2016] NSWCCA 78 at [125].

## **Directions**

[100] In the event tendency evidence is permitted, the jury should be directed as to the necessity to be satisfied of the facts relied on to establish the asserted tendency as well as the existence of the asserted tendency (consistently with the steps involved in the determination of admissibility of tendency evidence identified in *Hughes*).

[101] Conventional directions where tendency evidence has been admitted or tendency use has been permitted include directions against substitution of the tendency evidence for that the subject of the charges; reasoning the accused is generally a person of bad character; or reasoning that the accused may have done something wrong on one occasion that he/she is the sort of person who

would have done something wrong on the occasion the subject of the charge (see the model directions in the Criminal Trial Bench Book).

### Standard of proof

- [102] The standard of proof applicable to tendency evidence remains unsettled.
- [103] In *Doyle v R* [2014] NSWCCA 4 at [129], there was said to be 'no doubt' that conduct relied upon for tendency purposes had to be established beyond reasonable doubt (citing *DJV v R* [2008] NSWCCA 272 at [29] and [30]-[31]).
- [104] In *DJV*, McClellan CJ at CL cited *HML v The Queen* (2008) 235 CLR 334 as authority for the proposition that until the High Court held otherwise juries in child sexual assault trials should continue to be directed that tendency evidence must be established beyond reasonable doubt.
- [105] However, in *Campbell v R* [2014] NSWCCA 175 at [325]-[333], Simpson J queried the proposition that under the Act tendency evidence was required to be proved beyond reasonable doubt. Simpson J noted that *HML* was cited as authority for the proposition but was a case on the common law with conflicting judgments, and was in any event unclear as to whether either or both the acts relied on to establish the asserted tendency or the asserted tendency itself had to be proved beyond reasonable doubt. However, it was considered unnecessary to decide the question in *Campbell*, as it was in *McPhillamy v R* [2017] NSWCCA 130.
- [106] The Criminal Trial Bench Book model directions assume the standard of proof applicable remains beyond reasonable doubt for child sexual assault cases. The Bench Book directions require instruction to the jury both that the acts relied on to establish the asserted tendency be proved beyond reasonable doubt and that the asserted tendency itself be proved beyond reasonable doubt.

### Anti-tendency

- [107] Numerous categories of evidence relating to conduct of an accused person on occasions other than that the subject of the alleged offences may be admissible for purposes other than as tendency evidence.
- [108] The most commonly arising category of such evidence is context evidence. Conduct of the accused on occasions other than that the subject of the alleged offences may be relevant as context evidence in various ways.
- [109] For example, context evidence was relevant in numerous ways in the circumstances of *KJS v R* (2014) 86 NSWLR 603; [2014] NSWCCA 27, as McClellan CJ at CL summarised (at [34]):
- i. To demonstrate that there was a process of habituating ISS to physical contact with the appellant so that such contact seemed unremarkable.*
  - ii. To place count 1 in its proper context so that rather than appearing to be an extraordinary assault which had suddenly occurred, it could be seen as a result of a course of conduct in which sexual touching had been established between*

*the appellant and ISS as a normal activity and had progressed to a more serious form of indecent touching*

*iii. To provide a proper basis for the jury to make an assessment of the description by ISS of count 1 and more particularly her failure to resist the appellant, to cry out for help or to otherwise express surprise at what was, viewed in isolation, an almost unbelievable anomaly in the father/daughter relationship.*

*iv. To place count 2 in its proper context so that, rather than appearing to be another isolated and quite extraordinary sexual attack upon ISS, the offence was seen as the continuation and culmination of a consistent course of conduct over a period of years*

*v. To provide some explanation for the failure of ISS to complain about her father's conduct. Without the evidence of what could readily be considered as a slow process of habituating ISS to sexual activity, the jury might well have found it incredible that after the occurrence of count 1 (and later count 2), ISS made no complaint.*

[110] However, there is frequently confusion regarding the purpose for which such evidence is admitted resulting in numerous appeals where the evidence was not properly admitted, because of a failure to identify a proper basis for its admission; or where the evidence was properly admitted, because of a failure properly to explain the purpose and limited use that may be made of the evidence. Thus in *DJV* at [80], McClellan CJ at CL stressed the need carefully to consider the basis for the admission of context evidence.

