# ‘ZOMBIE SLAYERS AND MEXICAN STANDOFFS’

## CURRENT ISSUES IN TENDENCY LAW

A companion paper to a presentation by the
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[updated]

Michael P King LL.B
Public Defender
Papayanni Chambers

**INTRODUCTION:**

As John Stratton SC pointed out in his 2008 presentation to the NSW Public Defender's Annual Conference:

> *'there was a time when a criminal law practitioner could go through his or her career without ever being troubled by the intricacies of what used to be called similar fact evidence, so rarely was it called upon by the prosecution, let alone successfully called upon. Those days have definitely passed'.*

I would suggest that this comment has even more resonance to criminal defence lawyers in 2015.

Tendency, or propensity law, be it under the common law or the Uniform Evidence Acts, remains highly contentious, even amongst evidence scholars. As Heydon J pithily pointed out in HML v The Queen:

> *'evidence scholars seldom meet together, even for merriment and diversion, but the conversation ends in a quarrel about these questions.'*[1]

And it appears that this is not a new problem. As far back as 1894 Lord Herschell LC said in relation to 'similar fact' evidence in Makin v Attorney-General for New South Wales:

> *'In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means is free from difficulty ....the statement of these general principles is easy, but it is obvious that it may often be very difficult the draw the line and to decide whether a particular piece of evidence is on one side or the other'.*[2]

Not much appears to have changed in the last 120 or so years.

As something by way of confirmation of this confused state of affairs Beazley P pointed out in a recent paper that as at 2014 the NSW Court of Criminal Appeal had dealt with the question of tendency evidence over 340 times since commencement of the Uniform Evidence Act 1995.[3]

And that is only in New South Wales. The Uniform Evidence Act commenced operation in Victoria in 2008 and the judges of that State have been working hard to catch up to their

[1] [2008] HCA 186 at [320]
[2] [1894] AC 57 at 65
[3] 'Uniformity and similarity: Tendency evidence under the Uniform Evidence Law'

northern conterpart's 20 odd year start. Cracks in uniformity have begun to appear such that the view from south of the border has been expressed this way:

> *'In short, the law in the general area of what might be classed propensity evidence, is a farrago from which it is impossible to derive much harmony.'*[4]

Moreover, within the last decade there have been 614 successful conviction appeals Australia wide, 52 of which arose in this area of law alone.[5] Things do not appear to be slowing down, as will be discussed later.

This paper draws on earlier works on the topic by Deputy Senior Public Defenders John Stratton SC (2008), Craig Smith SC (2009) and (2013) and Dena Yehia SC (2011). I also acknowledge with great thanks the help and guidance of my colleague Eric Wilson SC, who truly has an encyclopaedic knowledge of all things to do with tendency and who has shared it with me so freely, contributing significantly to the parts of this paper dealing with relationship evidence and transactional evidence.

This paper will not try to explain or reconcile the disparate approaches or settle the state of confusion in tendency law, but hopefully it will not further confuse matters too much.

The presentation to Under 5's will be to focus will be on practical considerations of analysis of tendency notices as to content, form and timing of tendency notices served by the Crown.

The aim of this short paper is also to highlight some current trends in the application of tendency evidence law, namely by way of brief discussion of the border wars presently underway and in respect of the latest attempts to consign the High Court's 1982 decision in Hoch v The Queen to the bin of history.

Tendency Notices are frequently served in sex assault cases. Sometime the tendency sought to be presented is from other complainants, and sometimes not. It is not always easy to identify the nature of the evidence to be adduced and, importantly, its purpose.

It is essential that criminal defence practitioners look intently at each tendency notice to, in effect, divine those matters prior to trial and to inform any pre-trial arguments.

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[4] Reg v Murdoch per Priest J at [62]
[5] see S Tilmouth 'The wrong direction: A case study and anatomy of successful Australian criminal appeals' (2015) 40 Aust Bar Review 18

**CHALLENGING TENDENCY EVIDENCE:**

Not all Tendency Notices are born equal. Whilst they all may look similar it is essential to subject each such notice to close scrutiny.

The aim in such scrutiny should remain the same in each case:

1. To determine whether the evidence sought to be relied upon is truly in the nature of tendency;
2. To determine whether any such evidence may be otherwise excluded on the basis of there being a reasonable prospect of concoction or contamination; and,
3. Failing those substantive matters whether the necessary procedural requirements have been complied with in the notice for admissibility otherwise.

**IS THE PROPOSED EVIDENCE REALLY TENDENCY EVIDENCE?**

Care should be taken to establish that the evidence is properly characterized as tendency evidence. It may be, or not. Or it may be better characterized as context evidence, or evidence going to the state of mind of the accused around the time of the offence(s).

In criminal proceedings, evidence of the character, reputation or the 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 to act in a particular way or to have a particular state of mind unless three conditions are met:

(a) the evidence is relevant;

(b) the party seeking to adduce the evidence gave reasonable notice;

(c) the court thinks that the evidence, either by itself or having regard to other evidence adduced or to be adduced, has significant probative value:

- 'probative value' of evidence means 'te extent to which the evidence could rationally affect vthe assessment of the probability of the existence of a fact in issue;
- 'significant' means 'important or of consequence';[6] and

(d) the probative value must substantially outweigh any prejudicial effect it may have on the defendant:

- 'prejudicial effect' has the same meaning as 'unfair prejudice in s.137 EA.

Admission of evidence as tendency evidence will result in a direction to the jury that they can use that evidence of proof of the matters on the Indictment as it discloses a mindset that makes it more likely that the accused committed the offence(s).[7] A copy of the model direction for child sexual assault offences taken from the Judicial Commission Bench Book as attached to this paper at Annex 1.

In 2009 once again the world turned on its head with publication of the judgment of the Court of Criminal Appeal in Reg v Ford [2009] NSWCCA 306. In that case the accused was charged with indecent assaults upon 2 women who had stayed over at his house after

[6] Reg v Lockyer (1986) 89 A Crim R 459
[7] see Reg v Harker [2004] NSWCCA 427

attending a party, having consumed a significant amount of alcohol, who were asleep with others in the house. The trial judge was of the view that to qualify as tendency evidence the acts in question had to be 'closely similar' or 'strikingly similar'.

Campbell JA disagreed saying that in his view saying there was no need for a 'striking similarity' between the incidents or that the acts were 'compellingly rare or exceptional', rather, all that was required was that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence.

This line of reasoning was picked up in Reg v PWD [2010] NSWCCA 209. In that case the acts and surrounding circumstances of the various offences were quite different. However, the tendency alleged was said to be that the accused 'had a sexual interest in young boys and for the purpose of gratification of that interest, he preyed upon boys in his care in a variety of circumstances, but all of which involved some vulnerability'.

Beazley P said that the acts were not similar but there was a 'pattern of behaviour, a modus operandi, system or pattern and common threads in the accused's conduct'.

Beazley P also said at [79] that:

> *'the authorities are also 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, coincidences evidence is based on similarities'.*

Enter the Victorian Court of Appeal in Reg v Velkovski [2014] VSCA 121, one of the 'border wars', being a case which is said to represent a potential 'fault line' in the jurisprudence of NSW and Victoria, described at [163] as thus:

> *'Where there is an absence of remarkable or distinctive features in the manner in which the offences are committed, the difference in the law as stated by this Court and the New South Wales Court of Criminal Appeal has left the law in a state of uncertainty as to the degree of similarity in the commission of the offences or the circumstances which surround the commission of the offences that is necessary to support tendency reasoning. One line of authority has held that some degree of similarity in the acts or surrounding circumstances is necessary before it will be sufficient to support tendency reasoning. Another line of New South Wales authority, that has not been followed in Victoria, has emphasised that tendency reasoning is not 'based upon similarities,' and evidence of such a character need not be present. These lines of authority within each Court are not readily reconcilable.'*

Ultimately the Victorian Court considered that the approach currently taken in NSW to tendency law '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 position of our court reflected in the long line of authority to which we have referred'.*

There is little doubt that the NSW Court of Criminal Appeal was stung by Velkovski, coming as it did on the heels of Dupas, as another challenge to the Court's pre-eminance in developing the law surrounding the so called Uniform Evidence Act, Basten JA pointing out in Souad at [36]:

> *'A statement of another intermediate court of appeal in such uncompromising terms in relation to uniform legislation operating in both jurisdictions raises an issue of some sensitivity for this court. There are difficulties in responding to what is undoubtedly a thorough and troubling analysis'.*

As a means perhaps of responding in another way, in her recent article Beazley P is at pains to point out that in a long line of cases following Ford and PWB that the NSW Court of Criminal Appeal has considered the importance of similarity and dissimilarity in the admission of tendency evidence and that Velkovski is wrong in its assertion that similarity has in some way been abandoned by her Court.[8]

In Soaud at [48] Basten JA pointed out that there were multiple examples in NSW post Ford, where relevant and appropriate, that a proper consideration of similarities will constitute an essential part of the application of s.97, as the court had accepted on many occasions.

Most recently Leeming JA joined the debate in Reg v El-Haddad [2015] NSWCCA 10 pointing out that the specificity of any tendency alleged will directly inform the strength of the inferential mode of reasoning. Put another way, the more specific the tendency established, the stronger the probative value. On the other hand, relevant dissimilarities may well dilute the probative value of the evidence.

