Tendency and Coincidence Evidence

Dina Yehia SC

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Introduction

Tendency / coincidence evidence and the rules governing its admission is not an easy area of law to deal with.

What is the distinction between tendency and coincidence evidence?

What does 'significant probative value' mean within the context of ss 97 and 98?

When does the probative value of the evidence 'substantially' outweigh any prejudicial effect?

What is the difference between tendency evidence and 'context' (or 'relationship') evidence?

What sort of judicial direction is effective in avoiding the misuse of 'context/relationship' evidence?

The Common Law Position:

Even after the Evidence Act came into force, the predominant view was that the common law principles applied to the admission of tendency/coincidence evidence. In effect that the test in ***Pfenning v The Queen*** (1994-95) 182 CLR 461 applied:

In summary that ***test was that similar fact evidence was not admissible unless the judge concluded that there was no rational view of the similar fact evidence consistent with innocence***. It was a high hurdle to overcome for the Crown seeking the admission of tendency evidence.

In ***Regina v Ellis*** (2003) 58 NSWLR 700, the Court of Criminal Appeal on the whole rejected the Pfenning test and held that the test is that set out in section 101 Evidence Act: ***did the probative value of the evidence substantially outweigh any prejudicial effect that evidence had on the accused?***

The Chief Justice did leave a small window open for the application of the more stringent test when he said at [para 96]

> *"My conclusion in relation to the construction of s 101(2) should not be understood to suggest that the stringency of the approach, culminating in the Pfenning test, is never appropriate when the judgment for which the section calls has to be made. There may well be cases where, on the facts, it would not be open to conclude that the probative value of the particular evidence substantially outweighs the prejudicial effect, unless the "no rational explanation" test were satisfied."*

However, it is accepted generally that the test became less stringent. There have been a number of cases since Ellis that have sought to clarify the requirements under the Evidence Act provisions.

Distinction between Tendency/Coincidence Evidence:

The tendency rule: s 97

(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 (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.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Admission of tendency evidence means that a judge will direct a jury that the evidence may disclose a pattern of behaviour by the accused that shows that he acts in a particular way, with a particular mindset and making it more likely that the accused committed the offence.

As Howie J said in ***R v HARKER*** [2004] NSWCCA 427:

"The simple fact is that tendency evidence is placed before a jury as evidence tending to prove the guilt of the accused".....The jury is entitled to use it as "positive proof"

The coincidence rule: 98

(1) 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.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

In **Regina v Hennessy [**2001] NSWCCA 36, the trial judge's directions were held to be appropriate. In part, the trial judge directed the jury in the following terms:

> *"Similarities which go beyond ones you would expect to find as between crimes of this type. That is to say armed robberies on financial institutions. Similarities so marked and destructive that they cannot be mere coincidence. You should look to see whether the similarities relied upon are so striking, or of such a clear underlying unity as to make coincidence not an explanation and whether the similarities indicate that the same person was responsible for each offence.."*

Regrettably there is no clear dividing line between tendency and coincidence evidence. In many instances the material might be both tendency and coincidence evidence.

For Example, the facts in **R v Ellis** (2003) 58 NSWLR 700 were that a number of break and enters were committed where the glass pane was carefully removed and placed intact within the shop which was robbed.

On the one hand that evidence could be categorised as coincidence evidence because the circumstances of each incident were "substantially and relevantly similar" (s98)

However the evidence could also be regarded as tendency evidence in that it suggests the accused had a propensity to commit break and enters.

The Crown sought to rely on the evidence in that case as both tendency and coincidence evidence.

It is probably unhelpful to be too concerned about whether it is one or the other. Rather, the principles governing both types of evidence should be considered as alternative and overlapping avenues by which the material might be admitted.

Admissibility of Tendency/Coincidence Evidence

There are a number of distinct steps that should be addressed when considering the admissibility of tendency/coincidence evidence.

(a) Is the evidence relevant? (s 55)

(b) Has there been notice or has notice been dispensed with? (ss 97, 98, 100)

(c) Does the evidence have significant probative value? (97, 98)

(d) Does the the probative value of the evidence substantially outweigh the prejudice to the accused? (s 101)

What occurs in practice?