[111] In the event evidence capable of being used as tendency evidence is admitted for another purpose it will be necessary for the jury to be directed against a tendency use of the evidence: *CA* [2017] NSWCCA 324 at [82]-[83].

[112] In the event no proper basis exists for the evidence as context evidence, its admission may give rise to the real risk of its use as tendency evidence when it has not been admitted for that purpose: *Norman v R* [2012] NSWCCA 230 at [35].

[113] In *Qualtieri v R* (2006) 171 A Crim R 463 at [80], McClellan CJ at CL (Latham J agreeing; Howie J agreeing with separate reasons) said of context evidence:

*“If admitted the trial judge must carefully direct the jury both at the time at which the evidence is given and in the summing up of the confined use they may make of the evidence. They should be told in clear terms that the evidence has been admitted to provide background to the alleged relationship between the complainant and the accused so that the evidence of the complainant and his/her response to the alleged acts of the accused, can be understood and his/her evidence evaluated with a complete understanding of that alleged relationship. The jury must be told that they cannot use the evidence as tendency evidence.”*

# COINCIDENCE

## Overview

- [114] Evidence known as coincidence evidence under the *Evidence Act 1995* was known as similar fact evidence at common law.
- [115] In *R v Ellis* (2003) 58 NSWLR 700; 144 A Crim R 1, [2003] NSWCCA 319 at [75]-[78], Spigelman CJ noted that the use of different terminology in the Act with precise and comprehensive definitions manifested an intention to state the principles comprehensively and afresh.
- [116] At common law, the test for admissibility of similar fact evidence was whether there was a rational view consistent with the innocence of the accused: *Pfennig* at 483.
- [117] The five-judge bench of the NSW Court of Criminal Appeal in *Ellis* concluded that the common law test in *Pfennig* was inconsistent with the provisions of the Act. The trial judge was therefore not in error in ruling coincidence evidence and admissible without applying the *Pfennig* test.
- [118] The High Court granted but revoked special leave to appeal in *Ellis*, stating that Spigelman CJ's analysis of the Act was correct: [2004] HCA Trans 488.
- [119] Spigelman CJ's analysis in *Ellis* suggests the scope for coincidence reasoning is now broader than it was with similar fact evidence at common law.
- [120] The reasoning process underlying coincidence evidence is a form of inferential reasoning.
- [121] In *R v Gale; R v Duckworth* (2012) 217 A Crim R 487 at [25], Simpson J (McClellan CJ at CL and Fullerton J agreeing) described the reasoning process underlying coincidence evidence as follows:

*“At its heart, s 98 is a provision concerning the drawing of inferences. The purpose sought to be achieved by the tender of coincidence evidence is to provide the foundation upon which the tribunal of fact could draw an inference. The inference is that a person did a particular act or had a particular state of mind. The process of reasoning from which that inference would be drawn is:*

- *two or more events occurred; and*
- *there were similarities in those events; or there were similarities in the circumstances in which those events occurred; or there were similarities in both the events and the circumstances in which they occurred; and*
- *having regard to those similarities, it is improbable that the two events occurred coincidentally;*
- *therefore the person in question did a particular act or had a particular state of mind.”*

[122] In some circumstances, the same body of evidence may potentially support both coincidence and tendency reasoning. For example, in a joint trial of an accused for sexual offences against multiple complainants, coincidence reasoning may support the rational inference that the accused did the acts alleged because of the improbability of multiple individual complainants making similar allegations about the same person. However, the evidence of one or more complainant may also be relied upon to establish a tendency of the accused to act in a particular way or have a particular state of mind that may be relevant to the determination of facts in issue in respect of alleged offences against another complainant, particularly where the allegations involve relevant similarities.