[8] see for example BP; FB, and Sokolowskyj v Reg [2014] NSWCCA 55

Where the fault line will end no one knows. Both sides feel they have the superior arguments. Whilst the Victorians put the strength of their arguments based on solid common law principles, the NSW cases, such as Soaud, point out that attention to those considerations may in fact distract a court from its real job of statutory interpretation and application of a literal text.

At this stage 2 attempts have been made in NSW to put this question before the High Court but neither have been successful.

**Protective Directions:**

In the event that the Court is of the view that the evidence has significant probative value, the next matter to consider is that of prejudice. Although s.101 speaks only of prejudice and not 'unfair prejudice' as is seen in s.137, these concepts have been held to be the same.

In Reg v GAC [2007] NSWCCA 315 the Court spoke about the prejudice occasioned by tendency evidence and the capacity of the court to give directions that might ameliorate that *prejudice at [84] – [85]:*

> *'The prejudice was, as the respondent pointed out, similar to that identified in R v Watkins (2005) 153 A Crim R 434, where Barr J (with whom Grove and Howie JJ agreed) said -*
>
> > *"49 It seems to me that the difficulty about the evidence was the risk to which it gave rise that the jury would be overwhelmed by the knowledge that the appellant had been convicted of a series of frauds on a previous employer and would refuse to contemplate the appellant's defence to the charges before them, which were of a similar nature. His Honour recognized such a risk during a debate with counsel on 12 May 2004 when he said this –*
> >
> > *It gives rise to prejudgment. What do you say to the proposition that in this case that as a possibility, a jury might hypothetically, as soon as they learn about the 1984 matter, fold their arms and say 'oh well we might as well rack the cue here, he's obviously guilty, we won't listen to any more evidence, it's all over, he's done it before, he must have done it this time', why wouldn't they possibly take that approach?*
> >
> > *50 It seems to me that there was 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 of the question of his intent in the charges before them. The difficulty of obviating that risk had to be taken into account in assessing the likely prejudicial effect of the evidence."*

*The judge had regard to directions to the jury as an available course. He said that the jury might reason in the manner last mentioned "[n]otwithstanding the warnings that a trial judge must give" (at [50]). He said that the jury would be told not to punish the respondent again by basing their verdict on emotional rather than rational considerations, but no matter how many times the jury was told to be rational and dispassionate it was "in the trial of a self-confessed child molester ... a big ask" (at [50]-[51]). In his Honour's view "[t]he potential for very great prejudice remains regardless of what could be said by the trial judge to ameliorate it" (at [51]).*

This issue brings to mind the effectiveness of any so-called ameliorating directions that might be given by a judge. In this regard the oft-quoted panacea for protective directions is from McHugh J in Gilbert v The Queen(2000) 201 CLR 414**:**

*'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 assumpti0n, which I regard as fundamental to the criminal jury trial, the common law countries have staked a great deal. If it was now 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 were rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any authoritarian state. Put bluntly, unless we act on the assumption that criminal trials act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials'.*[9]

However Gleeson CJ and Gummow J said in the same case:

*'the system of criminal justice as administered by appellate courts, requires the assumption that, as a general rule, juries understand and follow, the directions given*

[9] at [31]

*to them by trial judges. It does not involve the assumption that their decision making is unaffected by matters of possible prejudice'.*[10]

Sometimes directions are perfectly capable of guarding against prejudice, but not always. It will be a matter for judgment as to when the prejudice is such that no direction, no matter how emphatic or repeated, simply can act as properly protective of an accused.

[10] at [13]

**IS THE EVIDENCE OTHERWISE RELEVANT AS BACKGROUND (CONTEXT, RELATIONSHIP or TRANSACTIONAL) EVIDENCE?**

Proposed evidence of similar activities undertaken at the same time of the subject conduct cannot amount to tendency. Also, evidence of prior similar incidents involving the accused and the complainant will rarely have the significant probative value necessary for admissibility as tendency evidence.[11]

**Does the proposed evidence come from only from the complainant and go to the relationship with the accused?**

Context or relationship evidence has long been admissible at common law and under the Evidence Act.

The threshold test for admissibility of any evidence is that of relevance i.e that it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. In Reg v DJV [2008] NSWCCA 272 McClellan CJ at CL said there must be an issue or issues relating to the charged acts, which justifies the reception of the evidence [28].

Context evidence is not tendency evidence and sections 97 and 101 of the Evidence Act need not be complied with. Sections 135 and 137 will be engaged in the process. A close consideration of the evidence and the operation of the sections is required particularly where a sexual interest is alleged by an accused in the complainant: DJV[16].

Contextual evidence has to meet the lower threshold tests of prejudice under section 137. The judge must refuse to admit evidence where its probative value is outweighed by the danger of unfair prejudice to the accused. Under section 101, evidence which is tendency evidence, cannot be used unless the probative value substantially outweighs the prejudicial effect it may have on the accused. Evidence of tendency excluded under s 101 might not be excluded as contextual evidence under section 137*:* DJV [16]. The Crown has a higher hurdle to cross with tendency evidence.

Problems arise where the evidence is of a tendency type but which the Crown seeks to introduce as context not tendency. This is discussed in DJV at [17].

[11] Reg v Qualtieri at [118]. This type of evidence however may be admissible as relationship evidence.

The court must critically analyse attempts by the prosecution to tender the evidence other than as tendency. [29]. To be admitted the uncharged acts must raise an issue which relates to the charged acts. The question is, "to what issue in the trial does the evidence go?" The Court is then to determine admissibility in the light of sections 135 & 137. [36].

In Reg v Qualtieri at [80] the Court set out the following steps:

- The identification of the evidence and the purpose of it's tender should be clearly identified;
- If the evidence is adduced to show a tendency on the part of the accused, it must be assessed in accordance with ss 97 and 101 of the Evidence Act 1995;
- Evidence led as contextual evidence for the charges will be admissible if it is relevant and not unfairly prejudicial in accordance with section 135 and 137. Considerable care must be exercised.

Evidence of a prior relationship between the complainant and the accused which extends beyond any indictment period and which comes only from the complainant will generally not be admitted as tendency evidence. In Qualtieri Howie J explained the reasons for that this way at [117] - [118]:

> *'Context evidence in child sexual assault offences will normally come from the complainant because it is part of the narrative or the history of events surrounding the particular allegations in the counts set out in the indictment. Its relevance will only be found in the extent to which it does provide an understanding of the particular allegations before the jury. Where the complainant is alleging a history of assaults upon him or her by the accused, the evidence, or some of it, may need to be admitted because it would be impossible for the complainant to give an account of the particular allegations without referring to uncharged allegations that proceed or surround them. It would often be unrealistic for the complainant to be expected to give an account of the particular allegations as if they happened "in a vacuum".*
>
> *On the other hand evidence of the relationship between the accused and the complainant that is admitted for the purposes of showing that the accused had a tendency or propensity to have sexual relations with the complainant will almost never be found in the complainant's account of his or her relationship with the accused. That is because the complainant's account of the relationship would rarely*

*have sufficient probative value to overcome the precondition of admissibility for tendency evidence in s 97 and s 101. It is presumably the lack of sufficient probative value of the complainant's evidence to prove a tendency on the part of the accused that led McHugh and Hayne JJ in Gipp v The Queen (1998) 194 CLR 106; 102 A Crim R 299 at [76] to require that evidence of the complainant to be used for this purpose to be proved beyond reasonable doubt.*

*Tendency evidence generally does not have to be proved to that standard. Evidence of the accused's sexual interest in the complainant will usually be found outside of the complainant's evidence, such as in a letter written by the accused to the complainant or some other act of the accused that shows a sexual interest in the complainant or children generally.'*

Evidence of contextual matters does not have to be proved beyond reasonable doubt: DJV [31], but tendency material cannot be used by the jury unless they are satisfied of it to that standard: DJV [30]

If the evidence of other acts is adduced for the purpose of proving a propensity being the sexual interest of an accused in a complainant then it is tendency: DJV [30]; as per the dictionary definition in the Evidence Act. It proves that the accused has a tendency to act in a certain way or to have a particular state of mind thereafter or at certain times. Behaviour in relation to one complainant based on an abnormal sexual interest is capable of being tendency. Tendency evidence will include other acts against other complainants of a similar nature and involving an identical or similar modus operandi.

Once admitted regard should be had to limiting its use under s.136 and directions prohibiting its use as tendency under s.95.

If the Court admits the evidence as relationship evidence regard should be had as to the form of the evidence and in this regard there is much to be said for the suggested approach of Gleeson CJ in HML v The Queen (2008) 235 CLR 334 where he said at [28]:

*'There may be cases in which fairness is best served by confining the evidence of uncharged acts to brief and general evidence that the occasion the subject of an alleged offence was not an isolated instance. In Gipp vThe Queen(116), McHugh and Hayne JJ referred to the possibility of a preference for evidence of sexual history that was given shortly and without detail.'*

Too much relationship evidence can sometimes lead to an unfair trial. In Reg v Makarov (No 3) [2008] NSWCCA 293 a piano teacher was charged with sexual offences against a number of his students. Some of the complainants' allegations were separated on the ground of possible collusion, but the trial judge allowed the complaints of two complainants to proceed in a single trial, even though the evidence was not cross admissible on tendency grounds (again based on possible collusion). Rather, the trials were run jointly on the basis that each of the complainants were witnesses to each others assaults. Further that the evidence of earlier sexual misconduct upon both of them (in Australia and in the Ukraine) was intended to be led in respect of both complainants and this was said to be cross admissible in each case in order to put each of the offences on the Indictment in its true context. The complicated factual matrix included therefore not only eye witness testimony but relationship evidence as well.