Mere 'logical relevance' is not sufficient to see purported tendency evidence admitted.[1] In **Gardiner v R**[2], Simpson J provided a summary of the steps to be undertaken when applying s 97:

'Where tendency evidence is tendered, the judicial process involves:

(i) Determining whether the evidence has probative value, that is, determining whether it is capable rationally of affecting the assessment (by the tribunal of fact) of the probability of a fact in issue;

(ii) If it is determined that the evidence is so capable (and therefore has probative value), determining whether that probative value is capable of being perceived by the tribunal of fact as significant;

(iii) (in a criminal case) if it is determined that the evidence is capable of being so perceived, applying the s101(2) test, and determining whether the probative value of the evidence substantially outweighs any prejudicial effect upon the defendant.

The first step in the process necessarily further involves the identification of the fact in issue the probability of the existence of which is said to be affected by the evidence tendered as tendency evidence.'

When assessing probative value a trial judge is required to make '*an assessment and prediction of the probative value that the jury might ascribe to the evidence'*.[3] In ***Fletcher*****,** Simpson J said:

> *"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 Lockeyer [1996] 89 A Crim R 457) probative value. If the evaluation results in the conclusion that the jury would be likely to assign the evidence significant probative value, the evidence is admissible. If the assessment is otherwise, s98 mandates that the evidence is not to be admitted."*

It is noteworthy that Basten JA takes the view that the determination of 'probative value' for the purposes of ss 97-98 should not be understood as requiring a predictive exercise on the part of the trial judge. In his dissenting judgment in Zhang,

[1] 'Admissibility of Tendency and Coincidence under the uniform Evidence Act', Justice R A Hulme (22 November 2009) Paper presented to the County Court of Victoria

[2] [2006]NSWCCA 190 at [125; 162 A Crim R 233

[3] Per Simpson J R v Fletcher [2005] NSW CCA 338 at [33]; R v Zhang [2005] NSWCCA 437 at [27].

Basten JA rejected the 'predictive' exercise described by Simpson J (with whom Buddin J agreed):[4]

> *"A separate concern relates to the five principles identified by her Honour in undertaking the exercise required under s 98 of the Evidence Act, at [139] below. The first two principles set out are unexceptionable. The third principle introduces a concept of the "actual probative value" of evidence, being the probative value assigned by the jury. The decision under s 98 is then said to be a two stage process by which the trial judge first identifies whether evidence is "capable of" rationally affecting the probability of a fact in issue, and, secondly, evaluating the likelihood that the jury would assign the evidence significant probative value. I do not agree with that approach, nor do I think it is supported by the judgment of Hunt CJ at CL in* ***R v Lockyer****. His Honour's discussion in* ***Lockyer****, at least at 460, was concerned with the exercise required by s 135 (and one might add, relevantly for present purposes, s 101(2)), namely the assessment of whether the probative value outweighs any prejudicial effect. It is true that the concept of prejudicial effect requires an assessment of the misuse of the evidence which might be made by a jury, comprising people without legal training. On the other hand, I do not think that the assessment of "probative value" requires such an exercise. That conclusion follows from the definition of "probative value" in the Dictionary to the Act, namely "the extent to which the evidence could rationally affect the assessment of the probability" of a fact. Evidence has significant probative value if it could have such an effect, to a significant extent. The trial judge is not required to second-guess the jury: the judge must make his or her own assessment of probative value for the purposes of s 98."*

However, until special leave is granted on the issue, the present approach in New South Wales is for the trial judge to follow the approach set out by Simpson J in Fletcher and Zhang[5], namely that the trial judge must engage in an evaluative and predictive process as to the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.[6]

When assessing the probative value of the evidence the factors that will usually be taken into account include:

- The cogency of the evidence relating to the conduct of the accused;
- The strength of the inference that can be drawn from that evidence as to the tendency of the accused to act in a particular way;
- The extent to which that tendency increases the likelihood that the fact in issue occurred.