[123] In *El Haddad v R* (2015) 88 NSWLR 93; (2015) 248 A Crim R 537; [2015] NSWCCA 10 at [46], Leeming JA said (McCallum and RA Hulme JJ agreeing):

*“The “tendency rule” and the “coincidence rule” are distinct, although it is trite that there is an overlap between the two, as was observed, for example, in KJR v R [2007] NSWCCA 165; 173 A Crim R 226 at [46]. More recently, in Saoud v R [2014] NSWCCA 136 at [43], Basten JA observed that there is awkwardness in separating “tendency” evidence and “coincidence” evidence where there is no dispute as to the identity of the alleged offender but what is in issue is whether the offences occurred: in a sexual assault case, evidence of an accused’s conduct on another occasion is apt to support reasoning to the effect both that it is improbable that two complainants made independent complaints of similar conduct and that the offender has a tendency to conduct himself in a particular way. The “overlap” or “awkwardness” comes about because of the generality of the modes of proof described in ss 97 and 98, and because tendency evidence will usually depend on establishing similarities in a course of conduct. As Basten JA said in Saoud at [48], “where relevant and appropriate, a proper consideration of similarities will constitute an essential part of the application of s 97, as this Court has accepted on numerous occasions”.*”

[124] In other circumstances, coincidence and tendency reasoning may not both be available because of the differences in the respective reasoning processes. Tendency reasoning is inherently sequential in nature; proof of the asserted tendency logically precedes its use in proof of facts in issue. Coincidence reasoning is inherently holistic in nature; proof of facts in issue depends on inferences to be drawn from a number of events. For example, in a case where the fact in issue is the identity of the offender, coincidence reasoning may be available from evidence of a number of events with relevant similarities but tendency reasoning may not be available because proof of the asserted tendency of the accused cannot be presumed (see e.g. *R v Matonwal*; *R v Amod* [2016] NSWCCA 174).

[125] The High Court did not consider the overlap between tendency and coincidence evidence in *Hughes*, as the Crown had not relied on the improbability of multiple complainants falsely making the allegations the accused (see at [43]).

### **Evidence Act 1995 provisions**

[126] The Dictionary to the Act defines ‘coincidence evidence’ as evidence of a kind referred to in section 98(1) that a party seeks to have adduced for the purpose referred to in that subsection.

[127] Accordingly, the purpose for which the evidence is tendered therefore defines it as coincidence evidence (as with tendency evidence):

[128] Section 95 of the Act provides that:

*(1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter 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.*

[129] Section 98(1) of the Act provides that:

*Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally 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.*

*Note: One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.*

[130] In considering authorities on coincidence evidence, it is important to note that amendments to s 98 were introduced in 2007. Prior to the amendments, the provision referred to 'two or more related events'. Admissibility depended on these related events being substantially and relevantly similar and the circumstances in which they occurred was substantially similar. Further, the concluding note was inserted in the amendments.

[131] Section 99 of the Act provides that:

*Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.*

[132] Section 101(2) of the Act provides that:

*[C]oincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.*

## **Notice**

[133] Notice is as important to the determination of admissibility of coincidence evidence as it is with respect to tendency evidence.

[134] In *Bryant v R* [2011] NSWCCA 26 at [50], Howie J said:

*“The importance of explicitly identifying the related events for the purpose of s 98 and the asserted tendency for the purpose of s 97 should be obvious: how else is the court going to be able to make a rational decision about the probative value of the evidence?”*

[135] In *R v Zhang* (2005) 158 A Crim R 504 at [131], Simpson J stated that a properly drafted coincidence notice required identification of four matters:

- *the two or more related “events” the subject of the proposed evidence;*
- *the person whose conduct or state of mind is the subject of the proposed evidence;*
- *whether the evidence is to be tendered to prove that a person did a particular act, and, if so, what that “act” is;*
- *whether the evidence is to be tendered to establish that that person had a particular state of mind, and, if so, what that “state of mind” is.*

## **Section 98(1) determination**

### Significant probative value

[136] Authorities regarding the meaning of the expression ‘significant probative value’ in the context of tendency evidence are equally applicable in the context of coincidence evidence: *JG v R* [2014] NSWCCA 138 at [105]; *R v Matonwal & Amod* [2016] NSWCCA 174 at [78].