On appeal the NSW Court of Criminal Appeal agreed with the appellant's submission that the evidence (particularly the relationship evidence) had the potential to swamp the allegations on the Indictment. New, separate trials were ordered.

In the event that evidence is admitted as relationship evidence the Court should give a direction in accordance with the suggested direction from the Judicial Commission Criminal Trials Bench Book, set out at Annex 2 to this paper.

**Does the proposed evidence relate to an accused state of mind at around the time of the alleged offence?**

Tendency Notices are sometimes served relying on the alleged conduct of the accused at or around the time of the alleged offence, purportedly to demonstrate a tendency on the part of the accused to commit the offence by reference to that conduct, or evidence of state of mind.

This is not tendency evidence per se. However, like relationship evidence, even if the evidence is not admissible as tendency evidence, it may still be admissible as relevant to show the accused's state of mind at or around the time of the alleged offence. This evidence is sometime called 'transactional evidence' and is closely related to the common law concept of 'res gestae'.

In O'Leary v The King(1946) 73 CLR 566 the High Court considered a case in which the accused was part of a working party situated in an isolated area of South Australia. On the 6-7 July 1946 the men engaged in a lot of drinking which commenced at Penola continued at

Kalangadoo and finished at the camp occupied by the men. The deceased was found in a cubicle at the camp from head injuries consistent with the infliction of 8-9 blows from a bottle. In addition kerosene had been poured upon him and his clothes set alight. The offender was present nearby and had possession of a bottle and his pullover was found nearby to the cubicle where the deceased was found.

During the course of the drinking, described by the Justices of the High Court as a "drunken orgy", the offender made a number of brutal unprovoked assaults on other workmates who were drunk and unable to defend themselves. The deceased was in the same position. The question in the trial was one of the identity of the offender. The murder took place in an isolated camp so that it was highly probable that it was committed by one of the inhabitants.

The trial judge allowed the evidence that the offender had attacked the other men in the camp around the time of the murder. The issue on appeal to the High Court was the admissibility of the other assaults committed on the other men by the accused in the period leading up to the death of the deceased.

The Court found that the evidence was properly admitted on the following basis:

1. The evidence was relevant to an issue before the jury. That relevancy depended upon the circumstances of the particular case. In this case it was relevant to the identification of the offender as the murderer.
2. It was evidence of a connected series of events which formed part of one transaction or one course of behaviour consisting of connected events
3. It was also evidence which put the events surrounding the death into its true context. The transaction of which the murder formed an integral part could not be understood in isolation from this evidence and would otherwise be presented as "an unreal and not very intelligent event." Latham CJ said that the evidence that the offender had on the day and night of the killing actually attacked fellow employees without cause put the act of attacking the deceased in a setting which made it possible for the jury to obtain a real appreciation of the events of the day and night. It made intelligible the course of conduct pursued. Rich J said it formed part of the circumstances of the crime including his drunken condition, how he reached that condition, how long it took and how he behaved in that condition.
4. In relation to the issue of the offender's state of mind Dixon J said that his generally violent and hostile conduct might well serve to explain his mind and attitude and

therefore to implicate him in the resulting homicide. Latham CJ said that the evidence that he had attacked fellow employees without cause was evidence which also went to the show the probability that he would attack some other fellow employee. The fact that he alone committed acts of violence and threatened violence during the drinking orgy had probative value because it made it logically probable that he was the man who assaulted the deceased.

In Reg v Adam (1999) 106 A Crim R 510 Spigelman CJ, James & Bell JJ considered whether the O'Leary principles remained operative within the Evidence Act context.

In that case an off-duty police officer was attacked by a group of men in the car park of a Fairfield hotel and died at the scene as a result of a stab wound to the chest. The accused was present at the hotel with his brother Gilbert Adam and others. They were part of an older group of men. There was another group of younger men also present at the hotel

The attacking group consisting of members of the younger group also included Gilbert Adam who was found guilty of the murder. It was not suggested that Richard Adam was present in the first attack when the fatal injury was inflicted. There was a second phase of the attack which included kicking & punching the deceased on the ground as he lay dying. Richard Adam was alleged to have been a part of this second group. They came from the hotel after becoming aware of the disturbance in the car park and after another of the younger men was stabbed sometime just before the stabbing of the policeman.

He was found guilty of maliciously inflicting grievous bodily harm on the police officer.

Evidence was left to the jury based on the O'Leary principles as Richard Adam having an aggressive state of mind following evidence that he had argued with and stared at various people earlier in the evening at the hotel.

On appeal Adam argued that the trial judge had failed to give a tendency evidence direction in relation to this evidence. The Court held:

1. The O'Leary principle was not abolished by the Evidence Act;
2. Evidence which falls within the O'Leary principle is not evidence of the conduct of an accused person in the past, or evidence tending to show that he has a particular disposition or propensity of inclination. No tendency direction is required (although a direction of some sort might arise in a particular case);

3. The elements of the principle were stated in relation to the relevant evidence relied upon by the Crown as follows: If the evidence:

    (a) Was an integral part of a connected series of events which included the assault; and

    (b) Which could not be truly understood without reference to the evidence (O'Leary principle); or

    (c) If the evidence was evidence of conduct by the accused at a time sufficiently proximate to the alleged assault to permit an inference to be drawn that the accused had the same continuing state of mind at the time of alleged assault as he had at the time of the evidence, such evidence would not be tendency evidence.

In R v Player [2000] NSWCCA 123 the Court of Criminal Appeal was asked to determine whether a judge was in error in permitting the Crown to lead evidence of the state of mind of the appellant immediately after the breaking of a window in an arcade belonging to the Fruit Market shop in Epping.

Two security guards from the Epping Hotel, who knew the appellant, heard the sound of breaking glass and went to that area. A few minutes after this they saw the appellant come from that direction. He was in aggressive state of mind and kicked a bin over, walked on and kicked and either karate chopped or slashed a for sale sign. He walked on and kicked another bin. The security people spoke to him and observed a Pepsi bottle in his hand.

The other evidence was that the window had been broken and Pepsi bottle removed from the shop were found in the gutter outside the market. There was no one else in the vicinity. It was a circumstantial case seeking to establish the identity of the offender.

The Court held that the accused's subsequent behaviour was relevant to his state of mind that existed at an earlier time. The smashing of the window was part of the same connected series of events, a drunken aggressive and destructive rampage in the early hours of the morning.

In LJW v R [2010] NSWCCA 114 the appellant was indicted on four counts, two of aggravated sexual intercourse with a child between 10 and 14, and two of aggravated commit an act of indecency towards a child under 16. He was convicted of an attempt in the first count and of all the other offences.

Count 1, anal intercourse and count 2, fellatio were alleged to have taken place in Muswellbrook at the home of the appellant's friends. The applicant had driven both the complainant and his cousin, the appellant's stepson from Sydney to Muswellbrook in March or April 2006. The complainant and the appellant shared a bed with the complainant's cousin. The cousin supported the complainant in some aspects as well as a complaint that the appellant was trying to rape him. Counts 3 & 4 involved the appellant masturbating in the complainant's presence. Count 3 occurred sometime after count 2 but months before count 4.

The complainant gave evidence that on the trip to Muswellbrook he had seen the appellant masturbating whilst driving. In his ERISP the appellant said the complainant raised this with him and he had explained that he had a problem with getting erections and that he had to keep his penis active or lose the ability to achieve an erection so he was 'sunning it' but not 'out and out' masturbating.

This evidence was admissible on the basis that it was directly relevant to prove the state of mind of the appellant in the course of travelling to Muswellbrook. The trial judge said that the travel was part of the sequence of events leading to the arrival and the sleeping arrangements and therefore it was res gestae.

On appeal Johnson J agreed with the submission that the evidence in the car was not admissible as part of the res gestae in accordance with O'Leary**.** There was not a connected series of events which should be considered as one transaction of which the events in the car were a part. It was however probative as evidence of a state of mind which could reasonably be inferred as having continued from the time of the incident in the car, in the middle of the day to the time of the events alleged in counts 1 & 2 at night. Johnson J relied on Reg v Adam in that regard.

There was also evidence that during the day the appellant had gone swimming without his clothes on in the presence of both boys leading to an available inference that the appellant's earlier state of mind was thus reinforced. In this regard Johnson J said the reasoning was not tendency reasoning but reasoning that on this day the appellant exhibited a state of mind displaying interest in and a lack of inhibition from such activity that it could be inferred continued until the night time.