[4] R v Zhang at [46]

[5] [2005] NSWCCA 437

[6] Supra at note 1 page 13

SIGNIFICANT PROBATIVE VALUE

'Significant' is not defined in the dictionary to the Act. Hunt CJ at CL in ***R v Lockyer*** said that one of the primary meanings of the adjective 'significant' is 'important' or 'of consequence'.[7]

The formulation propounded in Lockyer was restated in ***AW v R*** by Latham J (with whom Bell JA and Fullerton J agreed):[8]

> *"The evidence must have significant probative value, that is, it must be evidence that is meaningful in the context of the issues at trial. The provision is concerned with the qualitative aspects of the evidence, not quantitative ones. The extent to which such evidence is objectively proved, as in MM, has less to do with s 97(1) than it has to do with s 101(2). It must be more than merely relevant, but may be less that substantially so:* ***R v Lockyer****. The question for the trial judge was whether "the evidence was important in establishing the facts in issue, namely whether the appellant committed the charged sexual offences against the complainant."*

In practice, when the Court is considering whether the evidence has significant probative value it will primarily be concerned with two things:

(a) The Similarities Submission

Consider the similarities and differences in the alleged offending behaviour when compared to the suggested tendency evidence.

In ***Fletcher,*** objection to the tendency evidence was taken on two bases: the difference in the detail of the sexual activity and the remoteness in time (4 and 5 years apart). The Court described the approach taken on behalf of the appellant as 'unduly confined'. The criticism was directed at the difference the appellant sought to highlight, in the detail of the sexual activity alleged by the complainant and that alleged in the tendency notice. Simpson J said at [67]:

> *'In my opinion, the present appellant's argument focused too narrowly upon the tendency to have sexual intercourse in a particular fashion. The DPP's explanation, provided to the appellant's legal advisors, shows that the 'tendency' which it sought to establish was wider, and more detailed. The DPP sought to establish a pattern of behaviour. This included the use of his position as parish priest in meeting Catholic families and involving himself in their lives, developing a special relationship with the families, the children of the families, and in particular with a child the focus of his attention; and the introduction of the child to sexually explicit material and, eventually, inappropriate sexual behaviour'.*

The Court decided that s 97 does not require the Crown to establish striking similarities. It may be sufficient if the purported tendency evidence is capable of establishing a pattern of behaviour on the part of the accused. Simpson J referred to

[7] R v Lockyer (1996) 89 A Crim R 457 at 459

[8] [2009] NSWCCA 1 at [47].

R v Milton [2004] NSWCCA 195. There Hidden J (with whom Tobias J and Greg James J agreed), wrote at [31]:

> *"The detail of the sexual activity alleged by each of the complainants and the circumstances surrounding it is not to the point. True it is that evidence that the appellant had sexual contact with two boys in their early teens would not, of itself, be sufficient. However, that is not the only common thread in their evidence. What emerges from the testimony of each of them is an attempt by the appellant to foster a relationship with them conducive to sexual contact despite their youth and immaturity. This arises not just from his employing each of them. It is to be found in his encouraging them to drink and use drugs in a manner entirely inappropriate for boys of their age, and his efforts, by word and deed, to loosen their natural sexual inhibitions. It is also to be noted that, on the account of both complainants, he was prepared to impose his will upon them in the teeth of their resistance.'*

Simpson J did, however, express a word of caution in relation to the admission of tendency evidence, at [50]:

> *"But this is where caution needs to be exercised. While it may be tempting to think, for example, that evidence of a sexual attraction to male adolescents has probative value in a case where the allegations are, as here, of sexual misconduct with a male adolescent, an examination must be made of the nature of the sexual misconduct alleged and the degree to which it has similarities with the tendency evidence proferred"*

In ***R v PWD*** [2010] NSWCCA 209 at [66]-[70] Beazley JA referred to a number of examples of how tendency evidence may or may not have significant probative value for the purpose of section 97. The respondent was charged with 10 counts of sexual assault against 4 boys.

The Crown did not rely upon striking similarities between the acts alleged, but rather on a pattern of behaviour by the accused: [see paragraph 35].

The trial judge was of the view that the tendency evidence relied upon did not have significant probative value because the acts described by the boys were so different. In the alternative, her honour found that the requirements of section 101 were not satisfied.

