ARGUING THE ADMISSIBILITY OF TENDENCY EVIDENCE

AN INTERACTIVE CASE SCENARIO

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ARGUING THE ADMISSIBILITY OF TENDENCY EVIDENCE

1. Tendency evidence is regularly relied upon by the prosecution in the proof of guilt. Because it is propensity type evidence the question of its admission will be scrutinised by the courts with great precision before it is admitted. For the prosecution to use evidence of how someone has acted on another occasion to prove how they acted on the occasion of the charged offence requires a powerful degree of probative force.

2. When the prosecution relies on tendency evidence it must climb two hurdles. The first is regulated by Section 97 Evidence Act (NSW) and the second by Section 101. Section 97 requires the evidence to be *"important or of consequence**" R v Lockyer (1996) 89 A Crim R 457**.* This paper will return to the way that tendency evidence may demonstrate that *"importance"* which is required in order to be of *"significant probative value"* as referred to in Section 97.

3. In any approach to the admissibility of evidence, the issue to focus upon is the **probative value** of the evidence and the starting point must always be to determine what is the **fact in issue**. *(See Dictionary to Evidence Act).* This applies to all evidence but it is particularly important to bear in mind when preparing your argument for admitting tendency evidence.

4. Often in a criminal prosecution the accused will have been present at the relevant time and place (a fact not in issue) but his defence will be that he did not commit the criminal act. A good example of this is in child sexual assault cases where the accused's defence is innocent association. The fact in issue will be…… did the accused engage in this criminal conduct on the occasion in question? In such a case it will not be an issue of identity but a question of whether the accused who was present, in fact did this criminal act to the victim.

5. This distinction is often drawn by the courts to separate the concept of tendency from coincidence, the latter being used to establish identity of the accused person through the use of various similarities between the charged occasion and the other occasions. The former focuses more on the particularity of the act of the accused on both occasions. This distinction has been helpfully described in the recent decision of ***R v PWD [2010] NSWCCA 209 at para 79.***

> ''*The authorities are clear that for 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."*

6. The tendency to act in a particular way in this case was described in the following way at para 87

> **"** *The evidence sought to be relied upon, if accepted by the jury, would demonstrate that the respondent was a person who was sexually attracted to young male students and acted upon that predilection in various ways and at different times, but in a setting where the students to whom he directed his sexual attentions were boarders, who were homesick, did not fit in with the normal pattern of school life in various ways, for example, by not developing friendships or by having discipline problems, and who were thus vulnerable"*

7. With that introduction you are able to look at the following hypothetical example which is set out in the form of a written submission to judge at first instance. In addition it contains commentary as to why you would make the submission in this way.

Regina v Edward JAMES

Crown submissions on admissibility of evidence

Tendency evidence – the Burwood RSL evidence

1. On the 23rd November 2009 Ms Nguyen, a petite 35 year old woman was indecently assaulted in a toilet cubicle by the accused. She had been leaving the club at around 1.30 and needed to use the toilet. She asked the accused James (security guard) if she could use the toilet. He told her where it was and she went into a cubicle in that women's toilet, locking the door behind her.

2. A few seconds later she saw men's shoes at the bottom of the door. It was the security guard she had originally spoken to who said he was checking to see if she was OK. She finished urinating and opened the door in order to leave the cubicle. He grabbed her by the jaw and forced her face towards his and put his tongue in her mouth. He left and said she should wait as he would be back. She fled from the toilet

Relevance and the fact in issue

3. For evidence to be admissible it must be relevant. It must be capable of rationally affecting the assessment of the probability of a fact in issue in the proceeding. A first step in any such submission is to identify the fact or facts in issue in the case before the Court. To do so requires knowledge of the case the prosecution brings against the accused.

Evidence in the case before the Court.

4. Towards midnight on 14th November 2009, Ms Tien, a petite 20 year old Vietnamese woman went to a hotel near Central railway, Sydney. She had fallen over and grazed her knees on the street outside. She saw the accused James inside. He also worked as a security guard at this hotel. He told her she should go to the bathroom and clean herself up.

5. She went into the women's toilet and into a cubicle to go to the toilet. The accused came into the toilet and asked if she was in the cubicle. She finished urinating and opened the door. He came into the cubicle and asked her to sit down so that he could put bandaids on her knees. She let him do that but then he asked her for a kiss. She refused and then he forcibly turned her around, held her against the back wall of the cubicle and pulled her shorts down and then tried to get her panties down. During this time she could feel him rubbing his penis against the back of her. From this position she somehow managed to push past him and escape.

The issue.