In Jiang v Reg [2010] NSWCCA 277 the appellant was charged with two acts of sexual intercourse without consent under section 61I and an indecent assault section 61L. The offences arose during a full body massage which the complainant, a French backpacker, had

engaged accused, a massage therapist, to carry out. The massage took about an hour. The complainant gave evidence that whilst on her back she had been touched between her anus and vagina. When she turned over after about 30 minutes the accused massaged her breasts with particular attention to her nipples, massaged close to her vagina with a finger touching her clitoris (count 2) and at the same time he sucked her right nipple (count 1). She pushed his head and hand away and the massage continued. He placed a finger at the entrance to her vagina and put pressure on it (count 3). She pushed his hand away. The massage continued. She was asked to sit on a stool and complied. Her neck was massaged and he started to massage her breasts and nipples again and she pushed his hand away and stood up.

The activity in relation to the touching between her anus and vagina and the massaging of her breasts and nipples before the counts in the indictment and the further massaging of her breasts and nipples after them were all uncharged acts. A ground of appeal was that no appropriate direction was given in relation to that material. On appeal the Court considered state of mind and transactional evidence at [45]-[52].

R A Hulme (Simpson & Hoeben JJ agreeing) said at [45] that clearly that evidence was admissible upon the basis that it was part of a connected series of events and was evidence that the appellant had a continuing state of mind citing O'Leary, Adam and LJW. It was [46] particularly relevant as to the appellant's state of mind; ie that he was intent on overstepping the boundaries of legitimate massage and sexually assaulting the complainant.

The evidence was not led as tendency or relationship or contextual evidence. [47]

The subsequent act of breast massage, if accepted by the jury, so closely followed the charged acts that it was of use in evaluating the appellant's state of mind at the time of those acts.

The commission of the other acts, if the jury accepted they occurred, was relevant to proof of the appellant's state of mind, something that because of the close proximity in time to the charged acts was a legitimate mode of reasoning in accordance with O'Leary, Adam and LJW.

In the event that evidence is admitted as transactional evidence the Court should give a direction in accordance with the suggested direction from the Judicial Commission Criminal Trials Bench Book, set out at Annex 3 to this paper.

**IS THERE A POSSIBILITY OF CONCOCTIONOF THE ALLEGATIONS OR CONTAMINATION OF THE COMPLAINANTS' VERSIONS?**

As has been pointed out, the concept of 'concoction' suggests an active agreement by complainants to get together to make a false complaint, whereas the notion of 'contamination' might permit a more innocent perversion of fact by way of subconscious influence from other versions, particularly in cases that span back years or perhaps decades.

The modern common law position in Australia is drawn from Lord Wilberforce's judgment in Director of Public Prosecutions v Boardman [1975] AC 421where he said (at 459):

> *'The probative force [of similar fact evidence] is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all to be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly may be asked to judge whether the right conclusion is that all are true, so that each story is supported by the others.*
>
> *I use the words 'a cause common to the witnesses' to include not only the possibility that the witnesses may have invented a story in concert but also the possibility that a similar story may have arisen by a process of infection from media or publicity or simply from fashion. In the sexual field, and in others, this may be a real possibility: something much more than mere similarity and absence of proved conspiracy is needed if this evidence is to be allowed'.*

**Concoction:**

In 1988 in Hoch v The Queen, the High Court considered a case where a boys home worker was charged with three counts of indecent assault upon three different children who had been resident at the home. His application for separate trials was rejected and the evidence admitted as similar fact evidence. He was convicted. On appeal to the High Court Mason CJ, Wilson and Gaudron JJ said:

> *'[Similar] fact evidence serves two purposes. Its first function is, as circumstantial evidence, to corroborate or confirm the veracity of the evidence given by other*

*complainants. Its second function is to serve as circumstantial evidence of the happening of the event or events in issue. In relation to both functions the evidence, being circumstantial evidence, has probative value only if it bears no reasonable explanation other than the happening of the events in issue. In cases where there is a possibility of joint concoction there is another rational view of the evidence. That rational view – viz concoction – is inconsistent with both the guilt of the accused person and with the improbability of the complainants having concocted similar lies. It thus destroys the probative value of the evidence which is a condition precedent to its admissibility."*[12]

Further, matters of relationship, opportunity and motive or ill-disposition are relevant also matters to consider.[13]

Further, Brennan and Dawson JJ said:

*'Admissibility of evidence of this kind depends not only on similarity between the acts which the prosecution seeks to prove, but, more importantly, on the non-existence of a cause common to the witnesses';* [14] *and*

*'There is a [duty] on a trial judge to exclude similar fact evidence unless he is satisfied that there is no real chance that it is the product of a cause common to the witnesses';*[15] *and finally*

*'That is not to say that a trial judge should lightly conclude that there is a 'real chance' of conspiracy among the complainants in sexual cases, whether children or adults. Contact or antecedent friendship between complainants may be quite insufficient to found such a conclusion. But the circumstances of their contact or friendship may warrant an inquiry whether there was a real chance that they had agreed to concoct their allegations. When such circumstances appear, the judge must inquire."*[16]

The reasoning in Hoch was not only adopted, but extended by the High Court in Pfennig v The Queen (1995) 182 CLR 461 where Mason CJ, Deane and Dawson JJ said at p 482-483:

*'...Because propensity evidence is a special class of circumstantial evidence, its*

[12] at p.296
[13] at p.297
[14] at p.302
[15] at p.304
[16] at p.304

*probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused. Here "rational" must be taken to mean "reasonable" and the trial judge must ask himself or herself the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of that case. Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. And, unless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle.'*

Hoch and Pfennig were common law jurisdiction cases. Since the commencement of the Evidence Act 'similar fact' evidence now comes under tendency and coincidence evidence.

Despite arguments over the years that there is no place for Hoch type principles in an assessment of the tests under ss.97 and 101, the principle remains valid and operative. However, there has been something of a looseness of language used from time in time in respect of exactly how the test is to be expressed.

In Colby v Reg [1999] NSWCCA 261 Mason P said:

*'... the procedural approach adopted in Hoch should be applied to trials conducted in accordance with the Evidence Act where evidence is tendered to show tendency..... If the* ***reasonable possibility of concoction*** *suggests that evidence of this nature may be contaminated, it must be withheld from the jury because that risk deprives the evidence of its significant probative vale, regardless of its substantial and relevant similarity'.*[17]

However, and perhaps importantly in the context of the current debate over the operation of Hoch type principles, in Reg v OGD (No 2) (2000) 50 NSWLR 433the NSW Court of Criminal Appeal (per Simpson J) ruled that under the Evidence Act, where there is evidence that is capable of disclosing a tendency on the part of an accused to act in a particular way and the Crown fails to exclude the reasonable possibility of concoction on the part of the proposed witnesses, that evidence must be excluded, not because of the rule in Hoch, but because of the statutory requirement to weigh the probative value of such evidence against its

[17] at [107]

prejudicial effect set out in s.101(2) EA. This approach appears to have had some support over the years[18] but is now seemingly under attack.

As to the means of determining whether there is a reasonable possibility of concoction, Simpson J said at [74]:

> *'I would take the view, consistent generally with the approach taken in the criminal law, that the High Court [in Hoch] intended to state a rule that similar fact evidence is inadmissible unless (the onus lying on the Crown) the judge is satisfied that there is not* ***real possibility of concoction****. However, I also favour a view.that their Honours' envisaged a genuine fact finding exercise, in which evidence, if considered necessary or appropriate, could be adduced from the witnesses from whom the Crown seeks to adduce the similar fact evidence, and in which the focus of inquiry is on the factual (as distinct from the theoretical) possibility of concoction'.*[19]

As however, to the exact terms of the test, the language in that case did appear somewhat mixed. In addition to Simpson J's statement above at [74], she also earlier explained it as a duty to exclude the evidence answering 'whether the similar fact evidence is capable of reasonable explanation on the basis of concoction (at [70]).

However, in Reg v AE at [44] and Reg v BSJ at [16] the test was satisfied by use of the term 'possibly'.

Elsewhere in Tasmania v W (No 2)[20] the Tasmanian Court of Appeal referred to the test as operating when there is a 'likelihood' and/or 'more than a theoretical possibility' of concoction.

In Reg v Ellis (2003) 58 NSWLR 700 the NSW Court of Criminal Appeal convened a 5 judge bench to deal (apparently in final terms) with the effect of the Pfennig test (i.eexclusion unless 'no rational view consistent with innocence'). In that case Spigelman CJ found that as Pfennig applied the 'no rational explanation' test to a common law principle that probative value outweighs prejudicial effect, that reasoning was inapplicable to 'the statutory test that probative value substantially outweighs prejudicial effect' at [89].

Despite the apparent 'death' of Pfennig, the problem that Hoch dealt with remains a live one, requiring constant judicial attention. Courts have consistently continued to exclude evidence

[18] see for example in FB; and Tasmania v L
[19] at [74]
[20] [2012]TASSC 48

tendered as tendency on the basis of there being a real possibility of concoction or contamination between the complainants.

In AE v Reg [2008] NSWCCA 52, Bell JA, RS Hulme and Latham JJ considered a case in which the trial judge had permitted tendency evidence in a joint trial involving two complainants. There the trial judge had permitted tendency evidence of two complainants (step sisters) in circumstances where the first complainant disclosed long term sexual abuse and the second on the same day, after speaking to the first about it.