In vacating the rulings made by the trial judge, Beazley JA (Buddin J and Barr AJ agreeing) said:

> *'The authorities are clear that for the evidence to be admissible under s 97 there does not have to be striking similarities,* ***or even closely similar behaviour****. By contrast, coincidence evidence is based upon similarities. Section 98 provides in terms that two or more events occurring is not admissible to prove that a person did a particular act, 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, the evidence has significant probative value'. [79]* (Emphasis added)

The current position in NSW with respect to s 97 appears to be that where similarities do exist the tendency evidence has significant probative value. However, the absence of 'close similarities' does not necessarily mean that the evidence will be excluded.[9] In ***BP v R; R v BP*** [2010] NSWCCA 303Hodgson JA said at [108]

> *'It is not necessary in criminal cases that the incidents relied on as evidence of tendency be closely similar to the circumstances of the alleged offence, or that the tendency be a tendency to act in a way (or have a state of mind) that is closely similar to the act or state of mind alleged against the accused. However, generally the closer and more peculiar the similarities, the more likely it is that the evidence will have significant probative value'*.

(b) <u>The possibility of concoction submission:</u>

In practice, the second matter that should be addressed is whether the Crown can exclude the reasonable possibility of concoction?

- What is the relationship between complainants?
- Do they know each other?
- What opportunity has there been for them to discuss the allegations?
- What did they know of each other's allegations?
- What is the possibility of concoction by a potential witness in isolation, after becoming aware of complaints by others and becoming influenced by it without deliberate concoction?

In ***Hoch v R****,* Mason CJ, Wilson and Gaudron JJ stated at 297*:-*

> *"Thus, in our view, the admissibility of similar fact evidence in cases such as the present depends on that evidence having the quality that it is not reasonably explicable on the basis of concoction. That is a matter to be determined, as in all cases of circumstantial evidence, in the light of common sense and experience. It is not a matter that necessarily involves an examination on a voir dire. If the depositions of witnesses in committal proceedings or the statements of witnesses indicate that the witnesses had no relationship with each other prior to the making of the various complaints, and that is unchallenged, then assuming the requisite degree of similarity, common sense and experience will indicate that the evidence bares that probative force which renders it admissible. On the other hand, if the depositions of the statements indicate that the complainants have a sufficient relationship to each other and had opportunity and motive for concoction, then, as a matter of common sense and experience, the evidence will lack the degree of probative value necessary to render it admissible. Of course there may be cases where an examination on the voir dire is necessary, but that will be for the purpose of ascertaining the facts relevant to the circumstances of*

[9] See also FB v Regina; Regina v FB [2011] NSWCCA 217 at [26]-[27].

the witnesses to permit an assessment of the probative value of the evidence by reference to the consideration whether, in the light of common sense and experience, it is capable of reasonable explanation on the basis of concoction. It will not be for the purpose of the trial judge making a preliminary finding whether there was or was not concoction."

Although Hoch was concerned with the admission of similar fact evidence under the common law, it is appropriate for a trial judge to explore whether there was 'a real chance of concoction having occurred': ***BP v R; Rv BP*** at [110]; ***R v Colby*** [1999] NSWCCA 261 at [111]; ***FB v Regina***; ***Regina v FB*** [2011] NSWCCA 217 at [35].

'SUBSTANTIALLY OUTWEIGH" :Section 101 (2)

If the Court finds significant probative value, the next question arises under s 101(2): does the probative value substantially outweigh any prejudicial effect it may have on the accused?

In ***Regina v Ellis*** the Court held that s 101 was not to be construed consistent with the previous common law approach; the section is a statutory formulation and should be interpreted in accordance with the words used in the provision. Spigelman CJ (with whom Sully, O'Keefe, Hidden and Buddin JJ agreed) said:

"The words 'substantially outweigh' in a statute cannot, in my opinion, be construed to have the meaning which the majority in Pfenning determined was the way in which the common law balancing exercise should be conducted. The 'no rational explanation' test may result in a trial judge failing to give adequate consideration to the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh.

Section 101 (2) calls for a balancing exercise which can only be conducted on the facts of each case. It requires the Court to make a judgment, rather than to exercise a discretion…The 'no rational explanation' test focuses on one only of the two matters to be balanced – by requiring a high test of probative value- thereby averting any balancing process. I am unable to construe s 101(2) to that effect".

The following considerations are relevant to the question of the potential prejudicial effect of the purported tendency evidence:

- The jury may be influenced to convict as punishment for conduct other than that charged.
- The jury may overestimate the probative value of the evidence.
- The jury may be distracted from the prosecution evidence in relation to the elements of the offences charged.