[137] In *R v Zhang* (2005) 158 A Crim R 504 at [139], Simpson J set out the process for the determination of the probative value of coincidence evidence as follows:

*“(i) coincidence evidence is not to be admitted if the court thinks that evidence would not, either by itself, or having regard to other evidence already adduced, or anticipated, have significant probative value;*

*(ii) probative value is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue (see the Dictionary to the Evidence Act);*

*(iii) the actual probative value to be assigned to any item of evidence is a question for the tribunal of fact - here, the jury;*

*(iv) the probative value actually to be assigned to any item of evidence cannot finally be determined until all of the evidence in the case is complete;*

*(v) the task of the judge in determining whether to admit evidence tendered as coincidence evidence is therefore essentially an evaluative and predictive one. The judge is required, firstly, to determine whether the evidence is capable of rationally affecting the probability of the existence of a fact in issue; secondly (if that determination is affirmative) to evaluate, in the light of any evidence already adduced, and evidence that is anticipated, the likelihood that the jury would assign the evidence significant (in the sense explained by Hunt CJ at CL in *Lockyer* (1996) 89 A Crim R 457) probative value. If the evaluation results in a conclusion that the jury would be likely to assign the evidence*



*significant probative value, the evidence is admissible. If the assessment is otherwise, s 98 mandates that the evidence is not to be admitted.”*

[138] In *DSJ v R* (2012) 215 A Crim R 349; [2012] NSWCCA 9, a five-judge bench of the NSW Court of Criminal Appeal addressed the trial judge’s role in assessing the probative value of coincidence evidence. Bathurst CJ said (at [10]):

*“However, as Whealy JA has pointed out (at [78]-[81]), the trial judge in forming a view as to whether the evidence has significant probative value must consider by reference to the evidence itself or other evidence adduced or to be adduced by the party tendering it, whether there is a real possibility of an alternate explanation inconsistent with (in this case) the guilt of the party against whom it is tendered. This is because the availability of such an alternative hypothesis will be relevant to forming the view required by the section that the evidence has significant probative value. However, this does not involve either undertaking the fact-finding analysis suggested by senior counsel for DSJ or reaching a conclusion that the explanation for the coincidence proffered by the party seeking to tender the evidence was more probable than an alternative hypothesis. Each of these approaches go beyond what is required by the terms of s 98(1)(b) of the Act and would involve the judge usurping the fact-finding role of the jury.”*

[139] Whealy JA, in the passages mentioned above, said:

*“In this appeal the Crown has conceded that, in performing the task under s 98, a trial Judge may, in an appropriate case, have regard to an alternative explanation arising on the evidence. The Crown, however, insisted that, in so doing, the trial Judge is restricted to examining whether the Crown hypothesis has cogency, that is, whether the Crown evidence is capable of being regarded as significant in its ability to prove the Crown case. If the coincidence evidence, either by itself or having regard to other evidence in the Crown case, positively and forcefully suggested an explanation consistent with innocence, then the coincidence evidence could scarcely be regarded as important or of consequence in proving the fact or facts in issue. What is required is this: the trial Judge must ask whether the possibility of such an alternative explanation substantially alters his (or her) view as to the significant capacity of the Crown evidence, if accepted, to establish the fact in issue. Does the alternative possibility, in the Judge's view, rob the evidence of its otherwise cogent capacity to prove the Crown's case? If it does not, the trial judge may safely conclude that the evidence has significant probative value.*