The Court referred to Hoch and Pfennig, noting that these were no longer the tests for the admission of tendency evidence by reference to Ellis but went on to say at [44]:

> *'However, it was not an error to consider the possibility of joint concoction in assessing the probative value of the evidence. To the extent that his Honour did so, it was an error to find that there was no possibility of joint concoction. The complainants were sisters and were in contact with one another at the time each made her complaint. Insofar as the judge assessed the probative value of [one of the complainant's] allegation as being substantial in proof of the allegation that the appellant assaulted [the other complainant] his Honour erred'.*

In BP v Reg; Reg v BP [2010] NSWCCA 303 Hodgson JA (with whom Price and Fullerton JJ agreed) further acknowledged the significance of possible concoction in the exclusion of tendency evidence stating:

> ***'[109] The possibility of prejudicial effect with which s.101 is concerned is the possibly that the jury will act on the evidence otherwise than by way of its rational effect on the probability of a fact in issue. … An assessment must be made whether the probative value of the evidence substantially outweighs any prejudicial effect that the evidence may have: Ellis at [94] – [95].***
>
> ***[110] One matter that powerfully affects both the probative value of tendency evidence and the possibility of prejudicial effect is the risk of concoction or contamination of evidence.*** [21] *If the evidence of tendency from different witnesses is reasonably capable of explanation on the basis of concoction, then it will not have the necessary probative value: Hoch. However, this will be so only if there is a* real *chance rather than a merely speculative chance of concoction: Colby, R v OGD (No*

[21] These bolded portions were specifically approved of by Basten JA in Reg v BJS [2011] NSWCCA 239 at [27] whereas the additional parts of [110] specifically were not, as being inconsistent with Ellis.

> *2). The onus is on the Crown to negate the "real chance" of concoction: OGD at [74], R v F (2002) 129 A Crim R 126 at [48].*
>
> *[111] Relevant to consideration of concoction are the factors mentioned in Hoch at 297, namely relationship, opportunity and motive. One of these on its own is not sufficient to base a finding of a real possibility of concoction: Reg v RN [2005] NSWCCA 413 at [15], OGD at [111]-[112].*

Whilst it is safe to say that the question of the real possibility of concoction is still a matter for consideration at the exclusionary stage, counsel should be aware of a recent and intense attack upon the application of such principles, which appears to now be gaining some judicial traction.

The Hon DJ Heydon AC QC, shortly after his retirement from the High Court, presented the 2014 Paul Byrne SC Memorial Lecture[22] in which he drew on dicta of Dixon CJ in Wendo v The Queen to the effect that probative value of evidence will rarely be a matter for conclusive determination by a judge.[23] Readers will immediately recognize aspects of Reg v Shamouil[24] within this motif.

In his speech Mr Heydon expressed a quite condemnatory opinion about the continued application of the Hoch principles, acknowledging that their continued existence remains as a relevant consideration under s.97, but saying:

> *'This importation of a Hoch qualification was a gratuitous judicial creation, unsupported by any explicit statutory language. Indeed the judicially generated rebirth of the Hoch qualification in, or its grafting on to, a statute was a rather astonishing event, because it took place in the teeth of the legislative murder of its common law existence'.*

Given the use of the terms 'murder' and re-birth' it is no surprise that the Hoch principles are now being lambasted by some as resembling a zombie that cannot be killed.

In October 2014 the NSW Court of Criminal Appeal heard argument in a potential 'game changing' case, still shrouded within the Judicial Commission Restricted Judgments site as

[22] Reproduced in 'Current Issues in Criminal Justice' Vol 26 No 2 page 220

[23] (1963) 109 CLR 559 at 562
[24] (2006) 66 NSWLR 228

Reg v Jones [2014] NSWCCA 280. Readers should have regard to the admonition on its use contained on the Judicial Commission website.[25]

In Reg v Jones at first instance in the District Court the trial judge, A M Blackmore SC DCJ presided over a voir dire examination of the three complainants to determine the admissibility of the proposed tendency evidence. It appears that counsel then appearing for the accused did not put to the complainants, in terms, that they had concocted their versions.

The trial judge then made various findings to the effect that: (1) there was no aspect of their evidence which cause him to question the reliability of their evidence (2) there was no direct evidence of concoction and no such allegation was put to any of them (3) the spontaneity of the complaints (on one day at a meeting between them) did not bespeak of concoction and (4) whilst it was possible that there was some unwitting contamination (as opposed to concoction) that possibility was not pursued in cross-examination and the probative value of the evidence was not reduced. On appeal it was found that those matters were sufficient to dispose of the appeal.

However, Blackmore SC DCJ then went on to make a number of other, more broad-reaching findings:

(a) the applicant's submission concerning the significance of possible concoction should be rejected because it was based on Hoch, a case which reflected common law principles which have no application to the Evidence Act;

(b) Hoch and decisions following it (namely BP and FB) should not be followed;

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[25] 'Use of Restricted NSWCCA Judgments: Restricted NSWCCA judgments are those judgments of the Court of Criminal Appeal which have not been published on the internet and are not available to the general public. Restricted NSWCCA judgments made available on the Judicial Information System (JIRS) are not for general publication. Access is restricted to judicial officers and their staff and to legal practitioners only for use in connection with legal proceedings.

By accessing the restricted NSWCCA judgments you undertake to abide by the publication restriction. In the event that an approved user does not comply with a suppression order or statutory provisions prohibiting publication that may apply to a judgment or decision the Judicial Commission is not liable or responsible for such a breach. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision.'

(c) For the purpose of s.97, and in accordance with Reg v Shamouil, the probative value of the evidence was not to be determined by an assessment of its reliability and credibility;

(d) As a consequence of (c) there was no reason to consider the submission that the evidence may be concocted or contaminated, because such matters went only to the reliability and credibility of the evidence.

The possible significance of the trial judge's findings will be strikingly obvious to the reader. In effect, he was saying that Hoch was gone; and even if there was actual concoction or contamination proved, this was irrelevant in any event to the question of admissibility of the tendency evidence. The only issues for consideration were whether the evidence had significant probative value and whether any possible prejudice caused by the jury not giving each individual counts proper consideration could be dealt with by an appropriate direction.

In one fell swoop, the question of significance of any potential or actual concoction or contamination was dispensed to the bin. Put another way, the unacceptably high High Court test was lowered, apparently to there being no such test at all.

When the matter came before the Court of Criminal Appeal his Honour Bellew J (with whom Gleeson JA and Schmidt J agreed) fortunately took a more cautious approach.

In the appeal the applicant argued that Blackmore SC DCJ erred in:

(1) concluding that there was no evidence of concoction or contamination;

(2) failing to apply Hoch, BP and FB; and

(3) concluding that Shamouil operated to prohibit any consideration being given to the possibility of concoction when determining the probative value of the evidence.

The Crown argued that Hoch, BP and FB should not be followed and the preferred approach was that set out by Basten JA in Reg v BJS [2011] NSWCCA 239 as applied by Hoeben CJ at CL in Reg v BJS (No 2) [2013] NSWCCA 123. The Crown also relied on observations by Basten JA in Reg v Saoud (2014) 87 NSWLR 481 at [39] to the effect that the use of common law terms may distract a tribunal from properly focusing on the necessary statutory terms. The Crown also argued that Shamouil did indeed preclude consideration of the issues of concoction or contamination when determining the probative value of the evidence, because they went only to reliability and credibility.

In BJS Basten JA specifically did not approve of portions of Hodgson JA's judgment in BP,[26] but he did, in terms, accept that the real possibility of concoction or contamination is a matter which 'powerfully affects both the probative value of tendency evidence and the possibility of its prejudicial effect'.[27]

In BJS (No 2) Hoeben CJ at CL somewhat mutedly pointed out at [65] that the applicant's reliance on Hodgson JA in BP was 'problematic' for the reasons set out by Basten JA in the earlier BJS case.

In determining the appeal in Jones however Bellew J had to go no further than consideration of the first issue, finding that it was well open to the trial judge to conclude that there was no evidence of contamination or concoction. His Honour then went on to make some 'observations about the questions that they raise'. Any such observations are therefore clearly to be treated as obiter dicta.

As to the current status of Hoch, BP and FB, Bellew J said that the applicant's reliance on those authorities was indeed (as was said by Hoeben CJ at CL) 'problematic' as it tended to overlook Ellis and Saoud. This is hardly a ringing endorsement of the submission.

I might point out that in Saoud even Basten JA showed his soft side in considering the significance of the real possibility of concoction as potentially impacting upon the probative value of the putative tendency evidence, stating at [2]:

> *'Where two women make similar allegations of sexual assault against a man in circumstances where there is no risk of collaboration between the complainants or contamination of the complaints, the instinctive response is to treat each as supportive of each other. Two independent allegations of non-consensual sexual activity are less likely to be mistaken or fabricated than each considered separately. However, for the purposes of a criminal trial such a response is inadequate. The law requires that each must have 'significant probative value' with respect to the other and that probative value must 'substantially outweigh' any prejudicial effect'.*

As to the impact of Shamouil on the question of exclusion of the evidence generally Bellew J went through (in brief terms) the relevant parts of that judgment; he then referred to Reg v DSJ [2012] NSWCCA 9; and concluded his narrative with a consideration of the grab-bag of views expressed in Reg v XY (2013) 84 NSWLR 363.