In ***R v Watkins*** (2005) 153 A Crim R 434, Barr J referred at [49] to a "*real danger that the jury's recognition of the appellant's prior guilt was likely to divert them from a proper consideration of the evidence as bearing on the question of his intent in the charges before them".*

In ***R v GAC*** (2007) 178 A Crim R 408 it was recognised that the primary danger was that, notwithstanding any directions given by the trial judge, "*the jury might reason no*

more rationally than that, if the respondent molested [two other persons], he did the same to the complainant, and that emotion not rationality would govern" (Giles JA at [83]).

The test in s 101(2) is different from that contained in s 137. There is a requirement that the probative value '***substantially***' outweigh the prejudicial effect. In ***R v Fletcher***, Rothman J considered the meaning of the word '***substantially'*** in the context of s 101(2). His Honour concluded (at [119]) that 'substantial' "is used to mean 'large, weighty or big' and indicates an absolute significance". [10]

In arriving at this conclusion Rothman J noted the following statement of Deane J in ***Tillmans Butcheries Pty Ltd v AMIEU*** (1979) 42 FLR 331 at 348:

> *"The word 'substantial' is not only susceptible of ambiguity; it is a word calculated to conceal a lack of precision…It can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in the relative sense or can indicate an absolute significance, quantity or size."*

CASES WHERE TENDENCY/COINCIDENCE EVIDENCE HAS BEEN EXCLUDED

There have been a number of cases where tendency (or coincidence) evidence has been rejected. The following summaries are included as examples of such cases:

Regina v GAC [2007] NSWCCA 315

5F appeal by Crown against the Trial Judge's decision to exclude the tendency evidence.

The accused was charged with 2 counts of sexual assault on his stepdaughter.

The tendency evidence included allegations of sexual misconduct with his daughter and on a friend of his daughters.

The trial judge excluded the tendency evidence on the basis that there were a number of dissimilarities between the counts on the indictment and the uncharged acts. For example, the complainant was younger than JC and TJ (the tendency witnesses) and there was no alcohol or drugs used.

The Court of Criminal Appeal held there was no error. The trial judge had properly considered significant probative value and the s 101 requirement. His Honour also properly had regard to whether directions could cure the prejudice.

R v F [2002] NSW CCA 315

The charges involved four complainants. The Crown sought to have 4 trials run jointly and rely on evidence in each as tendency in the other.

[10] Rothman J was in dissent and the other members of the Court did not address this specific topic.

The trial Judge allowed 3 trials to run together and separated the fourth.

The Crown appealed. The Crown appeal dismissed. It was held that the trial judge had properly exercised discretion.

The trial judge allowed joint trials in 3 of the 4 trials, finding that in the case of the fourth complainant there was a reasonable possibility of concoction. There was evidence that the fourth complainant (JPMcF) had been informed by one of the other complainants of an indecent assault upon her before the fourth complainant had made a complaint to anyone. There was a reasonable possibility that JPMcF's evidence was tainted by that knowledge. The test was whether there is a real danger or real chance of concoction:

> *[48] Whether a coincidence of accounts was reasonably explicable on the basis that there was sufficient relationship between the complainants or an opportunity or motive for concoction. There has to be a reasonable possibility not mere speculation or conjecture.*

The onus rests on the Crown to negative that reasonable possibility.

Regina v Watkins (2005) 153 A Crim R 434

The appellant was charged with multiple counts of fraud. The allegation was that he, as an officer of a body corporate, deposited its cheques to the credit of his own bank account with intent to defraud the body corporate.

The Crown were allowed to lead tendency evidence that about 17 years earlier (1983/84) he had been charged and later convicted of 37 counts of larceny as a clerk.

In upholding the appeal Barr J said at [34]

> *"To have significant probative value the evidence had to be more than merely relevant, but have a substantial degree of relevance, and that was to be judged by reference to the issue raised at trial, namely whether the appellant deposited the cheques intending to cheat and defraud Tasman KB or whether he was innocently giving effect to an arrangement proposed by the company directors.*
>
> *There was no logical connection between the events of 1983 and those relating to the current proceedings and the only way in which the jury could have used the tendency evidence was to reason that the appellant was a cheat and a fraud and therefore more likely to have cheated and defrauded the body corporate".*

The Court decided that the evidence was more bad character evidence than tendency evidence and therefore impermissible. The accused was not saying "I am an honest person, I would not have done this".

AE v R [2008] NSWCCA 52

The appellant was convicted of 13 counts of sexual assault on stepdaughter PNE and two counts relating to his daughter CNE

The trial judge had admitted the allegations relating to each complainant as tendency evidence on the basis that there were a number of similarities:

- both complainants of a similar age (9 and 11);
- the assaults occurred in a bedroom in the appellant's home;
- each of the complainants was residing with the appellant in the family unit when assaults alleged;
- at the time of alleged assaults the appellant and the complainant were the only ones in the bedroom;
- the first assault on each complainant was in largely identical terms;

The trial judge found no possibility of concoction.

The appeal was upheld. The Court ordered retrials and acquittal on one count.

"It was an error to find no possibility of concoction", at [44]

That possibility went directly to the probative value of the evidence.

Furthermore, it was said that "*the probative value did not substantially outweigh the prejudicial effect that was identified here as the jury would be overwhelmed by the evidence of a long course of sexual misconduct against PNE in considering the allegations concerning CNE"*

While in most cases the tendency evidence could potentially overwhelm jurors, the deciding factor in this case was the possibility of concoction which went to the heart of the probative value of the evidence

O'Keefe v R [2009] NSWCCA 121

The appellant was tried in relation to sexual offences allegedly committed against four separate complainants. Each of the women was separately assaulted in bushland in suburban Sydney. The only issue at trial was whether the appellant was the perpetrator on each occasion.

The complaint made was that the trial judge should have severed the counts relating to the fourth complainant. On each occasion the perpetrator had expressed a particular interest in the women's breasts.

While the circumstances relating to three of the complainants was sufficient to give rise to coincidence evidence, the facts relating to the fourth complainant were 'insufficiently similar' to constitute coincidence evidence.

Howie J said, at [66]-[67]

> *"In my opinion the tendency did not gain sufficient probative value by the additional fact that the offender had an interest in the victim's breasts, however that interest might be described. I do not find it peculiar and, hence of any particular probative value, that a person who has a tendency to sexually assault females has a particular interest in what is the most prominent part of the female anatomy.*
>
> *I might have been prepared to accept that the use of the words, "Show us your tits" as the opening gambit by the offender in each of the four assaults would have given a rise to a tendency with sufficient specificity or peculiarity that it could survive the application of s101(2). But the Crown was in a difficult position because the interest in the breasts had to be generalised as there was no significant similarity in how that interest was demonstrated between counts 1 to 6, on the one hand (complainants one to three) and counts 7 to 11, on the other (complainant four)."*

WHAT IS THE DIFFERENCE BETWEEN TENDENCY/COINCIDENCE EVIDENCE and CONTEXT (sometimes referred to as 'relationship') EVIDENCE?

A Court is not bound by a statement by the Crown that evidence is admitted as context evidence only. The trial judge (and indeed an appellant Court) should look at the actual issues in the trial and consider how the evidence is to be (or was) used. In ***RG v R*** [2010] NSWCCA 173, Simpson J said, at [34]:

> *'While it is tempting to suggest that, since the stated purpose of the tender of the evidence was not to establish a tendency, the Dictionary definition excludes the application of ss97 and 101, to do so would be to over simplify. While neither the District Court nor this Court ought lightly to find that a purpose stated by a responsible trial advocate or Crown prosecutor is not the true purpose of the tender of the evidence, neither Court is bound by such a statement. In some cases at least, it will be necessary for the trial court, or this Court, to examine the reality of what is sought to be achieved by the admission of the evidence. If that analysis shows that, notwithstanding that the Crown's stated purpose was to establish a 'context', or a 'relationship', the reality is that the evidence was tendered to establish a tendency, then s 97 and s101 must be applied'.*

Where the Crown relies on uncharged acts as tendency or coincidence evidence the requirements in the Evidence Act must be fulfilled. Where, however, the evidence is relied on as 'context' evidence sections 97, 98,100, 101 do not apply. It is therefore essential, before the trial starts, that the purpose of the tender is clearly identified.