*In a practical sense, there are two avenues of approach to be taken. First, in examining the coincidence evidence (together with other material already in evidence or to be adduced) the trial Judge is required to ask whether there emerges, from a consideration of all the Crown evidence, a possible explanation inconsistent with guilt. For regard to be had to the alternative explanation, it must be a real possibility, not a fanciful one. It must be a broad or overarching possibility, capable of being stated in general terms, even though it may derive from an individual piece or pieces of evidence or the evidence taken as a whole.*

*Secondly, the trial Judge must ask whether that possibility substantially alters his (or her) view as to the otherwise significant capacity of the coincidence evidence to establish the fact or facts in issue. Of course, if the trial Judge has already concluded that the coincidence evidence does not reach that level of significance in terms of its capacity, he will have rejected the evidence in terms of s 98. In*

*that situation, the possibility of an alternative inference may, for the time being, be set to one side. Later in the trial, when the evidence has concluded, that possibility will become a matter for the jury to assess and determine when it comes to consider whether the Crown has proved its case beyond reasonable doubt.*

*The Crown, in making its concession, however, stressed that at no stage in this process was the trial Judge required or entitled to assess the actual weight of any part of the evidence, or to make any actual assessment concerning the probabilities of any alternative theory. Nor was the trial judge required or entitled to make a comparison of the Crown theory and the probabilities of any alternative theory. This proposition appears consistent with established authority. Any attempt by the trial Judge to anticipate the actual weight the jury would attach to the evidence is prohibited, as I have explained.”*

[140] Accordingly, competing inferences may, but questions of credibility and reliability may not, be taken into account in assessing the probative value of coincidence evidence.

[141] In *Gale; Duckworth* at [25]- [26], Simpson J (McClellan CJ at CL and Fullerton J agreeing) revisited the question of the role of the trial judge in assessing the probative value of coincidence evidence:

*“What is important to recognise, in my opinion, is that this process of reasoning and the drawing of the inferences (that the person did the act or had the state of mind) is for the tribunal of fact: see *DSJ v R*; *NS v R* [2012] NSWCCA 9. Part of that process involves findings of fact. Did the two (or more) events occur? Were there relevant similarities? Where the party tendering the evidence relies upon a number of asserted similarities, the tribunal of fact must identify which, if any, of those similarities have been established. Before asking itself the penultimate question - is it improbable that the two events occurred coincidentally? - it must discard any asserted similarities not established.*

*The task for the judge in determining the admissibility of evidence that would permit the jury to undertake that reasoning process, and draw the ultimate inference, is what is presently in issue. Provided the evidence is such that would permit the jury, acting reasonably, to reach that conclusion or draw that inference, the evidence could be held to have significant probative value. It is a question of the capacity of the evidence to have that effect: *DSJ* at [8], [11], [55]. Subject to s 101, the evidence would, following that reasoning, be admissible.”*

[142] In *Gale; Duckworth* at [30]-[31], Simpson J identified the proper approach for the determination of the admissibility of coincidence evidence as follows:

*“The factual underpinnings of the s 98 decision to admit or reject coincidence evidence are:*

- *that there is evidence capable of establishing the occurrence of two or more events; and*
- *that there is evidence capable of establishing similarities in the two or more events; or*
- *that there is evidence capable of establishing similarities in the circumstances in which two or more events occurred;*

- *that there is evidence capable of establishing both similarities in the two or more events and similarities in the circumstances in which the two events occurred.*

*In a case in which it is found that there is such evidence, then, in my opinion, the correct process in the determination of the admission of evidence under s 98 involves a series of steps, as follows:*