6. This argument proceeds on the assumption that the accused will admit that he was present but will deny that he committed the offence. It may be that in due course he will say that the victim consented and if so then the issue will be different and accordingly the way that his tendency might be used will also be different. So you can see

7. In this case the issue is simply, did the accused go into the toilet at the hotel and indecently assault the victim? The Crown needs to prove it was the accused who acted in this way on this night and enlists the evidence of how he acted in the St Mary's assault to prove this. That he acted in such a significantly distinctive or particular way on one occasion is highly probative that he acted in a similar way on the charged occasion.

Relevant law

7. In ***R v*** **Cittadini** ***[2008] NSWCCA 256; (2008) 189 A Crim R 492***, Simpson J (with whom McClellan CJ at CL agreed) said (at 495 [22]-[23]):

"Proof of a tendency to act in a particular way of itself goes nowhere. Evidence that a person had a particular tendency is adduced in order to render more probable the proposition that, on a particular occasion relevant to the proceedings, that person acted in a particular way (or had a particular state of mind); that is, to provide the foundation for an inference to that effect.

Put another way, tendency evidence is tendered to prove (by inference), that, because, on a particular occasion, a person acted in a particular way (or had a particular state of mind), that person, on an occasion relevant to the proceeding, acted in a particular way (or had a particular state of mind)."

40 Similarly in ***R v Harker*** [2004] NSWCCA 427 at [57], Howie J (with whom Santow JA and Bell J agreed) said:

"… tendency evidence is placed before the jury as evidence tending to prove the guilt of the accused. The jury are asked to reason that, because the accused acted in a particular way on some other occasion or occasions, he or she must have acted in the same way on another occasion."

Significant probative value

8.In ***R v Ford [2009] NSWCCA 306*** *at para 41,* Howie J made the following observation;

> *"The case law contains examples of the way in which a tendency to engage in a particular type of behaviour can be relevant to whether an accused has committed a particular crime charged, even though that tendency does not in itself involve performance of a contravention of the same provision of the criminal law as that charged, or closely similar behaviour. In* **R v Li** *[2003] NSWCCA 407, Dunford J (with whom Spigelman CJ agreed) said at [11]:*
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> *"Section 97 is not directed only at evidence showing a tendency to commit a particular crime but showing a tendency 'to act in a particular way'. In this case it was directed to showing that the appellant had a tendency to use violence to the complainant and to seek to control her in stressful marriage situations, and was relevant to whether he did by his actions on the night in question effectively 'detain' her; but it was not necessary for this purpose to show that he had detained her on any other occasion."*

Analysis

9. The prosecution submits that the tendency of the accused shown in the Burwood evidence is to use his position as a security guard to lull the victim into false sense of security. It is part of a particular approach to take advantage of a woman, who late at night would be more than usually vulnerable. There is an unusual and distinctive feature in that he knew that she was going to the women's toilet and he knew it was likely that she would be there alone.
10. In both incidents it was his choice to follow the victim and it was he who engineered the opportunity.
11. The accused followed her and then entered a women's toilet, of course unwelcome, feigning concern for the victim. When, by this ruse he had tricked her into opening the door he then entered the cubicle and indecently assaulted the victim. This last event was in great contrast to his apparent earlier concern for the welfare of the victim. So there is a surprise element to the act of the accused as well.
12. There exists in both incidents very distinctive and similar actions by the accused towards his victims. There are differences in the manner of the attacks but this is not case about proving identity under s 98. See ***R v PWD*** *at para 82.* It is about aspects of behaviour which are distinctive and particular and are shared in both incidents. It is this distinctive, particular behaviour which has significant probative value to prove that on the second occasion the accused was not innocently associating with the victim but he was acting towards her in the particular way that he had acted towards the other young woman on a previous occasion and it is from this that the probative value is produced.

13. This is not a case where the victims have been together at any time so there is no question of joint concoction.

Section 101(2) considerations.

14. The test to be applied in Section 101 is more clearly formulated as follows:

> *"If there is a real risk that the admission of such evidence may prejudice the fair trial of the criminal charge before the court, the interests of justice require the trial judge to make a value judgment, not a mathematical calculation. The judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted. Admitting the evidence will serve the interests of justice only if the judge concludes that the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial."*

15. This formulation was approved in ***R v RN* [2005] *NSWCCA 413*** which in turn was taken from the High Court judgement of ***Pfenning v R (1995) 182 CLR 461.*** See also ***HML v The Queen; SB v The Queen* (2008) 235 CLR 303**, a case of relationship evidence, Gleeson CJ, at [12],

> "*It is the risk that evidence of propensity will be taken by a jury to prove too much that the law seeks to guard against."*

16. The probative value is high and any jury will be directed properly as to how it can and cannot be used.