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[26] Set out above at page 33 above
[27] at [24] and [27]

In the end, Bellew J noted the competing views expressed in XY about the possible significance of competing inferences in assessing admissibility of evidence and at [89] and [90] kept the issue wide open for future consideration:

> *'Whether [a court] may take into account concoction and contamination is a separate question entirely, the answer to which will depend largely on the evidence [in the case]'; and*
>
> *'It is conceivable that there may be cases in which evidence of concoction and contamination gives rise to competing inferences. It may be in such a case, those inferences are relevant to determination of the probative value of the evidence. However, the evidence in this case does not give rise to such inferences'.*

In short, whilst in the end the case of Reg v Jones does little to actually change the current position in NSW, it does point in a particular direction and gives hope to those who would wish to eradicate concoction and contamination from an assessment of the admissibility of tendency evidence.

Enter Judge Peter 'the Zombie Slayer' Berman SC. In the latest Criminal Law News[28] his Honour has written a piece dealing with his perception of the impact of Reg v Jones, stating, with some apparent relief that after years of uncertainty the NSW Court of Criminal Appeal is now 'speaking with one voice' and that the 'preponderance of views is that cases such as Colby, BP and FB are no longer good law'.

Perhaps wisely, given the sympathetic approach of Basten JA in Saoudand that of Bellew J in Reg v Jones to the possible adverse significance of concoction to the probative value of tendency evidence, His Honour ended the article with this piece of advice:

> *'Popular culture suggests that zombies can be killed by an axe to the head. Given the number of times in which Hoch has been raised from the dead it would be a brave supporter of the statutory tests to be found in the Evidence Act who puts his or her axe away just yet'.*

Maybe the gift of Hoch that keeps on giving, will continue in the future to do just that.

Given the admitted sensitivity of the NSW Court of Criminal Appeal to decisions of the Victorian Court of Appeal in respect of matters in which it had already spoken (see Reg v Dupas [2012] VSCA 328) some regard might be had to other Evidence Act jurisdictions.

[28] Butterworths Vol 22 Issue 5 – June 2015

In Tasmania v L [2013] TASSC 47 something of a middle course appears to have been taken. Pearce J dealt with a matter in which the reasonable possibility of concoction was an issue. In that case the Court accepted what was said in Shamouil as to what use the court could make of reliability or credibility when determining the probative value of the evidence, but still thought that this was a relevant matter to consider when looking at the prejudicial effect of the evidence, saying at [61]:

> *'What is clear however, is that the prospect of concoction weighs heavily in the balancing exercise required under s.101(2). Whilst ultimately, if the evidence is admitted, the question of concoction or contamination will be a matter for the jury, it is appropriate for me in determining the admissibility of the evidence to make my own assessment as to the degree of likelihood of concoction or contamination and, in doing so, to, if necessary make findings of fact. There is no reason in principle why an assessment of the credibility or reliability of a complainant should not be made for the purposes of such a finding of fact: Tasmania v W (No 2).*

**Contamination:**

Apart from active concoction, there also exists a danger, particularly amongst complainants who are known to each other and who may have discussed the allegations made by one or more of them amongst themselves, that any subsequent version given by each of them may be contaminated by what they were told by others, or another.

In BP Hodgson JA referred to the Victorian Court of Appeal case of Glennon (No 2) (at [155] where Callaway JA said:

> *''Collusion" does not have any special meaning which includes unconscious influence or innocent infection. The point is rather that, just as collusion deprives disputed similar fact evidence of its probative value, the same may be true of unconscious influence or innocent infection from media publicity. The unconscious influence or innocent infection may supply the explanation for the similarity between the respective complainant's accounts without there being any dishonest fabrication. Where that is an issue at a trial, the judge should direct the jury that they have to be*

*satisfied beyond reasonable doubt that such unconscious influence or innocent infection is not the explanation for the similarities on which the Crown relies.'* [29]

In BP Hodgson JA went on to say:

*'In my view it is not a risk of any contamination that would necessarily require the exclusion of evidence: it must be a risk of contamination that goes to the substance of the evidence, not merely to incidental details of no materiality. I accept that, unless the Crown negates a real chance of contamination going to the substance of the evidence, then the evidence of other witnesses should not be admitted as tendency evidence. However, the risk of unconscious influence as to incidental details would not in my view necessarily require the evidence to be excluded'.* [30]

As to whether actual proven contamination will fall foul of the same problems visited upon possible concoction of evidence and discussed above is a live issue.

Logically, there must be a difference between assessing evidence where, for example, the complainants all deny getting together to concoct a joint story out of some animus for the accused and where there is positive evidence that a complainant only came forward with a complaint in circumstances where he or she had already been informed, by a family member or close friend, of all of the details of that person's complaint. The latter must have had all probative value (for tendency purposes) stripped away from it by the disclosure in full of the version prior to the making of the complaint.

**Life after Reg v Jones:**

In Reg v Steele [2015] NSWDC 100 Berman SC DCJ got his chance to slay the Hoch zombie, and did not miss with that axe. He found that indeed that Hoch, BP and FB are no longer good law, relying instead on Ellis and the 2 BJS decisions referred to above.

Factually, his Honour found that each of the three complainants had 'implicitly denied' falsely concocting their versions by adhering to what they had told the police in their interviews as the truth. He went on to say that Shamouil and Mr Heydon AC QC both say that he should accept that evidence. He did.

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[29] at [155]
[30] at [123]

What however was left was a consideration of whether there had been unconscious contamination of the versions of the three complainants. That his Honour dealt with the matter that way suggests that contamination will remain in any event as a matter to be considered separate to that of concoction and without regard to those matters referred to above in favour of its unguarded reception.

By way of late inclusion to this paper, on9 July 2015 the Court of Criminal Appeal handed down the decision of Reg v McIntosh [2015] NSWCCA 184. In that case Basten JA dipped his toe into further analysis of tendency evidence, but really went no further. Whilst Jones is listed in the 'cases cited' part of the judgment, I can see no further reference to it in the body of the judgment.

Apart from pointing out again that Hoch is not be followed as it is inconsistent with Ellis, Basten JA gives little other assistance as to what is the law. His Bonour also trod carefully through the Shamouil/XY jungle, offering this opinion at [42] – [43]:

> *'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.*
>
> *It should be acknowledged that this conclusion is inconsistent with the approach identified in the leading Australian text, Cross on Evidence.*[31] *However, that reasoning appears to have relied upon cases which predated R v Ellis in 2003.*[32] *Further, the view accepted here appears to be consistent with the explanation of R v XY accepted by the author of Cross as the applicable law in this State.*[33]

This does not say anything about the operation of s.101, nor does it really respond to those passages of BP (at [110]) previously approved of by Basten JA in BJS, discussed above.

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31 JD Heydon, Cross on Evidence (LexisNexis, 10th ed, 2015) at 768.
32 See R v OGD (No 2) [2000] NSWCCA 404; 50 NSWLR 433; R v Colby [1999] NSWCCA 261.
33 JD Heydon, "Is the Weight of Evidence Material to its Admissibility?" (2014) 26 Current Issues in Criminal Justice 219 at 227 and 237.

**Identifying Concoction or Contamination:**

In cases where concoction or contamination is suggested the proper course to take, therefore is to permit cross examination of the proposed tendency witnesses on a voir dire, to determine whether there is a real possibility that their evidence is the result of a 'cause common' to each of them, or if there has been some contamination (as to substance) of their versions. In Jones the application failed because counsel had failed to properly examine the witnesses on the voir dire. In McIntosh Basten JA referred to the need, on occasions, for a more comprehensive cross-examination than that which had been carried out, saying at [49]:

> *'If a possibility of concoction at a level sufficient to affect the capacity of the evidence to bear significant probative value were to be identified, it would probably have been necessary to carry out a reasonably searching cross-examination on the voir dire, before admissibility was ruled on. That did not happen*.'

In such cases, and particularly where such witnesses positively or by implication, eschew even contact with each other, it may be a legitimate forensic exercise to examine those witnesses' publicly available social network profiles, to establish connections between the witnesses not otherwise established on the face of the statements.

An example of a social network relationship map is attached to this paper as Annex 4.

As part of the voir dire examination it is suggested that the following topics should be considered:

- the nature of the relationship between the complainants;
- their physical proximity to each other;
- details of how often they met/spoke together after the alleged incidents but before their complaints;
- whether any of then have a motive to put forward a false story about the accused;
- complete circumstances of how each of the complaints was made known to each other;
- details of how many times they spoke about the allegations after the initial disclosure but prior to the any official complaint to police.

**IS THE NOTICE OTHERWISE VALID?**

**What should a Notice contain?**

A proper and valid Tendency/Coincidence Notice is one at least which:

- properly identifies the substance of the evidence and particulars of the conduct relief upon, in that it properly identifies (in terms) the specific evidence to be relied upon by the Crown in support of the asserted tendency; and
- attaches copies of the relevant statements and/or documents said to be the source of the allegations upon which the Crown rely to establish the asserted tendency

Under s.97(1)(a) EA in order make any alleged tendency evidence admissible it is necessary for the Crown to give 'reasonable notice' in writing to each other party of the party's intention to adduce the evidence.