R v AH (1997) 42 NSWLR 702 the Court described the difference in this way:

(a) relationship evidence may place the evidence of events which give rise to a particular charge into their true context as part of the essential background against which the evidence of the complainant and of the accused fall to be evaluated.

(b) the guilty passion or sexual desire or feeling of the accused for the complainant is directly relevant to proving the offence charged was committed.

In ***Regina v Qualtieri*** (2006) 171 A Crim R 463, McClellan CJ at CL identified the relevant steps in considering evidence of other misconduct.

The appellant faced of 5 counts of sexual assault on a person under 10. The complainant was his step daughter. The complainant gave an account of other incidents of acts of indecency (the uncharged acts).

The evidence was relied upon as 'relationship' evidence. One of the grounds of appeal was that evidence of uncharged sexual misconduct was wrongly admitted and, alternatively, that the trial judge's directions would have caused confusion on the part of the jury.

The Court held that the directions were such that the convictions must be quashed. McLellan CJ at CL set out the following steps when considering the admission of evidence of uncharged acts at [80]

- **Identification of the evidence the Crown seeks to tender and the purpose of the tender**
- **If the evidence is sought to be relied on as tendency/coincidence, the Crown must satisfy ss 97,98,101**
- **If the evidence is tendered not as tendency/coincidence but merely to provide context have to consider whether it is relevant to any issue raised**
- **the jury can make of the evidence.**

It is important to give due consideration to the third step, that is, if not tendency/coincidence, is it relevant to an issue raised at trial? Just because it may constitute context/relationship evidence does not necessarily mean it is relevant to an issue at trial.

The evidence may be relevant on a context basis to explain a lack of complaint or to demonstrate that the complainant's will has been overborne or is capable in some other way of assisting a jury to evaluate other evidence going to a fact in issue.[11] Careful consideration must be given to the relevance of the evidence to a fact in issue in the trial.

[11] Supra note 1 at page 16

R v ATM [2000] NSWCA 475

It is not sufficient that the evidence of other sexual conduct is admitted simply because it is relationship/background evidence. That it must be relevant to an issue in the trial is essential. And the relevance must be clearly identified at the outset.

In ***ATM*** the appellant was convicted of two counts of sexual assault on his daughter. Evidence of other sexual conduct was admitted not as tendency but as 'relationship' evidence.

Two grounds of appeal were argued:

(i) Jury misdirected on relationship evidence.

(ii) Unreasonable verdicts

The Court held that the trial judge had misdirected the jury:

[79] *"To tell the jury that the evidence of other misconduct could be used "in your assessment of the background of the relationship between the accused and his stepdaughter"*

or

"so you can understand the relationship between the accused and his stepdaughter over the relevant period of time"

or

"may assist you in determining whether he is guilty of any or both of the charges before you"

was not a sufficient direction.

Where evidence is admitted as 'context' evidence it is incumbent upon the trial judge to give clear directions so as to prevent propensity reasoning on the part of the jury. In ***Qualtieri v Regina***[12], Howie J referred to the problems that arise in respect of 'relationship evidence', at [112]:

> *"It seems to me that one of the problems that arises in respect of 'relationship evidence' particularly in child sexual assault cases, is that there is never a clear understanding of what the term means in any given case. As I sought to explain in **R v ATM** [2000] NSWCCA 475, evidence does not necessarily become admissible merely because it is said to disclose the relationship of the accused and the complainant: it must also be relevant and must not be unfairly prejudicial. Unless the relevance of the evidence is understood at the outset and kept in mind throughout the trial, and particularly during the summing up, there is a real risk that the jury will be misdirected as to how they are to use the evidence.*

McClellan CJ at CL, at [81] set out the model direction with respect to 'relationship evidence' contained in the Supreme Court Bench Book. His Honour considered the direction 'an appropriate manner in which to instruct the jury'.

That this area of the law throws up significant difficulties is evidenced by the fact that on occasion juries are misdirected in respect of the use which they can make of context evidence. In ***JDK v R*** [2009] NSWCCA 76, the appellant was tried on an indictment containing five counts of sexual assault with a child. He was acquitted on three counts. 'Relationship evidence' was led in the trial without objection.