- *the first step is to identify the ‘particular act of a person’ or the ‘particular state of mind of a person’ that the party tendering the evidence seeks to prove;*
- *the second step is to identify the ‘two or more events’ from the occurrence of which the party tendering the evidence seeks to prove that the person in question did the ‘particular act’ or had the ‘particular state of mind’;*
- *the third step is to identify the ‘similarities in the events’ and/or the ‘similarities in the circumstances in which the events occurred’ by reason of which the party tendering the evidence asserts the improbability of coincidental occurrence of the events;*
- *the fourth step is to determine whether ‘reasonable notice’ has been given of the intention to adduce the evidence (or, if reasonable notice has not been given, whether a direction under s 100(2) ought to be given, dispensing with the requirement);*
- *the fifth step is to make an evaluation whether the evidence will, either by itself or in conjunction with other evidence already given or anticipated, ‘have significant probative value’;*
- *in a criminal proceeding, if it is determined that the evidence would have ‘significant probative value’, the sixth step is the determination whether the probative value of the evidence ‘substantially outweighs’ any prejudicial effect it may have on the defendant (s 101(2));*
- *the sixth step necessarily involves some analysis both of the probative value of the evidence in question and any prejudicial effect it might have: R v RN [2005] NSWCCA 413, and a balancing of the two.”*

[143] In *El Haddad v R* (2015) 88 NSWLR 93; (2015) 248 A Crim R 537; [2015] NSWCCA 10 at [79], Leeming JA (McCallum and RA Hulme JJ agreeing) described the inquiry whether coincidence had significant probative value as follows:

*“...The question is whether there is a real possibility of an alternative explanation inconsistent with the appellant’s guilt, based on the evidence together with the other evidence in the Crown case. If there is such an alternative possibility, then that may rob the evidence of its significant probative value, in the manner described by Bathurst CJ and Whealy JA in DSJ at [10] and [78]-[81].”*

## Considerations

[144] Some particular questions that frequently arise in the context of considering the probative value of coincidence evidence are discussed below.

### *Cumulative effect*

[145] In assessing the probative value of coincidence evidence, it is necessary to consider the evidence as a whole, rather than separately to consider each particular circumstance relied upon (consistently with its nature as a form of circumstantial evidence).

[146] As Beech-Jones J (Hoeben CJ at CL agreeing) observed in *R v MR* [2013] NSWCCA 236 at [79]:

*“[G]iven that s 98 is addressing evidence that is put forward to invite the trier of fact to engage in a particular form of probabilistic reasoning, it necessarily follows that the assessment of whether the evidence of the relevant events has either probative or significant probative value requires a consideration of the combined effect of all the relevant similarities. Unless they are all considered then the ‘basis’ upon which the evidence is put forward, namely that it is ‘improbable that the events occurred coincidentally’ and that instead the events are explicable by reason of the particular act or state of mind sought to be proved, such as the involvement of the same offender or offenders in all the events, cannot be properly addressed.”*

[147] It is therefore the cumulative effect of each of the features relied upon as coincidence evidence that must be considered in evaluating its probative value: *R v Matonwal*; *R v Awood* [2016] NSWCCA 174 at [75].

### *Other evidence*

[148] The terms of section 98(1)(b) make clear that the probative value of the evidence must be considered having regard to other evidence adduced or to be adduced.

[149] Accordingly, it is erroneous to assess the probative value of coincidence evidence in isolation from other evidence adduced or to be adduced: *Matonwal*; *Awood* at [75].

### *Similarities*

[150] Section 98(1), in contrast to s 97(1), is premised on the existence of similarities in the events the subject of the proposed coincidence evidence, and/or the circumstances in which the events occurred: *R v PWD* [2010] NSWCCA 209; (2010) 205 A Crim R 75 at [79]; *Saoud* at [45].

[151] Accordingly, the determination of the probative value of coincidence evidence inevitably involves a consideration of the nature and extent of similarities in the events and/or the circumstances in which they occurred.

[152] However, identification of dissimilarities does not necessarily mean coincidence evidence will be deprived of significant probative value.