Under s.99 EA notices under s.97 are to be given in accordance with any regulation or rules of court made for the purposes of this section.

Clause 6(2) Evidence Act Regulations 2010 provides in mandatory terms that a tendency/coincidence notice must state:

(a) the substance of the evidence of the kind referred to in s.97(1) that the party giving notice intends to adduce; and

(b) if that evidence consists of, or includes, evidence of the conduct of a person, particulars of:

(i) the date, time and place and circumstances at or in which the conduct occurred; and

(ii) the names and addresses of each person who saw, heard or otherwise perceived the conduct.

In Reg v AN (2000) 117 A Crim R 176 the NSW Court of Criminal Appeal dealt with a Tendency Notice which purported to describe the substance of the evidence to be relied upon as:

> *'The substance of [the] evidence and the particulars of the date, time, place and circumstances at or in which the conduct occurred has been disclosed in the brief of evidence and the evidence at committal, as have the names and addresses of each*

*person who saw, heard or otherwise perceived the conduct so far as they are known to the Crown'.*[34]

Kirby J said in respect of that Notice: at [61]:

*'Plainly such a notice does not comply with the requirements of the Regulations. The Crown did not suggest otherwise. The notice should have identified, in terms, the evidence to be called, and provided the other information required by the Regulations'.*[35]

It follows that a Tendency/Coincidence Notice that is said to be based on a whole particularised statement is not on its face valid because much of any such statement would not amount to tendency/coincidence evidence. An accused should not be required to work out for himself what evidence the Crown will seek to rely upon as tendency evidence.

Further guidance as to what should be included in a properly drafted tendency notice can be found in Gardiner (2006) 162 A Crim R 233where the NSW Court of Criminal Appeal dealt with a Tendency Notice which simply:

*'[I]dentified the appellant as the subject of the evidence and indicated that the relevant evidence was to be found in the statements of various police witnesses and the transcript from the conducts/execution of search warrants at Gladiator's Club House, Turf St Grafton – 20 November 2002'.*

McClelland CJ at CL noted that no where in his reasons for judgment did the trial judge identify the tendency that the evidence supported and it is to be inferred that the relevant tendency was not properly articulated in the Notice.[36]

Simpson J looked more closely at the contents of the Notice and said this:

*'A properly drafted tendency notice should, in my opinion, explicitly identify the fact or facts in issue upon which the tendering party asserts the evidence bears. It should also explicitly identify the tendency sought to be proved…*

*… … …*

*The tendency notice was, to put it mildly, terse. It expressly identified the appellant as the person whose 'tendency' was the subject of the evidence sought to be adduced,*

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[34] at [60]
[35] at [61]
[36] at [53]

*and it listed the prosecution statements containing the evidence upon which it proposed to rely as tendency evidence. As the presiding judge has pointed out, at no point did it descent to the specification of the tendency which the evidence was tendered to prove. Nor did it specify any fact (or facts) in issue upon which the evidence was said to bear.'*[37]

In Reg v Ford Campbell JA referred to a properly drafted tendency notice in these terms:

*'The Crown served notice of its intention to adduce tendency evidence on 30 January 2009. It stated: The tendency sought to be proved is his tendency to act in a particular way, namely to sexually assault and indecently assault women who are asleep in his home after they have been drinking alcohol. It identifies the precise parts of witness statements, and of the transcript of evidence given at the previous hearing, that the Crown alleges establish the tendency for which it contends. No complaint is made about the adequacy of this notice to fulfil the requirement of s 97(1)(a).*[38]

More recently in Reg v Bryant (2011) 205 A Crim R 531 the NSW Court of Criminal Appeal dealt with a matter in which no tendency notice was served, although tendency evidence was lead in the trial without objection. In this regard Howie J said:

*'The contents of a properly drafted notice for tendency evidence was considered in Gardiner v The Queen. The importance of explicitly identifying 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.*

*The judge should have refused to proceed until proper notices were given notwithstanding the attitude take (sic) by defence counsel. Here the whole of the evidence was simply placed before the judge on the basis it was tendency, coincidence or circumstantial evidence without any attempt to place it into its component parts or identify what evidence was admissible on what basis.*

*The application proceeded on the basis of the tender of a large amount of material including witness statements, documents, CCTV footage and still photographs. No witnesses were called to give evidence at, therefore, the application was to be considered taking the Crown case at its highest.'*[39]

[37] at [128] – [130]
[38] at [25] – [26]
[39] at [50] – [53]

Howie J made no mention of the use of s.100 EA in the circumstances of the breaches identified in Bryant.

**When should a Tendency Notice be served?**

As was previously pointed out under s.99 EA tendency notices must be given in accordance with the regulations or rules of court.

The District Court Rules provide in Part 53:

> '10 C Rule 31.5 of the Uniform Civil Procedure Rules 2005 applies in respect of proceedings in the criminal jurisdiction of the Court.'

The Uniform Civil Procedure Rules provide as follows:

> 31.5 Notice under s 67 or s 99 of the Evidence Act 1995
>
> Unless the court orders otherwise, notice for the purposes of section 67 or 99 of the Evidence Act 1995 must be given:
>
> > (a) in any case where the court by notice to the parties fixes a date for determining the date for hearing, not later than 21 days before the date fixed by that notice, and
> >
> > (b) in any other case where the place of hearing is a place other than Sydney, not later than 21 days before the first call-over held in respect of the sittings at that place, and
> >
> > (c) in any other case, not later than 21 days before the date on which the court determines the date for hearing.'

**Section 100 Evidence Act:**

Under s.100 EA a party who has served a notice otherwise than in accordance with the legislation, regulations or rules of court may seek leave of the court to adduce the evidence in the absence of reasonable notice. In Reg v Harker [2004] NSWCCA 427 at [34] the Court

said that in determining that question the Court is to have regard, inter alia, to the provisions of section 192 EA.

An alternative to dispending with notice is to adjourn the proceedings for an appropriate tome in order to permit proper notice. That was the course suggested in Reg v Willoughby [2000] NSWSC 751, and in practice, that is the course that is most often taken in criminal trials where the Crown has not complied with the legislation concerning service of Notices.

However, the late service of Tendency Notices by the Crown in criminal matters has become a common, if not endemic problem. In Reg v RJ [2011] NSWDC 158 Colefax DCJ had cause to consider whether the notice requirements should be dispensed with under s. 100 EA. In dealing with the question of whether the Crown should be permitted to adduce tendency evidence he said:

> *'Before turning to that, however, I wish to say something about the late service of the notice.*
>
> *It is important to recall that no explanation of any kind was offered by the Crown as to why the service requirements clearly laid out by Parliament were not complied with. Informal enquiries that I have made of senior and experienced judges of this court, together with my own more limited experience, suggest that this is not an isolated incident. In fact Mr Hamill made the assertion, uncontradicted in the present case by the Crown Prosecutor, that it is a regular occurrence.*
>
> *In R v Harker[2004] NSWCCA 427 the court of Criminal Appeal considered the discretionary factors which a court ought to take into account in determining an application to dispense with notice requirements. Unsurprisingly the court held that the two most important considerations were the probative value of the evidence and any prejudice caused to the respondent.*
>
> *One factor which the court did not consider, however, was repeated non-compliance by the Crown with the statutory requirement for service. Non-compliance is not simply a matter of case management but the ignoring of the will of Parliament.*
>
> *There may well be an appropriate case where the mere fact of the Crown yet again not complying with the notice requirements in and of itself would entitle a court*

*not to dispense with the service requirements and regardless of the weighing of the probative value of the evidence as against any prejudice to the respondent.*

*This is a matter on which I would want fuller argument than was provided in the present voir dire. Subject to such argument, however, there does seem to me to be some force in such a proposition.'*[40]

**Section 192 Evidence Act:**

In R v Leonard Reardon and Others [2002] NSWCCA 203 Hodgson JA was dealing with an application to dispense with notice under s.100. He said at [30]:

*'In my opinion, unless the contrary may be inferred from the circumstances or from what a judge does say, it should be assumed that a judge hearing a case will continually be having regard, in making such decisions as in the judge's other acts and omissions during the course of the hearing to:*

*(a) the effect of the decision, act or omission on the length of the hearing, and how that in turn affects the legitimate interests of the parties and the efficient conduct of the court's business;*

*(b) the imperative to avoid unfairness to parties and witnesses;*

*(c) the importance of any piece of evidence about which some discretions is to be exercised;*

*(d) the nature of the proceedings themselves; and*

*(e) the available alternatives, whether they be by way of adjournments or otherwise;*

*that is, to the matters referred to in s.192(2) EA'.*

Experience tells us that little joy is received from the Bench when complaining about late service of notices and adjournments are commonplace in answer to an argument of prejudice. However, in some cases an adjournment will not cure prejudice to an accused person. Sometimes cases must run, as is. This is certainly the way the civil jurisdiction of courts proceed these days.

[40] at [13] – [18]

Practitioners should be alert as to the possibility of arguing this ground as a means of avoiding tendency evidence and forcing the trial on.