Ground 2 on the appeal was that the trial judge had misdirected the jury in respect of the use they could make of the 'relationship evidence'. McClellan CJ at CL referred to the decision in ***DJV v R*** [2008] NSWCCA 272 where he had considered the issues relating to 'relationship evidence'. The problems associated with such evidence had been recently considered in the High Court decision of ***HML v R*** (2008) 245 ALR 204, by Hayne J at [129] and Crennan J at [399]:

> *"Whatever the purpose for which it is tendered the evidence will almost always occasion significant prejudice to an accused. Care must be exercised both as to the admission and, if admitted, the directions given to the jury as to its use. If admitted as 'context' evidence s 136, which requires directions to be given with respect to the limited use of the evidence, is engaged.'*

It is essential that the trial court critically analyse attempts by the prosecution to tender evidence otherwise than as tendency evidence. 'Context' evidence is not relevant merely because it discloses aspects of the relationship between the accused and the complainant. There must be an issue which the evidence may explain or resolve by placing the alleged events in their true context: (***Qualtieri v Regina***, per McClellan CJ at CL at [112].

'Context' or 'relationship' evidence is not limited to cases involving allegations of sexual assault. In ***David L'Estrange v The Queen*** [2011] NSWCCA 89 the appellant was charged with conspiracy to commit an aggravated break, enter and steal and armed robbery. The Crown sought to rely upon 'background evidence'

[12] (2006) 171 A Crim R 463

going to explain the association between the appellant and other members of the group alleged to have been involved in the commission of the offences charged on the indictment.

The 'background' evidence related to a separate arrangement by members of the group including the appellant to rob a different drug dealer at the Crossroads Hotel some 10 days before. The trial judge admitted the evidence under the "Harriman principle", noting it was not tendency or coincidence evidence.

The Crown had disavowed any reliance on the evidence for the purpose of proving a particular tendency on the part of the appellant. However, the Court pointed out once again that such disavowal does not remove the risk that a jury will engage in propensity reasoning: at [61].

In upholding the appeal, McCallum J (McClellan CJ at CL and R A Hulme J agreeing) said that in the present case the risk of tendency reasoning was high, at [62]-[64]:

> *"Indeed, it is difficult to imagine the jury using the evidence in any other way. The Crown contended that the evidence could be used to explain an otherwise surprising feature of the Crown case that Mr L'Estrange had readily agreed to join the group on the evening of 26 March 2006, and (on the Crown case) to carry out the two crimes although he had not been involved in their planning.*
>
> *63There is an element of circularity in that reasoning, which only serves to highlight the prejudice of admitting the evidence. Whether Mr L'Estrange was agreeing to carry out the two offences charged on the indictment when he allegedly gave an affirmative answer to the question "are you ready to go off" was the very issue to be determined by the jury. It was very likely that they would use the evidence of the Crossroads incident for the purpose of assisting their interpretation of that obscure exchange and that they would do so by engaging in tendency reasoning. In my view, the risk that the jury would engage in impermissible paths of reasoning was a material consideration which his Honour was required to take into account. His Honour did not address that risk when he gave the pre-trial ruling.*
>
> *64The result, in my view, is that the decision to admit the evidence miscarried. For my part, I do not think that the evidence of the Crossroads incident was admissible. Assuming it was relevant for any purpose other than to establish tendency (a purpose disavowed by the Crown), which is doubtful, its probative value was undoubtedly outweighed by the danger of unfair prejudice to the appellant.*

Conclusion

Evidence of past criminal conduct on the part of an accused is arguably the most prejudicial evidence that can be put before a jury. It is precisely for this reason that the Evidence Act puts in place strict requirements before tendency/coincidence evidence is admitted in a criminal trial.

However, these same requirements do not apply to the consideration and admission of 'context/relationship' evidence. Where the Crown disavowes any reliance upon the evidence for the purpose of proving a tendency, sections

97,98 and 101 have no application. Careful consideration must be given to the relevance of the evidence to an issue in the trial. The mere fact that there is evidence going to the relationship between the accused and the complainant is not sufficient.

The relevance of the evidence and the reliance placed upon it by the Crown must be clearly stated at the outset of the trial both for the purpose of assessing admissibility and, if admissible, in order to formulate clear and appropriate directions to prevent propensity reasoning on the part of the jury. This is not an easy task. It is made all the harder when these issues are not clearly resolved at the outset of a trial.