[153] In *Selby v R* [2017] NSWCCA 40, the Court (Leeming JA, Schmidt and Wilson JJ) responded to a contention regarding the significance of dissimilarities for the determination to permit coincidence evidence as follows (at [23]-[24]):

*“[I]t is not to the point merely to identify various dissimilarities. One way of explaining why this is so is to observe that one incident occurred on a Monday, the other on a Friday. That particular dissimilarity has no bearing whatsoever on the process of inferential reasoning that it permitted.*

*The questions posed by ss 98 and 101 ultimately turn on a mode of reasoning based on the improbability that something was a coincidence. That mode of reasoning is not displaced by the fact that the two (or more) events bear some dissimilarities. Two (or more) events will always be dissimilar in some respects. The question is whether the dissimilarities undercut the improbability of something being a coincidence.”*

#### *Assertions cf. events*

[154] The note to s 98 states that one of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

[155] However, a combination of mere assertions cannot establish two or more ‘events’ with relevant similarities to support coincidence reasoning in proof of facts in issue.

[156] In *Gale; Duckworth* at [37], Simpson J described as a “serious logical fallacy” the prosecution’s reliance on a number of mere assertions to establish similarities in events which were in turn relied upon to prove the improbability of the fact in issue occurring coincidentally,.

#### *Unusual features*

[157] The nature of the events may affect the assessment of the probative value of coincidence evidence.

[158] The common law emphasised the significance of the nature of the events for the assessment of the probative value of similar fact evidence. In *Hoch v The Queen* (1988) 165 CLR 292, 294–5, Mason CJ, Wilson and Gaudron JJ explained the reasoning underlying this as follows:

*“The fact that the evidence reveals ‘striking similarities’, ‘unusual features’, ‘underlying unity’, ‘system’ or ‘pattern’ such that it raises, as a matter of common experience and logic, the objective improbability of some event having occurred other than as alleged by the prosecution.”*

[159] The scope for the availability of coincidence reasoning under the Act (discussed above) is such that it is not a condition of admissibility that the evidence relates to events with unusual features. However, evidence relating to events with unusual features may more readily have significant probative value than evidence relating to commonplace events.

### *Concoction & contamination*

- [160] Where the evidence of multiple complainants comprises relevant similarities, coincidence evidence probative value because of “the improbability of the witnesses giving accounts of happenings having requisite degree of similarity unless those happenings occurred” (*Hoch*). In such cases, the evidence of the multiple complainants is admitted to bolster the credibility of each other: see, e.g. *R v F* (2002) 129 A Crim R 126.
- [161] However, the improbability that a number of complainants would give accounts of similar events unless the accounts were true ceases to exist where there is a possibility of concoction or contamination.
- [162] The discussion regarding the significance of the possibility of concoction or contamination for the assessment of the probative value of tendency evidence is equally applicable to coincidence evidence (see above at [63]-[72]).

### **Section 101 determination**

#### Prejudicial effect

- [163] The discussion of the prejudicial effect that tendency evidence may have on an accused is equally applicable to coincidence evidence (see above at [82]-[99]).
- [164] In *El Haddad v R* (2015) 88 NSWLR 93; (2015) 248 A Crim R 537; [2015] NSWCCA 10 at [79], Leeming JA (McCallum and RA Hulme JJ agreeing) made the following observations regarding the determination required under s 101(2):
- “Section 101 will apply with much greater force when the only way in which evidence is said to be relevant is because of tendency or coincidence reasoning (for example, a sexual assault case where evidence is called of another complainant in respect of whom no charges have been laid). Where, as here, the evidence which was sought to be used for coincidence and tendency reasoning was (a) relevant to other charges which were able to be determined fairly at the same trial and (b) not said to be inherently unfairly prejudicial in its own right, then it is apt to be difficult for s 101 to apply so as to preclude tendency or coincidence reasoning based on it.”*
- [165] An example of circumstances in which coincidence evidence was considered to have “obvious” prejudicial effect not substantially outweighing its probative value is *Gale; Duckworth* (see at [34], [49]).
- [166] However, coincidence evidence will not be unfairly prejudicial to the accused merely because it has the capacity powerfully to implicate the accused in the commission of the subject offence: see *Ceissman v R* [2015] NSWCCA 74 at [46].

## **Directions**

### Standard of proof

- [167] The standard of proof applicable to coincidence evidence differs from that applicable to tendency evidence (see the discussion above at [102]-[106]).
- [168] As coincidence evidence is a form of circumstantial evidence, which is generally not required to be proved beyond reasonable doubt unless it relates to an essential intermediate fact, coincidence evidence may not need to be proved beyond reasonable doubt unless it is not relied on as an indispensable link in proof of guilt.
- [169] In *Folbigg v R* [2005] NSWCCA 23 at [103], it was accepted that there was no requirement that the coincidence evidence concerned was required to be proved beyond reasonable doubt in a case where the evidence was not relied on as an essential intermediate fact but one of several facts relied on to prove guilt.

### Concoction & contamination

- [170] In a case where the improbability of multiple complainants independently making similar allegations against the accused unless they were true is permitted as coincidence reasoning, it will be invariably be necessary for the jury to be directed that the possibility of concoction or contamination must be excluded.

# JOINT TRIALS

## Criminal Procedure Act 1986 provisions

[171] Section 21(2) of the Criminal Procedure Act 1986 provides that:

*If of the opinion:*

*(a) that an accused person may be prejudiced or embarrassed in his or her defence by reason of being charged with more than one offence in the same indictment, or*

*(b) that for any other reason it is desirable to direct that an accused person be tried separately for any one or more offences charged in an indictment,*

*the court may order a separate trial of any count or counts of the indictment.*

[172] Section 29(1) of the *Criminal Procedure Act 1986* provides that:

*A court may hear and determine together proceedings related to 2 or more offences alleged to have been committed by the same accused person in any of the following circumstances:*

*(a) the accused person and the prosecutor consent,*

*(b) the offences arise out of the same set of circumstances,*

*(c) the offences form or are part of a series of offences of the same or a similar character.*

## General principles

[173] Generally, the answer to the question whether or not the evidence on one count is cross-admissible on another count will likely be determinative of whether an order for separate trials is in the interests of justice.

[174] Where evidence on counts relating to different complainants is not cross-admissible, separate trials of counts relating to each complainant will generally be appropriate: *De Jesus v The Queen* (1986) 61 ALJR 1.

[175] Where tendency and/or coincidence evidence is admitted, such that the evidence on counts relating to different complainants is cross-admissible, a joint trial of counts relating to all the complainants will often be appropriate: see e.g. *Abbott (a pseudonym) v R* [2017] NSWCCA 149 at [15]; *Donohoe v R* [2017] NSWCCA 174 at [93].

[176] In *Hughes*, the majority considered the hypothesis of separate trials for each complainant, with the only evidence against the appellant being the evidence of that complainant to highlight the importance of the tendency evidence (at [59]):

*“[I]n isolation, JP’s evidence might have seemed inherently unlikely: the appellant, a family friend, at dinner in JP’s home, absented himself from the party*



*and came into her bedroom, and without making any attempt to ensure her silence, commenced to invasively sexually assault her while his daughter lay sleeping in the same bed. The jury might well be disinclined to accept JP's evidence [...] Proof of the appellant's tendency to engage in sexual activity with underage girls opportunistically, notwithstanding the evident risk, was capable of removing a doubt which the brazenness of the appellant's conduct might otherwise have raised."*

- [177] In cases involving a single complainant but a number of counts, evidence of all the complainant's allegations will often be relevant otherwise than as tendency evidence (for example, as context evidence). In these circumstances, a joint trial of multiple counts relating to a single complainant will also often be appropriate.
- [178] Where tendency evidence is not admitted in a trial of multiple counts relating to a single complainant, and it is considered that any directions against tendency reasoning would be ineffective to eradicate the risk of prejudice to the accused arising from use of the evidence for tendency reasoning, an order for separate trials may be warranted.
- [179] Finally, whether or not tendency and/or coincidence evidence is admitted, there will of course always be cases where some feature of the evidence in respect of one or more counts gives rise to the risk of prejudice to the accused such that an order for separate trials of these counts will be in the interests of justice.