# ANNEX 1 – MODEL DIRECTION EXTRACTED FROM THE NSW JUDICIAL COMMISSION CRIMINAL TRIAL BENCH BOOK

**[4-232] Suggested direction — tendency evidence in a child sexual assault case**

As you would be aware [*the accused*] is charged only with the offence(s) stated in the indictment. You have before you evidence that the Crown relies upon as directly establishing that [*he/she*] committed [*that/those*] offence(s). However, you also have evidence that the Crown relies upon to prove beyond reasonable doubt that [*the accused*] had a sexual interest in [*the complainant*] and was willing to act upon it in the way that [*the complainant*] alleges. The Crown argues that you will find [*the accused's*] sexual interest proved beyond reasonable doubt and therefore you can use it to prove the allegations in the indictment beyond reasonable doubt. The Crown says that you will be satisfied that [*the accused*] had a sexual interest in [*the complainant*] on the basis of what I shall refer to as other acts of a sexual nature committed against [*the complainant*].

[*Outline the Crown's evidence upon which it relies to prove that the accused had a sexual interest in the complainant.*]

Before you can use the evidence of other acts in the way the Crown asks you to use it you must make two findings beyond reasonable doubt. The first finding is that you must be satisfied beyond reasonable doubt that one or more of those other acts occurred. In making that finding you do not consider each of the acts in isolation but consider all the evidence and ask yourself whether you are satisfied that a particular act relied upon actually took place.

If you cannot find that any of these acts is proved by the Crown beyond reasonable doubt, then you must put aside any suggestion that [*the accused*] had the sexual interest in [*the complainant*] as alleged by the Crown and decide the case on rest of the evidence.

If you are satisfied beyond reasonable doubt that one or more of those acts occurred, then you go on to consider the second finding. You ask yourself whether, from the act or acts that you have found proved, you can infer or conclude beyond reasonable doubt that [*the accused*] had a sexual interest in [*the complainant*] as the Crown alleges. If you cannot draw that inference or conclusion beyond reasonable doubt, then again you must put aside any suggestion that [*the accused*] had a sexual interest in [*the complainant*].

So, if having found one or more of the acts attributed to [*the accused*] to have been proved by the Crown beyond reasonable doubt and you can from the proved act or acts infer or conclude beyond reasonable doubt that [*the accused*] had the sexual interest in [*the complainant*], you may use that fact in determining whether [*the accused*] committed the offence(s) charged.

The evidence must not be used in any other way. It would be completely wrong to reason that, because [*the accused*] has committed one crime or has been guilty of one piece of misconduct, [*he/she*] is therefore generally a person of bad character and for that reason must have committed the offence(s) charged. That is not the purpose of the evidence being placed before you and you must not reason in that way. You cannot punish [*the accused*] for other conduct attributed to [*him/her*] by finding [*the accused*] guilty of the charge(s) in the indictment. You cannot use it in any way prejudicial to [*the accused*] unless you accept the Crown's argument that it shows that [*the accused*] had a sexual interest in [*the complainant*] and therefore makes it more likely that [*the accused*] committed the offence(s) charged against [*him/her*].

Further you must not substitute the evidence of the other acts led to prove that [*the accused*] had a sexual interest in [*the complainant*] for the evidence of the specific allegations contained in the charges in the indictment. The Crown is not charging a course of misconduct by [*the accused*] but has charged particular allegations arising in, what [*the complainant*] says, was a course of sexual misconduct. You are concerned with the particular and precise occasion alleged in [*the/each*] charge(s). If you find that [*the accused*] had a sexual interest in [*the complainant*], it may indicate that the particular allegations are true, but remember you are required to find that each specific charge is proved beyond reasonable doubt before you can find [*him/her*] guilty.

# ANNEX 2 – MODEL DIRECTION EXTRACTED FROM THE NSW JUDICIAL COMMISSION CRIMINAL TRIAL BENCH BOOK

**[4-215] Suggested direction — context evidence**

As should by now be clear to you, before you can convict [*the accused*] in respect of any charge in the indictment, you must be satisfied beyond reasonable doubt that the particular allegation occurred. That is, the Crown must prove the particular act to which [*the/each*] charge relates as alleged by the complainant.

In addition to the evidence led by the Crown specifically on the count(s) in the indictment, the Crown has led evidence of other acts of alleged misconduct by [*the accused*] towards [*the complainant*]. I shall, for the sake of convenience, refer to this evidence as evidence of "other acts".

The evidence of other acts is as follows:

[*Specify the evidence of other acts upon which the Crown relies*].

It is important that I explain to you the relevance of this evidence of other acts. It was admitted solely for the purpose of placing [*the complainant's*] evidence towards proof of the charges into what the Crown says is a realistic and intelligible context. By context I mean the history of the conduct by [*the accused*] toward [*the complainant*] as [*he/she*] alleges it took place.

[*Recite the Crown's submission of the issue(s) in the trial which justified the reception of context evidence.*]

Without the evidence of these other acts the Crown says, you may wonder, for example, about the likelihood of apparently isolated acts occurring suddenly without any reason or any circumstance to link them in anyway. If you had not heard about the evidence of other acts, you may have thought that [*the complainant's*] evidence was less credible because it was less understandable. So the evidence is placed before you only to answer questions that might otherwise arise in your mind about the particular allegations in the charges in the indictment.

[*The following should be adapted to the circumstances of the case:*]

If, for example, the particular acts charged are placed in a wider context, that is, a context of what [*the complainant*] alleges was an ongoing history of [*the accused's*] conduct toward [*her/him*], then what might appear to be a curious feature of [*the complainant's*] evidence — that [*she/he*] did not complain about what was done to [*her/him*] on a particular occasion — would disappear. It is for that reason that the law permits a complainant to give an account of the alleged sexual history between herself or himself and an accused person in addition to the evidence given in support of the charge(s) in the indictment. It is to avoid any artificiality or unreality in the presentation of the evidence from the complainant. [*The complainant's*] account of other acts by [*the accused*] allows [*him/her*] to more naturally and intelligibly explain [*her/his*] account of what allegedly took place.

The Crown can therefore lead evidence of other acts of a sexual nature between [*the accused*] and [*the complainant*] to place the particular charge(s) into the context of [*the complainant's*] account of the whole of [*the accused's*] alleged conduct.

However, I must give you some important warnings with regard to the use of this evidence of other acts.

Firstly, you must not use this evidence of other acts as establishing a tendency on the part of [*the accused*] to commit offences of the type charged. You cannot act on the basis that [*the accused*] is likely to have committed the offence(s) charged because [*the complainant*] made other allegations against [*him/her*]. This is not the reason that the Crown placed the evidence before you. The evidence has a very limited purpose as I have explained it to you, and it cannot be used for any other purpose or as evidence that the particular allegations contained in the charges have been proved beyond reasonable doubt.

Secondly, you must not substitute the evidence of the other acts for the evidence of the specific allegations contained in the charges in the indictment. The Crown is not charging a course of misconduct by [*the accused*] but has charged particular allegations arising in what [*the complainant*] says, was a course of sexual misconduct. You are concerned with the particular and precise occasion alleged in [*the/each*] charge.

You must not reason that, just because [*the accused*] may have done something wrong to [*the complainant*] on some or other occasion, [*he/she*] must have done so on the occasion(s) alleged in the indictment. You cannot punish [*the accused*] for other acts attributed to [*him/her*] by finding [*the accused*] guilty of the charge(s) in the indictment. Such a line of reasoning would amount to a misuse of the evidence and not be in accordance with the law.

[*Note: attention should be directed to any particular matters that might affect the weight to be given to the evidence.*]

# ANNEX 3 – MODEL DIRECTION EXTRACTED FROM THE NSW JUDICIAL COMMISSION CRIMINAL TRIAL BENCH BOOK

**[4-222] Suggested direction — background evidence**

The function of a direction in the case of background evidence is to inform the jury of the limited purpose for which the evidence is admitted and to direct them against using the evidence for tendency reasoning. The content of the direction will depend substantially upon the nature of evidence and the purpose it is being admitted. For example, if it is admitted to rebut a defence of accident. The direction should contain the following components:

The evidence led by the Crown [*recite the form of the background evidence*] was placed before you as evidence of background to the incident giving rise to the charge(s) before you. The Crown's argument is that without that evidence you would not have the whole history that is necessary to understand the full significance of the incident upon which the charge is based. The Crown argues that this evidence:

[*State Crown argument eg explains why the accused and the victim acted in the way they did or reveals the state of mind of the accused at the relevant time or rebuts accident or identifies the accused as the offender*].

That is why this evidence was placed before you and how the Crown relies upon it in proof of the charge. However, that is the only reason that the evidence is before you and you cannot use it for any other purpose. Whether you give it the significance that the Crown asks you to place on the evidence is a matter for you. But that is the only relevance it has to your deliberations.

In particular you must not use that evidence to reason that, because [*the accused*] has behaved in a certain way on a particular occasion, [*he/she*] must have behaved in that or a similar way on the occasion giving rise to the charge. You must not use that evidence to reason that [*the accused*] is the type of person who would commit the offence with which [*he/she*] has been charged. You cannot punish [*the accused*] for other conduct attributed to [*him/her*] by finding [*the accused*] guilty of the charge(s) in the indictment. That is not the Crown's argument and it would be contrary to the law and your duty as a juror to use the evidence for a purpose

other than the specific basis relied upon by the Crown.

## ANNEX 4 – FACEBOOK RELATIONSHIP MAP: