‘Turning the tables’: Defence tendency applications in criminal trials

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"The best defence is a good offence."

— Jack Dempsey, World Heavyweight Boxing Champion 1919-1926

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I. Introduction

1. Once thought of as the exclusive province of prosecutors, tendency evidence is being utilised by defence practitioners with greater frequency. A defence tendency application can be a useful way to introduce evidence to bolster a self-defence case, strengthen a duress defence, impugn prosecution witnesses or even support an alternative hypothesis that another person committed the crime.

2. A successful application can alter the dynamic of a trial, challenging the prosecution narrative of what occurred whilst exposing weaknesses that were not otherwise apparent.

3. It is somewhat anomalous that tendency evidence is not deployed by defence counsel more often. That is because defence practitioners are better placed, compared to prosecutors, to make tendency applications for three key reasons:

    a. Firstly, the "significant probative value" test in s 97(1)(b) of the *Evidence Act* (the **Act**)[1] operates differently – and is easier to satisfy – where the accused seeks to adduce tendency evidence;

    b. Secondly, the further restriction in s 101(2) does not apply to defence tendency applications; and

    c. Thirdly, the case law suggests that a trial judge should rarely exercise a discretion to exclude tendency evidence adduced by the defence.

4. This paper will begin with a brief overview of tendency evidence under the Act and the general principles of case law that apply. The paper will then examine specific cases involving defence tendency applications and the jurisprudence that has developed. Finally, the paper will outline the practical and procedural steps required to make a defence tendency application. An example of a defence tendency notice is also annexed at the end as a guidepost for what is required to be set out.

5. The paper is designed as a practical guide for legal practitioners who wish to make a defence tendency application but do not yet have the experience or technical knowledge to do so.

[1] The Act refers to the enactment of the *Model Uniform Evidence Bill* as reflected in the *Evidence Act 2008* (Vic), *Evidence Act 1995* (NSW), *Evidence Act 2011* (ACT*), Evidence (National Uniform Legislation) Act 2011* (NT) and *Evidence Act 1995* (Cth). The specific wording of certain provisions in each enactment of the Act may vary depending upon the particular jurisdiction.

II. A brief overview of tendency evidence

An inferential process of reasoning

6. Any practitioner who wishes to make a tendency application must first have a sound understanding of the principles – and leading authorities – that govern the admissibility of tendency evidence. This can be a technical area of evidence law, so it is critical that the conceptual foundation is firmly cemented in the mind of the applicant at the outset.

7. Tendency evidence is a type of circumstantial evidence that supports a particular mode of reasoning.[2] It provides the foundation for an inference to reach a conclusion of fact. In *Elomar v R*,[3] the court (Bathurst CJ; Hoeben CJ at CL; Simpson J) described the inference as follows:

> The inference is that, because the person had the relevant tendency, it is more likely that he or she acted in the way asserted by the tendering party, or had the state of mind asserted by the tendering party on an occasion the subject of the proceedings. Tendency evidence is a stepping stone. It is indirect evidence. It allows for a form of syllogistic reasoning.[4]

8. In *Hughes v The Queen*,[5] the majority of the High Court (Kiefel CJ, Bell, Keane and Edelman JJ) explained the reasoning process as:

> The trier of fact reasons from satisfaction that a person has a tendency to have a particular state of mind or to act in a particular way to the likelihood that the person had the particular state of mind or acted in a particular way on the occasion in issue.[6]

9. Applied to evidence of past conduct, Gageler J concisely distilled the logic of tendency reasoning as:

> [N]o more sophisticated than: he did it before; he has a propensity to do this sort of thing; the likelihood is that he did it again on the occasion in issue.'[7]

10. Whilst Gageler J issued a dissenting opinion in *Hughes*, his Honour's refreshingly blunt description is perhaps the easiest starting point for practitioners unfamiliar with this type of evidence.

A purposive definition

11. The definition of "tendency evidence" in the Act focuses on the *purpose* for which the evidence is tendered.[8] Tendency evidence is defined in the Dictionary of the Act as:

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[2] *Chen v R* [2011] NSWCCA 145 at [96].
[3] [2014] NSWCCA 303.
[4] *Elomar v R; Hasan v R; Cheikho v R; Cheikho v R; Jamal v R* [2014] NSWCCA 303 at [359].
[5] [2017] HCA 20.
[6] *Hughes v The Queen* [2017] HCA 20 at [16].
[7] *Hughes v The Queen* [2017] HCA 20 at [70].
[8] *R v Quach* [2002] NSWCCA 519 at [32].

> "tendency evidence" means evidence of a kind referred to in section 97(1) that a party seeks to have adduced for the **purpose** referred to in that subsection.

12. When read in conjunction with the wording in s 97(1) of Act, tendency evidence can be comprehensively defined as:

> Evidence of the character, reputation or conduct of a person, or a tendency a person has or had, which a party seeks to adduce for the **purpose** of proving the person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind.

13. It follows that the *purpose* for which the evidence is tendered defines it as tendency evidence.[9] Where evidence is tendered for a non-tendency purpose (for example, evidence about the accused's prior conduct which is tendered as relationship evidence), then the evidence will not be caught by the operation of the tendency rule. However, note the operation of s 95 which prohibits the use of evidence admitted for a non-tendency purpose to then be used for its tendency purpose.[10]

Section 97 – the tendency rule

14. The admissibility of tendency evidence is governed by s 97(1) of the Act. This section provides:

> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is **not admissible** to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind **unless**—
>
> (a) the party seeking to adduce the evidence gave **reasonable notice** in writing to each other party of the party's intention to adduce the evidence; **and**
>
> (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have **significant probative value**.

15. It is to be emphasised that s 97(1) establishes an exclusionary regime. The statutory presumption is that tendency evidence is inadmissible unless certain preconditions are met. These preconditions include the provision of reasonable notice and satisfaction of the "significant probative value" threshold.

16. Further, when adduced by the prosecution, there is an additional restriction in s 101(2) that the tendency evidence cannot be admitted unless the evidence substantially outweighs any prejudicial effect it may have on the accused.[11]

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[9] *David L'Estrange v The Queen* [2011] NSWCCA 89 at [59]; *CA v R* [2017] NSWCCA 324 at [81].
[10] Section 95 has the opposite effect of sections 60 and 77 of the Act, which both permit evidence admitted for another purpose to also be used for its hearsay or opinion purpose, as the case may be.
[11] Section 101(2) has recently been amended in NSW, ACT and the NT as discussed at [50] below.

17. The onus is on the party seeking to adduce the evidence to satisfy the necessary preconditions.[12]

Reasonable notice

18. What constitutes "reasonable notice" for the purposes of s 97(1)(a) will depend on the date the notice is given, the complexity of the evidence and the level of detail provided in the notice.[13]

19. Section 99 provides that tendency notices are to be given in "in accordance with any regulations or rules of court made for the purposes of this section".

20. There are also regulations that govern the form and content of the tendency notice.[14] These regulations are directed towards ensuring that the notice contains sufficient particularisation of the tendency evidence sought to be relied upon.

21. It should be noted that some jurisdictions have prescribed time limits for service of a tendency notice. For example, in the Supreme Court of NSW, the tendency notice must be served at least 21 days before commencement of the trial.[15]

22. In *Hughes*, Gageler J described the purpose behind a tendency notice as follows:

> Making the evaluative judgment required of a court in the implementation of the tendency rule is facilitated by the procedural requirement that a party must ordinarily give notice of an intention to seek to adduce tendency evidence. **The utility of the tendency notice goes beyond providing procedural fairness to other parties**. The tendency notice provides the court, at the critical time of assessing the admissibility of tendency evidence, with a statement of the particular tendency which the party seeking to adduce the tendency evidence seeks to prove by it … By identifying the particular tendency that the evidence is asserted to prove, **the notice allows the court to evaluate the strength of the connection between the evidence and the tendency and the strength of the connection between the tendency and the fact in issue**.[16]

23. It follows that the purpose behind the tendency notice is two-fold. Firstly, to provide procedural fairness to the opposing party to consider and respond to the application. Secondly, to clearly identify and particularise the tendency asserted so that the trial judge can assess its probative value and determine whether the evidence should be admitted.

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[12] Stephen Odgers, *Uniform Evidence Law* (16th Edition) at [EA.97.420].
[13] Stephen Odgers, *Uniform Evidence Law* (16th Edition) at [EA.97.180].
[14] See for example Reg 8 of the *Evidence Regulations 2019* (VIC) and Reg 5 of the *Evidence Regulation 2020* (NSW).
[15] Rule 75.3(6) of the *Supreme Court Rules 1970* (NSW) cross-referencing to Rule 31.5 of the *Uniform Civil Procedure Rules 2005* (NSW).
[16] *Hughes v The Queen* [2017] HCA 20 at [105] (per Gageler J).

24. Finally, the court may dispense with the notice requirements pursuant to s 100(1). As will be seen, this section permits tendency evidence to be adduced at a late stage of the proceedings, sometimes even mid-way through the trial.[17]

Significant probative value

25. To be admissible, tendency evidence must satisfy the "significant probative value" threshold set out in s 97(1)(b). Whether this threshold has been satisfied is often the hottest area of contention between the parties on a tendency application.

26. The term "significant probative value" is not defined in the Act. In *Hughes*, the majority held that:

> Tendency evidence will have significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent.[18]

27. The majority in *Hughes* went on to explain:

> [T]he disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged.[19]

28. "Significant probative value" has also been interpreted as meaning "something more than mere relevance" but something less than "substantial". To meet the threshold, the evidence must be "important" or "of consequence" to the assessment of the probability of the existence of a fact in issue.[20]

29. The determination as to whether tendency evidence has significant probative value involves an "open-textured" enquiry and "evaluative judgment" about which reasonable minds will inevitably differ.[21]

30. In assessing "significant probative value", the general starting point – at least for a prosecution tendency application – is to identify the tendency and the fact(s) in issue which it is adduced to prove.[22] The facts in issue in a criminal proceeding are those which establish the elements of the offence.[23] However, remember that in a criminal trial the accused does not bear any legal onus of proof. For this reason, the "significant probative value" threshold operates differently in the context of a defence tendency application (as explained in further detail at [40]).

31. In undertaking the assessment of probative value, and in accordance with the High Court's decision in *IMM v The Queen*,[24] the proper approach is to assume

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[17] See for example: *R v Nudjulu* [2020] NTSC 54; *R v Holmes (No 5*) [2021] NSWSC 115.
[18] *Hughes v The Queen* [2017] HCA 20 at [16].
[19] *Hughes v The Queen* [2017] HCA 20 at [40].
[20] *R v Lockyer* (1996) 89 A Crim R 457 at 459; *DSJ v The Queen* [2012] NSWCCA 9 at [58] and [60].
[21] *Hughes v The Queen* [2017] HCA 20 at [42].
[22] *Hughes v The Queen* [2017] HCA 20 at [16]:
[23] *Hughes v The Queen* [2017] HCA 20 at [16]
[24] [2016] HCA 14.

that the tendency evidence "is accepted" (and thus regarded as both reliable and credible).[25]

32. In *Hughes*, the majority made clear that the assessment of whether tendency evidence has significant probative value involves the consideration of two interrelated but separate matters:

> The **first matter** is the **extent to which the evidence supports the tendency**. The **second matter** is the **extent to which the tendency makes more likely the facts making up the charged offence**. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters.[26]

33. In applying this two-step process, the majority observed:

> … By seeing that there are **two matters** involved it is easier to appreciate the dangers in focusing on single labels such as 'underlying unity', 'pattern of conduct' or 'modus operandi'. In summary **there is likely** to be a **high degree** of **probative value** where (i) the **evidence** by itself or together with other evidence **strongly supports proof of a tendency** and (ii), the **tendency strongly supports the proof of a fact** that makes up the offence charged.[27]

34. It must be kept in mind that the leading High Court authorities on tendency evidence, have all considered its admissibility through the lens of a prosecution application.[28] Accordingly, the two-step process outlined in *Hughes* is arguably of limited guidance when assessing "significant probative value" in the context of a defence application, as the evidence is not being adduced to make "more likely the facts making up the charged offence". The differing way in which the "significant probative value" threshold operates for a defence application is explained in the section that follows.

35. Until *Hughes*, there had been a divergence of opinion between appellate courts in NSW and Victoria as to whether the tendency evidence must have particular features of similarity or an underlying unity with the facts in issue in order to have significant probative value. This divergence was resolved in *Hughes*, where the High Court preferred the NSW approach by reasoning:

> Commonly, evidence of a person's conduct adduced to prove a tendency to act in a particular way will bear similarity to the conduct in issue. Section 97(1) does not, however, condition the admission of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. The probative value of tendency evidence will vary depending upon the issue that it is adduced to prove.[29]

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[25] *IMM v The Queen* [2016] HCA 14 at [39].
[26] *Hughes v The Queen* [2017] HCA 20 at [41].
[27] *Hughes v The Queen* [2017] HCA 20 at [41].
[28] See for example: *IMM v The Queen* [2016] HCA 14; *Hughes v The Queen* [2017] HCA 20; *The Queen v Dennis Bauer (a pseudonym) [2018] HCA 40*; *McPhillamy v The Queen* [2018] HCA 52.
[29] *Hughes v The Queen* [2017] HCA 20 at [39].

36. Nevertheless, the nature and extent of any similarities between the conduct the subject of the tendency evidence and that the subject of the charged offence is still relevant to the assessment of the probative value of tendency evidence.[30] In *Hughes*, the majority observed:

> … In criminal proceedings where it is adduced to prove the **identity** of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon **close similarity** between the conduct evidencing the tendency and the offence. Different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence.[31]

37. The generality or specificity with which an asserted tendency is particularised will also impact upon the assessment of its probative value. A tendency stated with a high degree of generality may be compromised in its capacity to achieve significant probative value having regard to the facts in issue in the case.[32] Whereas a tendency expressed with a level of particularity will likely have more probative value.[33] For an example of the difference, refer to [146]-[147] below.

[30] *Hughes v The Queen* [2017] HCA 20 at [39].
[31] *Hughes v The Queen* [2017] HCA 20 at [39].
[32] *Hughes v The Queen* [2017] HCA 20 at [64].
[33] *Hughes v The Queen* [2017] HCA 20 at [64].

III. Tendency evidence adduced by the defence

Three key observations

38. At the outset, three key observations can be distilled from the case law and wording of the legislation in respect of defence tendency applications:

    i. The significant probative value test in s 97(1)(b) operates differently – and is easier to satisfy – where the defence seeks to adduce tendency evidence;

    ii. The further restriction in s 101(2) does not apply in respect of a defence tendency application; and

    iii. The discretion in s 135 should rarely be exercised to exclude tendency evidence adduced by an accused.

39. These three key observations are considered in greater detail below.

Significant probative value test operates differently for a defence application

40. There is a strong line of authority that the significant probative value test operates differently – and is easier to satisfy – where tendency evidence is sought to be adduced by the accused.

41. This is because in a criminal trial the accused does not bear any legal onus of proof and so "the evidence must [instead] have significant probative value to the establishment of a particular reasonable possibility of a state of facts consistent with the innocence of the accused person".[34]

42. In *DPP v Campbell (Ruling No 1)*,[35] Kaye JA explained the different way that the significant probative value test operates as follows:

> The approach to **the question of admissibility of tendency evidence, sought to be adduced on behalf of the accused, must, of necessity, be different to the approach taken by the court to tendency evidence which is sought to be adduced on behalf of the prosecution**. In a criminal trial, the accused does not bear any legal onus of proof. Rather, on particular issues, the accused may bear an evidentiary onus of adducing evidence, from which an inference arises that a reasonable possibility, consistent with innocence, exists. Thus, in determining whether tendency evidence, sought to be adduced by an accused, is admissible under s 97(1), **it must be borne in mind that that evidence must have significant probative value to the establishment of a particular reasonable possibility of a state of facts consistent with the innocence of the accused person**.[36]

[34] *DPP v Campbell (Ruling No 1)* [2013] VSC 665 at [41].
[35] [2013] VSC 665.
[36] *DPP v Campbell (Ruling No 1)* [2013] VSC 665 at [41].

43. In *R v Holmes (No 5)*,[37] Campbell J observed that the leading authorities on tendency evidence – including the seminal High Court decision in *Hughes* – have all considered the meaning of "significant probative value" in the context of prosecution applications.[38] His Honour went on to explain:

> It is quite apparent from [the analysis of the majority in *Hughes*] that the explanation they have given for the guidance of other courts **is conditioned strongly by the idea that often it is the prosecution that seeks to introduce the tendency evidence**. "Beyond reasonable doubt" is the applicable standard of proof and the facts in issue relate to the legal elements of the offence. **Matters may be somewhat different in terms of "significant probative value" when one deals with the evidence to be introduced by the accused**.[39]

44. Having regard to the burden of proof in a criminal trial, Campbell J explained:

> Although the principles are immutable, it needs to be borne firmly in mind that in a criminal prosecution the Crown carries the onus of proving each and every element of the offence beyond reasonable doubt. An accused person, particular circumstances aside, carries no onus. There is no onus on the accused here. As a function of the criminal standard of proof, and the accusatory nature of criminal proceedings, **it is sufficient to entitle the accused to an acquittal if the jury is left with the view that an accused's exculpatory version of events, where one is proffered, might be true as a reasonable possibility**. And in my judgment **one is to bear this important consideration in mind when considering the meaning of "significant probative value" in s 97(1)(b)**.

45. Campbell J went on to consider the different way in which the threshold operates in respect of a defence application:

> I am also of the view that, as I have tried to explain already, **the requirement of significant probative value in relation to evidence sought to be led by the accused must necessarily be different** from its assessment when the same evidence is sought to be led by the prosecution in proof of an accused's persons guilt, and that is a function of the standard and burden of proof. It seems to me that the **evidence may well be significant when it comes to determining whether there is a reasonable possibility that the account of the accused is true which in turn may mean the jury is not persuaded beyond reasonable doubt** that the prosecution has proved its case.[40]

46. In *R v Smiler (No 2)*,[41] Kelly J also considered the different way in which the threshold operates in the context of a defence tendency application:

> It needs to be borne in mind that the Crown bears the legal onus of proof on all issues including negating self-defence. The accused need only point to a reasonable possibility that he was acting in self-defence and submit that the

[37] *R v Holmes (No 5)* [2021] NSWSC 115.
[38] *R v Holmes (No 5)* [2021] NSWSC 115 at [34].
[39] *R v Holmes (No 5)* [2021] NSWSC 115 at [35].
[40] *R v Holmes (No 5)* [2021] NSWSC 115 at [44].
[41] [2017] NTSC 31.

> Crown has not eliminated that possibility. **Very little may be required for evidence to be "significant" or "of consequence" in pointing only to a reasonable possibility that the accused may have been acting in self-defence**.[42]

47. The above passage from Kelly J's judgment in *Smiler (No 2)* has been quoted with approval by Mildren AJ in *Nudjulu*.[43]

Further restriction in s 101(2) does not apply to a defence application

48. The second key observation is that the further restriction in s 101(2) of the Act does not apply in respect of a defence application.[44] That is because s 101(2) is framed in express terms to only apply to tendency evidence "about an accused" that is "adduced by the prosecution".

49. Section 101(2) of the Act in Victoria provides as follows:

> Tendency evidence about an accused, or coincidence evidence about an accused, that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.

50. It should be noted that s 101(2) has recently been amended in NSW, ACT and the NT. The amendment has reduced the height of the hurdle that the Crown must overcome to adduce tendency evidence by removing the "substantially outweigh" requirement.[45] The newly amended s 101(2) is now expressed in NSW, ACT and the NT as follows:

> Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.

51. It is also worth noting that the protection in s 101(2) does not apply to tendency evidence adduced by the prosecution to explain or contradict tendency evidence adduced by the accused.[46] This means that where the accused adduces tendency evidence, he or she will be lowering their shield and making it easier for the prosecution to adduce tendency evidence in rebuttal. Of course, the exclusions in ss 135 and 137 of the Act still allow the defence to object to the rebuttal evidence where necessary.

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[42] *R v Smiler (No 2)* [2017] NTSC 31 at [16].
[43] *R v Nudjulu* [2020] NTSC 54 at [15].
[44] *R v Lockyer* (1996) 89 A Crim R 457 at 459.
[45] *Taylor v R* [2020] NSWCCA 355 at [122].
[46] Section 101(3) of the Act.

Discretion under s 135 should rarely be exercised against an accused

52. The third key observation is that the discretionary exclusion in s 135 of the Act should rarely be exercised to exclude defence tendency evidence. Indeed, a review of the relevant authorities confirms that prosecution applications to exclude defence tendency evidence have been overwhelmingly rejected at trial.

53. As a general principle, few prosecution applications to exclude evidence led by an accused in a criminal trial – where the purpose of the evidence is merely to raise a reasonable doubt in relation to the prosecution case – should be successful.[47] There is also authority that a trial judge should think "long and hard" before exercising the discretion in s 135 against an accused. In *R v Cakovski*,[48] Hidden JA observed (at [72]):

> No doubt, the Crown would suffer some prejudice from an inability so long after the event to examine the circumstances of the murders. However, that would not justify the exercise of the discretion under s135 of the Act to reject the evidence. In my view, **a trial judge would need to think long and hard before exercising that discretion against an accused in a criminal trial**.

54. This "long and hard" passage has been quoted with approval in subsequent decisions including by Davies J in *R v Basanovic (No. 3)*.[49]

55. In *DPP v Dixon & Ors (Ruling No 1)*,[50] Kaye JA rejected a prosecution application under s 135 to exclude defence tendency evidence:

> **I do not consider that the admission of that evidence, in the trial, would be unfairly prejudicial to the prosecution, or that it would result in an unnecessary waste of time**. As I have already discussed, the evidence, concerning the circumstances in which Morgan killed SM, would be susceptible of rather simple proof, particularly if the prosecution in the present case**, in conformity with its duty as a minister of justice,** were to **cooperate with the defence in adducing the relevant proofs**. I would anticipate that in that way the evidence concerning that previous incident would be quite confined. The relevance of the evidence would be explained to the jury by the judge, and by the prosecutor. It would not, in my view, result in unfair prejudice to the prosecution.[51]

56. Kaye JA's decision reiterates the importance of the Crown conducting itself in accordance with its duties as a model litigant and "minister of justice". In light of this decision, it would appear that the Crown's duty extends to cooperating with defence counsel to assist, where necessary, with relevant proofs of tendency

[47] *R v Taylor* [2003] NSWCCA 194 at [130] per Bell J (with Spigelman CJ and and Miles AJ agreeing): "I consider that the occasions on which the exercise of the discretion under s 135 to reject evidence tendered by an accused in the course of criminal proceedings will be few".
[48] *R v Cakovski* [2004] NSWCCA 280.
[49] *R v Basanovic and ors (No. 3)* [2015] NSWSC 1092 at [8].
[50] [2020] VSC 743.
[51] *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743 at [137].

evidence sought to be adduced by the accused.[52] Pointing out the duty of the prosecution to act as a model litigant, and assist the defence where necessary, can often be an effective response to a prosecution application for exclusion under s 135.

57. In *Smiler (No 2)*, Kelly J also rejected a prosecution application under s 135. Her Honour held that appropriate jury directions would ameliorate any risk of impermissible reasoning by the jury (at [20]):

> I do not think that its probative value is substantially outweighed by the risk that it might be unfairly prejudicial to the Crown, primarily because I do not think that risk is all that great either. The jury will receive the appropriate warnings to set aside emotion and prejudice and make their decision in accordance with reason and logic on the facts that they find made out on the evidence.

58. Similarly, Mildren JA in *Nudjulu* rejected a prosecution application to exclude under s 135, ruling that directions would sufficiently address any risk of impermissible reasoning by the jury:

> In any event, I agree with defence counsel's submission that any unfair prejudice to the Crown can be alleviated by the giving of a proper direction to the jury, and if so, then any possible remaining unfair prejudice would not outweigh the probative value of the evidence.[53]

59. Mildren AJ also acknowledged the argument advanced by defence counsel that jurors are regularly given directions in relation to prosecution tendency evidence which, in some cases, can consist of confronting and abhorrent past sexual offending on the part of the accused. It is a common refrain that jurors are presumed to conscientiously follow directions of law given by the trial judge.[54]

60. In *Holmes (No 5)*, the Crown objected to a defence tendency application made on the sixth day of the trial. The prosecutor argued that the court should not dispense with the notice requirement under s 100 as the admission of the defence tendency evidence at such a late stage of the proceeding would prejudice the Crown as it would require a "considerable change of tack on its part" and have the effect of poisoning the mind of the jury against the deceased.[55] In rejecting the Crown's application, Campbell J held (at [51)]:

> The circumstance in which this matter has arisen is, of course, most unsatisfactory, as I have said already. I accept that the obligation to procedural fairness applies equally to the prosecution and the defence. Having said that**, there can be no doubt that in a criminal trial the primary focus of the affirmative duty of the trial judge to afford a fair**

[52] For a historical overview of the Crown prosecutor's role as a minister of justice refer to David Plater & Lucy Line, "Has the 'Silver Thread' of the Criminal Law Lost its Lustre? The Modern Prosecutor as a Minister of Justice?" (2012) *University of Tasmania Law Review*, Vol. 31 No. 2.
[53] *R v Nudjulu* [2020] NTSC 54 at [19].
[54] *Amos v R* [2014] NSWCCA 302 at [19] citing *Dupas v R* [2010] HCA 20 at [26], *Darwiche v R* [2011] NSWCCA 62 at [269]; *Gilbert v R* [2000] HCA 15 at [9].
[55] *R v Holmes (No 5)* [2021] NSWSC 115 at [49].

> **trial is directed to the accused** and this is especially so in a murder trial. And while bearing the Crown's position in mind, **it seems to me that were I to refuse to admit the evidence on discretionary grounds, having determined that it is legally admissible, there is a real risk that the accused could be deprived of a fair opportunity of an acquittal of the more serious charge of murder**. That is to say, there is a real risk that my discretion would miscarry.

61. Whilst *Holmes (No 5)* was technically concerned with the court's discretion under s 100(1) to dispense with notice requirements – rather than an application to exclude under s 135 – the decision is useful authority for the proposition that the "primary focus" of procedural fairness in a criminal trial should be "directed to the accused". This is reflective of the reality that it is the accused – not the Crown – who is on trial and whose liberty is at stake.

IV. Examples of defence tendency applications

Overview

62. This next section provides an overview of specific cases where defence tendency applications have been judicially determined in superior courts across Australia.

63. The cases begin with the most recent authorities and proceed in reverse chronological order.

R v Holmes (No 5) [2021] NSWSC 115 (per Campbell J)

Defence tendency application successful; defence permitted to adduce tendency evidence of the deceased's prior violent offences to support accused's account that he was acting in self-defence

64. In *Holmes (No 5)*, the accused had been charged with the murder of a friend. The accused and deceased had been out drinking together. At one point a dispute arose over a missing tobacco pouch.

65. The prosecution alleged that the accused punched the deceased, knocking him to the ground, and then repeatedly punched his head whilst the deceased was lying on the ground causing his death. In contrast, the accused told police that the deceased was acting aggressively and threatened to kill him, and that he only punched the deceased once knocking him to the ground and then "slapped" him two to three times on his face when he was on the ground.

66. To support the defence case that the deceased was the primary aggressor, the accused sought to adduce evidence of the deceased's prior convictions for 7 violent offences committed within a 23-year window.[56] Most of the prior convictions related to acts of violence committed by the deceased against his domestic partner.[57] The accused argued that the prior convictions established a tendency on the part of the deceased to act in a particular way:

> It will be alleged that the deceased has a tendency to resort to irrational physical violence, sufficient to cause substantial injury to persons and property.
>
> The tendency, when manifest against persons, consistently resulted in bodily injury. The tendency tends to manifest itself against people variously near to the deceased, partners, a parent, and in this matter an old friend.
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> The tendency frequently manifested itself following the consumption, by the deceased, of alcohol or other drugs.[58]

[56] *R v Holmes* (No 5) [2021] NSWSC 115 at [27].
[57] *R v Holmes* (No 5) [2021] NSWSC 115 at [27].
[58] *R v Holmes* (No 5) [2021] NSWSC 115 at [6].

67. In allowing the tendency evidence to be admitted, Campbell J held that the significant probative value threshold was satisfied:

> I am also of the view that, as I have tried to explain already, the requirement of significant probative value in relation to evidence sought to be led by the accused must necessarily be different from its assessment when the same evidence is sought to be led by the prosecution in proof of an accused's persons guilt, and that is a function of the standard and burden of proof. **It seems to me that the evidence may well be significant** when it comes to determining whether there is a **reasonable possibility that the account of the accused is true** which in turn may mean the jury is not persuaded beyond reasonable doubt that the prosecution has proved its case. For that reason, **I am of the view that the tendency of the deceased to violence to those around him, especially when under the influence of alcohol, is capable of having significant probative value** afforded it in the deliberations of the jury.[59]

68. As noted above at [60], Campbell J dispensed with the notice requirements using the discretion in s 100 despite the application only being made at a very late stage of the proceedings, being the sixth day of the trial.

69. The trial proceeded to verdict and the accused was found not guilty of murder. He had previously entered a plea of guilty to manslaughter which the Crown had rejected at the arraignment. He was given full credit for his early plea and sentenced accordingly.[60]

DPP v Dixon & Ors (Ruling No 1) [2020] VSC 743 (per Kaye JA)

Defence tendency application successful; defence permitted to adduce tendency evidence of the complainant having previously killed a man (even though the deceased had been acquitted of murder at trial some 25 years earlier) to support self-defence

70. In *Dixon*, three accused stood trial for attempted murder and other related offences. It was conceded that one of the accused (Tahaney) had shot the complainant (Morgan). The defence case for all three accused was that Tahaney had shot Morgan in self-defence of either himself and/or the other two co-accused who were also present at the scene. The complainant survived but had no recollection of the incident.

71. In support of self-defence, the three accused jointly sought to adduce tendency evidence of Morgan's violent past. The accused asserted a tendency on the part of Morgan to: "resort to aggression and violence when angered, and to use firearms to settle personal grievances".[61]

72. The three accused relied on five prior incidents of violence committed by Morgan. These five incidents were comprised of: two assaults committed by

[59] *R v Holmes* (No 5) [2021] NSWSC 115 at [44].
[60] See *R v Holmes (No 7)* [2021] NSWSC 570 for the sentencing judgment.
[61] *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743 at [84].

Morgan on members of the public (when Morgan was a serving police officer in NSW), threatening behaviour by Morgan towards his brother-in-law, killing his brother-in-law (for which Morgan was acquitted of murder at trial) and sending threatening text messages to the three accused in the weeks leading up to the shooting.[62]

73. The three accused had knowledge that Morgan had shot and killed his brother-in-law some 25 years earlier, as Morgan had bragged about how he had "put six bullets in a fellows head before and [wasn't] afraid to do it again".[63]

74. The defence argued that the tendency evidence was said to be relevant to the issue of whether:

> … at the time Tahaney discharged the firearm and shot Morgan, the particular accused **was or were acting in self-defence or defence of another**. Thus, in order to be admissible under s 97(1) of the *Evidence Act*, that evidence must have significant probative value in respect of the issue whether there is a **reasonable possibility** that when Tahaney discharged the firearm, he, and the other accused, was or were **acting in self-defence** or defence of another.[64]

75. In considering whether the tendency evidence had "significant probative value", Kaye JA observed at [121]:

> … evidence that Morgan had a tendency to resort to aggression and violence, and particularly violence of an excessive kind, when angered, would be relevant. **It would be capable of supporting the probability of the position contended for on behalf of the accused**, namely, that at the time at which Morgan was shot, he was then acting in a violent and aggressive manner, driven by anger, in circumstances in which he was threatening, or understood to be threatening, to kill or cause really serious injury to the accused.

76. Kaye JA allowed the accused to adduce tendency evidence of Morgan killing his brother-in-law (even though Morgan had been acquitted of murder at trial). His Honour held at [134]:

> The fact that the incident, in which Morgan shot and killed SM, occurred 25 years ago, is relevant to an assessment whether that circumstance, and evidence in proof of it, would have significant probative value in the present case. However, it is a **quite extraordinary matter for a man, and in particular a police officer, to take the law into his own hands**, and to resort to lethal violence to protect a close family member in the manner in which Morgan did when he killed SM. The **very nature** of the actions of Morgan, and the **similarity** between them and his conduct in the present case, would, in my view, **have significant probative value in demonstrating that Morgan was a person who, when driven by anger, was prepared to resort to particularly extreme forms of violence to vindicate the rights of people who are close to him**.

[62] *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743 at [85].
[63] *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743 at [111].
[64] *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743 at [108].

77. It should be noted that his Honour refused to admit evidence of the two assaults committed when Morgan was a police officer as well as the threats made by Morgan to his brother-in-law before he killed him, finding that they were too "far removed" from the present circumstances to satisfy the significant probative value threshold in s 97(1)(b). There were also issues to do with proof of the first and second incidents as they relied upon hearsay material.[65] In relation to the fifth incident, the Crown did not object to the admissibility of the threatening text messages.

78. As noted above at [55], Kaye JA also rejected the Crown's application to exclude the evidence under s 135, ruling that the evidence would not be unfairly prejudicial or result in undue waste of time "particularly if the prosecution in the present case, in conformity with its duty as a minister of justice, were to cooperate with the defence in adducing the relevant proofs [of the tendency evidence]".[66]

79. The trial proceeded to verdict and the three co-accused where acquitted of all charges and walked free.

***R v Nudjulu* [2020] NTSC 54 (per Mildren AJ)**

Defence tendency application successful; defence permitted to adduce tendency evidence of complainant's prior violent convictions to support self-defence

80. In *Nudjulu*, the key issue at trial was whether the accused was acting in self-defence when he stabbed the complainant with a knife. The prosecution alleged that the accused initiated the physical confrontation with the complainant, whereas the defence asserted that the complainant was the primary aggressor. The incident occurred at a birthday party for one of the complainant's children. The accused was an adult guest at that birthday party.

81. On the second day of the trial, defence counsel served a tendency notice on the prosecution.[67] The tendency notice sought to adduce details of the complainant's prior convictions for 7 violent offences. The defence particularised two separate tendencies on the part of the complainant, as described by Mildren AJ (at [7]):

> The tendency notice provided that the tendencies sought to be proved were, **firstly**, a tendency by [the complainant] Wayne Singh to **act in a particular way**, namely to **initiate physical violence** towards a person in the context of an argument, with violence directed towards the person's upper body (including head); and **secondly**, to **have a particular state of mind**, namely to **readily anger and develop feelings of aggression** in response to perceived slights or signs of disrespect.

[65] *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743 at [87]-[88].
[66] *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743 at [137].
[67] In the interests of disclosure, the author appeared as defence counsel in *Nudjulu*.

82. The relevant facts in issue were described by Mildren AJ follows at [7]:

> The tendency notice stated that the evidence related to the following facts in issue in this case, namely whether [the complainant] Wayne Singh or the accused initiated the physical altercation and whether **the accused was acting in self-defence** when he stabbed Wayne Singh with the knife.

83. The Crown objected to the tendency evidence on the basis that all of the prior offences occurred in the context of disputes between the complainant and his domestic partner and female family members.

84. In determining whether the evidence had significant probative value, Mildren AJ applied the two-step test enunciated in *Hughes*:

> The second question is whether the evidence, if accepted by the jury, had significant probative value. As was pointed out in *Hughes v The Queen* this involves consideration of two inter-related but separate matters. The first is the extent to which the evidence supports the tendency or tendencies alleged. **In my opinion the evidence does support the tendencies alleged**, perhaps more strongly with the first tendency than the second. But it also supports the second tendency because it could well be said that feelings of anger arising from jealousy over real or imagined infidelity by the victim is a "perceived slight or sign of disrespect", so far as Mr Singh is concerned which resulted in anger and aggression towards his victims. Similarly, it could be said that the anger and aggression directed towards the victims who attempted to intervene showed disrespect to Mr Singh, at least in his mind, because they were interfering in a matter which did not concern them.[68]

85. His Honour rejected the prosecution's attempt to characterise the evidence as only supporting a tendency limited to violence directed toward his domestic partners and female family members rather than a male adult such as the accused:

> Secondly it was submitted that the defence had inaccurately characterised the tendency, and what it really showed was a tendency to engage in violence towards his domestic partners and female family members and to possess a jealous and controlling state of mind towards his female partners. Whilst I agree that the previous convictions show those tendencies as well, **I do not accept that the evidence is incapable of showing the tendencies relied upon by the defence**. It was put that there were other differences, such as the fact that weapons were used, that the offending took place in a domestic setting, that in each case the victim was a female, and in most cases his female partner. It was submitted that that significantly reduced the probative value of the proposed evidence to the extent that its probative value at best was only slight. However, **the jury and I were able to see that Mr Singh was a large, powerfully built man, much bigger than the slender frame of the accused**. It is not difficult to see how he might use his propensities in a case such as this against a much smaller person.[69]

[68] *R v Nudjulu* [2020] NTSC 54 at [13].
[69] *R v Nudjulu* [2020] NTSC 54 at [13].

86. Mildren AJ continued:

> So far as the domestic setting of the violence was concerned, this happened at a supposed party for Mr Singh's son, it was alleged that he was upset at the accused for his behaviour at his son's party and for his disrespect towards himself and his mother, Sonya Singh, and it happened at 53 Schombacher Circuit, Moulden, where his mother and his sister Cheyanne Singh, were living. **In all the circumstances, despite the generality of the tendency alleged, I considered that the evidence had significant probative value in the circumstances**.[70]

87. Mildren AJ dispensed with the notice requirements notwithstanding that the defence tendency notice had only been filed on the second day of the trial.[71] His Honour also rejected the s 135 argument advanced by the prosecution to exclude the evidence by ruling that any prejudice to the Crown could be cured by appropriate directions.[72]

88. The complainant was recalled at the conclusion of the prosecution case and defence counsel was permitted to cross-examine the complainant about his prior convictions to adduce the tendency evidence.

89. The trial proceeded to verdict and the accused was acquitted by the jury of all three offences on the indictment (the accused had also been charged with a separate stabbing and attempted stabbing of two other persons at the party arising from the same incident).

R v Smiler (No 2) [2017] NTSC 31 (per Kelly J)

Defence tendency application successful; defence permitted to adduce tendency evidence of the complainant's violent history (both convictions and uncharged acts) to support self-defence

90. In *Smiler No (2)*, the key issue at trial was whether the accused was acting in self-defence. The accused and complainant had become involved in an argument at a boarding house in central Darwin.

91. The accused sought to adduce tendency evidence of the complainant's violent prior conduct comprised of 2 separate incidents spaced some 10 years apart. The first incident concerned convictions for violent offences that the complainant had committed against two separate victims. The second incident, some 10 years later, concerned an allegation that the complainant had assaulted another man with a weapon, but the complainant had not yet been charged or found guilty of that subsequent assault.

92. The tendency was particularised by the defence as follows:

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[70] *R v Nudjulu* [2020] NTSC 54 at [17].
[71] *R v Nudjulu* [2020] NTSC 54 at [24].
[72] *R v Nudjulu* [2020] NTSC 54 at [19].

> A tendency on the part of [the complainant] to resort to acts of serious violence, involving weapons, to resolve disputes with other men in or around residential accommodation.[73]

93. After considering the tendency evidence sought to be relied on by the defence, Kelly J held:

> With some hesitation, I conclude that it would be open to the jury to conclude, on the basis of the evidence of these two episodes, that [the complainant] had a tendency to resort to acts of serious violence, involving weapons, to resolve disputes with other men in or around residential accommodation.[74]

94. Her Honour went on to find that the evidence satisfied the significant probative value threshold:

> It needs to be borne in mind that the Crown bears the legal onus of proof on all issues including negating self-defence. The accused need only point to a reasonable possibility that he was acting in self-defence and submit that the Crown has not eliminated that possibility. **Very little may be required for evidence to be "significant" or "of consequence" in pointing only to a reasonable possibility that the accused may have been acting in self-defence**.[75]

95. As noted above at [57], Kelly J also rejected a prosecution application to exclude the evidence under s 135, ruling that any risk of impermissible reasoning by the jury could be ameliorated by an appropriate direction.[76]

96. Finally, it is worth noting that Kelly J also ruled to separately admit the evidence of the complainant's violent history as "disposition evidence", that is "to suggest that the complainant was a person who was not subject to very strong inhibitions against extreme acts of violence in the way most people are".[77] It was submitted that this disposition evidence:

> … tends to diminish what might ordinarily be thought to be the **inherent improbability** that a man in his fifties of short stature and slight build would intervene in a fight between two other men with anything but a lawful purpose and in any way but proportionately.[78]

97. In allowing the disposition evidence, her Honour relied upon the majority decision of the NSW Court of Criminal Appeal in *Cakovski*[79] (discussed in greater detail at [121] below).

98. The advantage of disposition evidence is that it avoids the need to comply with the statutory preconditions imposed by the tendency rule in s 97. However, it is

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[73] *R v Smiler (No 2)* [2017] NTSC 31 at [5].
[74] *R v Smiler (No 2)* [2017] NTSC 31 at [11].
[75] *R v Smiler (No 2)* [2017] NTSC 31 at [16], quoted with approval in *Nudjulu* [2020] NTSC 54 at [15].
[76] *R v Smiler (No 2)* [2017] NTSC 31 at [20].
[77] *R v Smiler (No 2)* [2017] NTSC 31 at [17].
[78] *R v Smiler (No 2)* [2017] NTSC 31 at [17].
[79] *R v Cakovski* [2004] NSWCCA 280.

> suggested that the line between tendency evidence and disposition evidence is a fine one indeed – if it exists at all – and courts are increasingly unlikely to permit disposition evidence to be relied upon as an alternative to tendency evidence, given the overlap between the two concepts and the criticism that *Cakovski* has attracted in the years since it was handed down.[80]

R v Basanovic and Ors (No. 3) [2015] NSWSC 1092 (per Davies J)

Defence tendency application successful; defence permitted to adduce evidence of the deceased having arranged for other persons to "sort out" certain individuals depending on the deceased's wishes

99. *Basanovic* is an interesting decision because it illustrates how a tendency application can be made mid-trial during cross-examination of a prosecution witness. In *Basanovic*, defence counsel was in the process of cross-examining a witness about whether he had heard the deceased say to another person on the telephone to "sort out" certain inmates in gaol. The deceased was said to have been involved with an outlaw motorcycle gang.

100. The Crown took objection to the line of cross-examination and argued that defence counsel was seeking to adduce tendency evidence without serving a notice. Davies J noted:

> Objection was taken to the question and the line of questioning on the basis that the cross-examiner was seeking to lead tendency evidence from the witness without having served a tendency notice. [Defence counsel] agreed that no tendency notice had been served but said that because the material was contained in the witness's statement which had been served he had not known that the Crown would not lead that part of the statement in evidence.[81]

101. His Honour described the evidence:

> … as going to a tendency on the part of the deceased to have others sort people out rather than a tendency for the deceased to engage in violence himself in that regard.[82]

102. Ultimately, Davies J ruled to permit the line of cross-examination, dispensing with the notice requirements under s 100(1):

> The Court has power to dispense with a tendency notice pursuant to s 100(1). In the present case I consider that the requirement for the service of the notice should be dispensed with. The evidence sought to be relied upon for the tendency was contained in the statement served by the Crown. Further, the witness had already been asked questions in cross-examination directed to the same matter and no objection was made by the Crown.

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[80] See *Elias v R* [2006] NSWCCA 365 at [31] (per Simpson J with McClellan CJ at CL and Rothman J agreeing).
[81] *R v Basanovic and Ors (No.3)* [2015] NSWSC 1092 at [2].
[82] *R v Basanovic and Ors (No.3)* [2015] NSWSC 1092 at [4].

> Counsel for [the accused] has identified the basis of the tendency relied upon. I do not consider that the Crown is prejudiced by the admission of this evidence.[83]

103. Two of the three co-accused in *Basanovic* were ultimately found guilty of various offences. The two men found guilty (who happened to be father and son) appealed the verdicts. One of the issues on appeal was whether the trial judge had erred in directing the jury that acts relied on by the accused as tendency evidence must be proven on the balance of probabilities. The NSW Court of Criminal Appeal held that the trial judge had misdirected the jury on this issue:

> There is no onus of proof on an accused person, and there is no standard of proof applicable to evidence called by an accused. The direction was erroneous.[84]

104. The appeal was allowed in respect of the father's conviction for murder and a retrial was ordered, whilst it was dismissed in respect of the son's conviction for manslaughter. The appeal judgment is a firm reminder that there is no standard of proof applicable to evidence adduced by the accused in a criminal trial, including tendency evidence.

***R v Castaneda* [2015] NSWSC 964 (per Wilson J)**

Defence tendency application successful; defence permitted to adduce evidence of the deceased's violent behaviour towards his previous partner whilst living overseas

105. In *Castaneda*, the accused was charged with murdering her partner by stabbing him with a knife. The prosecution alleged that she stabbed him during a fit of anger whereas the defence maintained that she had stabbed him in self-defence.

106. At trial, the defence sought to adduce evidence from the deceased's ex-partner who resided in the United States. It was common ground that the previous partner was "unavailable" as a witness in the jurisdiction of the trial court. However, the defence sought to adduce evidence of email and Facebook exchanges between the accused and the ex-partner as tendency evidence. This information from the ex-partner had been communicated to the accused some 3 years before she stabbed the deceased.

107. The tendency relied on by the defence was particularised as a tendency on the part of the deceased "to be violent, particularly when affected by alcohol, with women whom he was involved in a relationship".[85]

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[83] *R v Basanovic and Ors (No. 3)* [2015] NSWSC 1092 at [14].
[84] *R v Basanovic, Michael; R v Basanovic, Wade* [2018] NSWCCA 246 at [62].
[85] *R v Castaneda* [2015] NSWSC 964 at [9].

108. Wilson J described the evidence relied on by the defence as follows:

> It seems to me that what is of relevance here is not the trail of communications per se, being communications in which [the ex-partner] expresses her opinions of the deceased and portrays him in a less than favourable light, but the fact of what she communicated to the accused in March 2010, that being that:
>
> (i) the deceased was violent and aggressive when drunk;
>
> (ii) that he had on one occasion dragged [the ex-partner] across the floor by her hair during the course of an argument;
>
> (iii) that he had on one occasion locked her out of the house when she was not dressed; and
>
> (iv) that he had been verbally abusive to [the ex-partner] during the course of their relationship.[86]

109. Her Honour concluded that the communications with the ex-partner were relevant to the issue of self-defence.[87] Aside from being admissible as relevant to the accused's subjective state of mind when she stabbed the deceased, Wilson J also held that the evidence was admissible as tendency evidence:

> In circumstances where the accused's case is to be one of self-defence, in my view the evidence of the deceased's character and reputation, and of his conduct towards [the ex-partner] and the tendency to violence that that conduct is capable of establishing, will have significant probative value. The requirements of s.97 are thus met.[88]

110. Importantly, Wilson J held that the evidence of the electronic messages was not admissible in its current form:

> The evidence however is not admissible in the present form of the email and Facebook communications. It may be that it can be led by way of a s 191 agreed statement of fact; through questions directed to the police officer in charge of the investigation; or, by way of tender of the relevant transcript from the committal hearing; but the document trail itself contains much which is inadmissible and it cannot be admitted in that form.[89]

111. The evidence was ultimately adduced by way of agreed facts pursuant to s 191 of the Act. Such cooperation is consistent with the Crown's duty to act as model litigant and minister of justice by assisting the defence in adducing proofs of the tendency evidence where such evidence is ruled admissible.[90]

112. The matter proceeded to verdict and Ms Castaneda was acquitted of manslaughter (after a directed acquittal on the murder).

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[86] *R v Castaneda* [2015] NSWSC 964 at [17].
[87] *R v Castaneda* [2015] NSWSC 964 at [18].
[88] *R v Castaneda* [2015] NSWSC 964 at [33].
[89] *R v Castaneda* [2015] NSWSC 964 at [28].
[90] As discussed above in relation to *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743.

***DPP v Campbell & Ors (Ruling No 1)* [2013] VSC 665 (per Kaye J)**

Defence tendency application successful; co-accused permitted to adduce tendency evidence of threatening behaviour of other two co-accused to support duress defence

113. In *Campbell*, three co-accused were on trial for offences relating to a murder. Two of the co-accused (Campbell and Rosendale) were alleged to have committed the murder. The third co-accused (Barnett) was charged as an accessory after the fact for assisting with the transportation and disposal of the deceased's body.

114. Prior to trial, Barnett indicated that he intended to rely upon duress, claiming that the two principal co-accused (Campbell and Rosendale) threatened him with violence if he did not assist with the disposal of the body.

115. In support of duress, Barnett filed a tendency notice against the two other co-accused (Campbell and Rosendale), claiming that both men had a tendency to act in a particular way, namely "a violent, intimidatory and threatening manner".[91] The tendency evidence related to prior convictions for violent offences that Campbell and Rosendale had committed in the past.

116. Kaye J went on to find that the tendency evidence would not have been admissible upon the application of the prosecution, however, as this was at the instigation of a co-accused, the situation was different:

> … if the prosecution had sought to adduce the tendency evidence against Rosendale, it would fall well short of having significant probative value for any issue between the prosecution and Rosendale. However, that is not the question. As the authorities to which I have referred emphasise, **Barnett does not bear any legal onus to prove that Rosendale engaged in the threatening and intimidatory conduct alleged by him**. The issue, to which the tendency evidence will be addressed, **is whether there is a reasonable possibility that such threatening and intimidatory conduct was engaged in by Rosendale to Barnett**.[92]

117. The tendency evidence in respect of Rosendale comprised five violent offences committed over an 18 month period some 10 years earlier. Kaye J concluded that the evidence was relevant to the duress defence:

> In that context, the evidence consists of five separate incidents of violent offending over a period of eighteen months. Each of the incidents, and the violent conduct engaged in by **Rosendale was directed to intimidating his victim or victims**. Certainly, **Rosendale was ten years younger**, but he was of an adult age. The incidents took place a decade previously. However, in my view, **that interval does not mean that those events were so remote as to detract from their capacity to demonstrate a relevant**

[91] *DPP v Campbell & Ors (Ruling No 1)* [2013] VSC 665 at [2].
[92] *DPP v Campbell & Ors (Ruling No 1)* [2013] VSC 665 at [55].

> **tendency by Rosendale to act in a particular way** at the time with which this case is concerned. That is, in my view, **the evidence rationally adds to the likelihood that Rosendale might have indulged in the intimidatory conduct alleged by Barnett**. In other words, the proposition that there was a reasonable possibility that Rosendale engaged in that conduct is, I consider, rationally enhanced by the knowledge that Rosendale had, albeit ten years previously, engaged in a series of incidents involving intimidatory acts of violence.[93]

118. As to whether the tendency evidence of Rosendale met the significant probative value threshold, Kaye J considered the tendency in light of the other evidence to be adduced by the prosecution including that Rosendale and Campbell had committed the murder two days earlier, at [58]:

> Further, the extent to which the tendency evidence does have a probative value must be considered in the context of **all the facts of the case**. Section 97(1)(b) directs the court (if necessary) to have regard to " ... other evidence adduced or to be adduced by the party seeking to adduce the (tendency) evidence", in determining whether that evidence has significant probative value. It would be **incongruous** if, in considering that question, the court did not also take into account other evidence which was to be adduced by the prosecution. In this case, the prosecution will be adducing evidence, against Barnett, that **two days before** he assisted to dispose of Williams's body, **Rosendale and Campbell had been involved in acts of brutal violence** which caused Williams's death. **In that context, the evidence of the previous offences committed by Rosendale would have significant probative value in respect of the issue of whether it is reasonably possible that Rosendale threatened Barnett in the manner in which, I understand, it is to be alleged**.

119. Kaye J ruled to admit the tendency evidence in respect of Rosendale subject to the defence of duress being sufficiently raised at trial. With some hesitation, his Honour also admitted the tendency evidence against the other co-accused (Campbell) on the same basis.[94]

120. As a result of the ruling on the tendency application, his Honour ordered that Barnett be tried separately to Rosendale and Campbell.[95] Mr Barnett was subsequently tried and acquitted of being an accessory.

R v Cakovski [2004] NSWCCA 280 (per Hodgson JA, Hulme J and Hidden J)

Defence permitted to adduce evidence of the deceased's violent past to support self-defence; court divided as to basis for admission; the majority (Hodgson JA and Hulme J) ruled that the evidence was admissible as "disposition evidence"; the minority (Hidden J) held that the evidence was admissible as tendency evidence

121. In *Cakovski*, the accused had been charged with murder after stabbing the deceased in what the prosecution alleged was a robbery gone awry. The

[93] *DPP v Campbell & Ors (Ruling No 1)* [2013] VSC 665 at [56].
[94] *DPP v Campbell & Ors (Ruling No 1)* [2013] VSC 665 at [64]-[65].
[95] *DPP v Campbell & Ors (Ruling No 1)* [2013] VSC 665 at [66].

accused claimed that he acted in self-defence after the deceased threatened to kill him, and the accused was forced to respond by pulling out a knife and stabbing the deceased to protect himself.

122. At trial, the accused sought to adduce tendency evidence that the deceased had previously murdered 3 people some 23 years earlier. The accused also sought to adduce evidence of a threat made to an unrelated person (Logounov) earlier in the evening. The accused had no knowledge of the deceased's violent past nor the threat to Logounov when he stabbed the deceased. The trial judge refused to admit the evidence. The trial proceeded to verdict and the accused was found guilty of murder.

123. On appeal, all three judges agreed that the evidence should have been admitted at trial. However, their reasoning differed. Hodgson JA and Hulme J both considered that the evidence was not tendency evidence, but rather evidence which was relevant to the question of whether there was a reasonable possibility that the deceased had acted in a way that might otherwise seem to be highly improbable (namely by threatening to kill the accused). This type of evidence has since been labelled as "disposition evidence".[96]

124. Explaining this basis of admission, Hodgson JA held:

> … the main relevance of the evidence is not to prove that the deceased had a tendency to act in a particular way', **but rather to suggest that the deceased was a person who was not subject to very strong inhibitions against killing and contemplation of killing in the same way as are the great majority of people**. This is not to say that the deceased had a tendency to kill, but rather that there is **less improbability in the deceased killing or making a serious threat to kill another person**, than there would be for the great majority of people.[97]

125. Hulme J took a similar view to that of Hodgson JA, reasoning:

> … in my view the **only basis** upon which the evidence was admissible was that it **rendered less improbable the Appellant's account that the deceased had threatened to kill him**. Killing, and thoughts and threats of killing another human being are sufficiently extreme or unusual that the fact that the deceased had killed people in the past was relevant because it rendered more probable, or perhaps more accurately, **less improbable, that the deceased uttered the threats the Appellant attributed to him**.[98]

126. Hidden J ruled that the evidence should be admitted as tendency evidence:

> I agree that the evidence had probative force for the reasons identified by their Honours, that is, that it lent some credence to the appellant's account of the deceased's behaviour, which otherwise would have seemed highly improbable. However, **in my view, it did so because it demonstrated a propensity on the part of the deceased to retaliate in an extremely**

[96] See Kelly J's description of this type of evidence in *R v Smiler (No 2)* [2017] NTSC 31 at [17].
[97] *R v Cakovski* [2004] NSWCCA 280 at [37].
[98] *R v Cakovski* [2004] NSWCCA 280 at [56]

> **violent way against anyone who crossed him**. (Whether he was affected by alcohol is not the point.) This, it appears to me, is **necessarily tendency evidence**.

127. The split of opinion in *Cakovski* is illustrative of the fine distinctions that can arise in this area and how reasonable minds can differ.

128. Indeed it is hard to conceptualise how evidence of the deceased being a person "not subject to very strong inhibitions against killing" would not be caught by the definition of "tendency evidence" as on one view, it clearly falls within the "character, reputation or conduct" of the deceased.[99] It must be that there is a very fine line between tendency evidence and evidence of a person's violent "disposition", if the line exists at all.[100]

129. *Cakovski* has since been the subject of criticism and has been interpreted as limited to its unusual facts. In *Elias v R*,[101] Simpson J (McClellan CJ at CL with Rothman J agreeing) made the following observations:

> For myself, **I am quite unable to perceive the evidence, particularly as expressed by Hodgson JA and Hulme J, as other than tendency evidence**. However, it is not for this Court as presently constituted to examine the reasoning of another bench of the Court. **There is, in *Cakovski*, no binding or persuasive statement of principle, nor, indeed, any statement of principle on this issue**. The decision is one made on its own facts and does not, in my opinion, guide this Court to a like result in the present case.[102]

130. For these reasons, it is suggested that the approach of the majority in *Cakovski* should be treated with caution.

R v Lockyer (1996) 89 A Crim R 457 (per Hunt CJ at CL)

Defence tendency application successful; defence permitted to adduce evidence to support alternative hypothesis that another person committed the murder

131. The decision of *Lockyer* was handed down in 1996 when the Act was still very much in its infancy in NSW, having been enacted only one year earlier. In this decision, Hunt CJ at CL ruled to admit tendency evidence which supported an alternative hypothesis consistent with innocence that another person was responsible for the murder.

132. The accused had been charged with the murder of his daughter. At trial, the defence maintained that there was a reasonable possibility that the daughter had been murdered by her mother (who was in a de facto relationship with the accused).

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[99] Refer to the definition of "tendency evidence" set out above at [12] above.
[100] *R v Smiler (No 2)* [2017] NTSC 31 at [17]-[18] is one example where this distinction was applied.
[101] [2006] NSWCCA 365.
[102] *Elias v R* [2006] NSWCCA 365 at [31].

133. The tendency evidence was described as follows:

> The proposed tendency evidence was that both [the deceased daughter] and one of her brothers (Andrew) had previously received injuries in circumstances from which **the inference could be drawn that there is a reasonable possibility that [the mother] Ms Dolan was responsible for inflicting those injuries**. It was conceded that there were no eye witnesses to her doing so, but it was asserted that witnesses could attest to the nature of the injuries and - particularly in relation to Andrew - to the unlikelihood that they had been inflicted accidentally.[103]

134. In an often-cited passage as to the meaning of "significant" in the context of "significant probative value", Hunt CJ at CL held:

> There is no definition of "significant" probative value as that phrase is used in s97. In its context as I have outlined it, however, "significant" probative value must mean something more than mere relevance but something less than a "substantial" degree of relevance … One of the primary meanings of the adjective "significant" is important", or "of consequence".[104]

135. His Honour went on to conclude:

> In the present case, **the accused seeks to adduce the evidence as part of his case that there is a reasonable possibility that the child was bashed by Ms Dolan**. The accused bears no legal onus of proof, but he does bear an evidentiary onus of pointing to or producing evidence from which the inference arises that such a reasonable possibility exists. Where such an inference does arise from that evidence, **the Crown bears the legal onus to eliminate that reasonable possibility as part of its obligation to prove that it was beyond reasonable doubt the accused who killed the child**.[105]

136. In permitting the tendency evidence to be adduced, his Honour concluded:

> Although the circumstances in which these injuries are alleged to have occurred were not spelt out for me in any great detail, **enough was demonstrated by the accused to persuade me that the reasonable possibility that Ms Dolan was responsible for inflicting them could be inferred without the need for speculation**. If the issue had been whether she had inflicted them, of course, the position would not have been the same. **The difference between establishing that something was the fact and establishing that there is a reasonable possibility that it was the fact is an extensive one**.[106]

[103] *R v Lockyer* (1996) 89 A Crim R 457 at 458.
[104] *R v Lockyer* (1996) 89 A Crim R 457 at 459.
[105] *R v Lockyer* (1996) 89 A Crim R 457 at 459.
[106] *R v Lockyer* (1996) 89 A Crim R 457 at 460.

V. How to make a defence tendency application

Step 1 – Collect evidence to support the tendency

137. Now that you are familiar with the legislative framework and relevant case law that governs the admissibility of tendency evidence, the next question is: *what are the practical steps to making a defence tendency application?*

138. The decision whether to make a defence tendency application will invariably be guided by your case theory for defending the matter at trial. Is your case theory that your client was acting in self-defence? That it was the complainant who threw the first punch or uttered the first threat? Is your case theory that your client was acting under duress following a threat of violence from a co-accused? Is your case theory that the police have mistakenly identified the wrong culprit and a different person is responsible for the crime? All of this will be guided by your client's instructions as well as your ethical and professional obligations as an officer of the court.

139. Once you have identified the prospective basis upon which the proposed tendency fits within your case theory, you then need to collect evidence to explore the viability of a tendency application.

140. One of the main advantages of a tendency application in the context of a self-defence case is that your client does *not* need to have subjective knowledge of the complainant's violent past in order for the tendency evidence to be admissible. That is because you are asserting a tendency on the part of the *complainant* to act in a particular way or have a particular state of mind – which is separate and distinct from the accused's subjective state of mind at the time.

141. This can be contrasted with a typical self-defence case where the accused would ordinarily need to have knowledge of the complainant's violent past in order for the evidence to be relevant to the accused's state of mind and whether he/she believed that their conduct was necessary in self-defence. It follows that when considering whether to make a tendency application you are not limited to what your client knows about the complainant's past but can investigate and explore the viability of an application by collecting evidence from external sources.

142. Some obvious steps to collect evidence are:

    a. Request disclosure of the criminal records for the complainant, deceased (if applicable), or other prosecution witnesses;[107]

    b. Where a prosecution witness appears to have an offence on their criminal record (such as an assault) that may be relevant to the tendency you are seeking to explore, and the witness pleaded guilty to

[107] This should ordinarily be done as a matter of course. Prosecution guidelines often have specific disclosure obligations for prior criminal records of prosecution witness, see for example: *Guidelines of the Director of Public Prosecutions (NT)* at Guideline 8.4(12).

that offence, obtain the statement of facts tendered on the plea. In some jurisdictions this is done by requesting disclosure from the prosecution, in others it is done by contacting the court registry where the offence was finalised. Obtaining the statement of facts will assist you in determining whether the prior offence supports the tendency you are seeking to assert;

c. Request the transcript of the plea or sentencing remarks to confirm what admissions were made at the plea hearing;

d. If necessary, request certificates of conviction. The certificate is usually signed by the registrar of the relevant court stating the particulars of the conviction pursuant to s 178 of the Act;

e. Where the relevant witness was found guilty after a contested hearing, it may be necessary to speak to the original witnesses who gave evidence at the earlier hearing to see if they would be willing to give evidence again in support of the tendency application;[108]

f. Google the names of relevant witnesses – it never fails to amaze how much a simple online search can reveal about a witness, whether it be information about their professional qualifications, past occupations or even social media rants on public forums;

g. Where the relevant witness is a police officer, have they been the subject of disciplinary proceedings before? If so, can you request disclosure of the details of the disciplinary proceeding from the Ombudsman or relevant oversight body? Do you need to file and serve subpoenas to access this information? Similar avenues apply where the witness is a prison officer or member of the military;

h. Has the witness been the subject of adverse findings in court proceedings before? Perhaps you may be asserting that a certain police officer has a tendency to use excessive force when making an arrest – has the officer been the subject of adverse findings by a court in the past in relation to the use of excessive force? While the court findings themselves will likely be inadmissible,[109] the court ruling will

[108] Section 91 of the Act establishes a prima facie rule that evidence of a decision, judgment or finding of fact in a proceeding is not admissible to prove some fact that was in issue in that proceeding. Essentially the rule prevents a current factual dispute from being resolved by relying on how an earlier decision-maker resolved the same factual dispute. By way of example, if you are seeking to adduce tendency evidence that the complainant had previously assaulted a person in 2010, and the complainant had contested the assault and been found guilty after hearing in 2010, the fact that the complainant had been found guilty of the 2010 assault cannot be used to prove that the complainant committed the assault for the purposes of the tendency application in the later proceeding. That is why it might be necessary to call the witnesses from the 2010 hearing to give evidence again about the complainant committing the prior assault, unless facts can be agreed pursuant to s 191 or another accommodation can be reached with the prosecution. Whereas if the complainant had instead pleaded guilty to the 2010 assault, then the s 91 issue does not arise as it was not a "fact in issue" in the 2010 proceeding that the complainant had committed the assault.

[109] Refer to the operation of s 91 of the Act (considered in the footnote above).

provide fodder for cross-examination of the police officer about what occurred during the prior incident and also help you identify potential witnesses who may be able to assist your case; and

i. If you become aware that a relevant witness has committed an *uncharged* criminal act, can you find other witnesses to give evidence about what occurred? This is what happened in *Smiler (No 2*) where the defence were permitted to call evidence from a hotel manager who had observed the complainant commit an uncharged assault on a previous occasion to the incident in question.

143. Undertaking a thorough investigation at the outset will help you assess the strength of the evidential foundation for a prospective tendency application and whether it is a viable option in the context of your overall case theory.

Step 2 – Prepare and file your tendency notice

144. Once you have collected your evidence, the next step is to distil, condense and particularise the tendency you are seeking to assert. Is it a tendency to *act in a particular way* or is it a tendency to *have a particular state of mind*? Remember that these are the two different types of tendencies you can seek to assert under s 97. Which type of tendency you assert will largely depend upon the evidential foundation that you have at your disposal and how it relates to your case theory.

145. When particularising your tendency, remember that a tendency expressed at a high level of generality is likely to have less probative value compared to a tendency expressed with a level of specificity.[110]

146. For example, a tendency particularised in general terms such as the following is likely to have limited probative value:

> A tendency on the part of Joe Bloggs to act in a particular way, namely to use violence when intoxicated.

147. In contrast, a tendency expressed with a greater level of specificity will likely have much more probative value, for example:

> A tendency on the part of Joe Bloggs to act in a particular way, namely, to initiate and use physical violence to settle disputes, generally in the context of a domestic argument, whilst intoxicated.

148. The key to particularising your tendency is to try and keep it broad enough to encompass as much of the evidence you seek to adduce, whilst ensuring that it is still specific enough so that its probative value is not diminished. At times, this can be akin to walking on a tight rope given the inherent tension between the two objectives and it may be necessary to narrow the scope of the evidence that you seek to adduce to enhance the probative value of the tendency.

[110] *Hughes v The Queen* [2017] HCA 20 at [64].

149. Remember it is *not* essential that the prior incidents sought to be adduced as tendency evidence are identical or even similar to the incident in question – but rather, do those prior incidents support the tendency that you are seeking to assert? Strict reliance upon features of similarity was expressly disavowed by the High Court in *Hughes* when it preferred the NSW line of authority over the competing Victorian approach.

150. Once you have particularised your tendency, you then need to compile your tendency notice to serve on the prosecution pursuant to s 97(1)(a). To assist you with this task, an example of a defence tendency notice is set out at Schedule 1 of this paper.

151. Pursuant to s 99 of the Act, the tendency notice needs to be in accordance with any regulations or rules of the court. In Victoria, clause 8 of the *Evidence Regulations 2019* (Vic) provides:

> (1) For the purposes of section 99 of the Act, a notice given under section 97(1)(a) of the Act (relating to the tendency rule) must state—
>
> (a) the **substance** of the evidence that the notifying party 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** at and the circumstances in which the conduct occurred; and
>
> (ii) the **name of each person** who saw, heard or otherwise perceived the conduct; and
>
> (iii) in a **civil** proceeding, the address of each person named under subparagraph (ii), so far as the addresses of each person are known to the notifying party.

152. Make sure to serve your tendency notice within a "a reasonable time" so that the prosecution has sufficient opportunity to consider the application. Check the court rules of your jurisdiction to confirm if there are prescribed time periods for service. As a rule of thumb, and in the absence of a prescribed time period, try and serve your tendency notice at least 3-4 weeks before the trial commences.

153. Late service of a tendency notice will require you to argue that the court should dispense with the notice requirements by exercising the discretion in s 100(1). This is an additional hurdle that you can avoid at the outset by being well prepared in advance.

Step 3 – Prepare for legal argument

154. Like night follows day, you can expect that the prosecutor will strenuously object to your tendency application. Be prepared for this inevitability. Compile detailed written submissions outlining the relevant principles of case law and the basis for your tendency application – in particular, how the tendency

evidence satisfies the significant probative value threshold in s 97(1)(b). In a contested application, the hottest area of dispute is usually whether the significant probative value threshold has been met.

155. Don't simply try to "wing it" by speaking to your tendency notice in oral submissions on the fly. The preparation of detailed written submissions is an important part of criminal advocacy. It demonstrates to the bench that you are making a carefully considered application that warrants a commensurate considered ruling.

156. Remember, defence tendency applications are still relatively novel. Many judicial officers may not have encountered – or even heard of them – before. It will be your job to respectfully "educate the bench" by outlining the relevant case law and how the test in s 97 operates differently for a defence application.

157. If you have not yet had the opportunity to argue a tendency application in court then ask a friend or colleague to role-play being the trial judge. Convene a mock court for the application. It's not hard to do this – simply expect the judge to question you about the relevant principles of case law and how the tendency evidence you seek to adduce has significant probative value in the context of the issues in dispute. This will give you practise articulating your application so that you feel more comfortable when the time comes to argue your application in court.

Step 4 – Adduce your tendency evidence

158. Assuming that you have successfully argued your application and the court has ruled to admit the tendency evidence, the next step is to adduce your tendency evidence before the tribunal of fact in an *admissible* form. The evidence that you intend to rely upon will already be outlined in your tendency notice.

159. How you adduce tendency evidence will depend on the *type* of evidence you are seeking to adduce.

160. For example, if you are seeking to adduce evidence of the complainant's prior convictions for violent offences, then you can usually do this by cross-examining the complainant. Remember that you need to adduce not just the type of prior offences but also the factual circumstances of those prior offences to support the tendency you are seeking to assert.

161. If during cross-examination the complainant denies that they committed a prior offence or can't recall the precise details of the prior offence, then it may be necessary to tender the certificate of conviction along with the statement of facts admitted on the plea. If the complainant did not plead guilty to the prior offence, then it may be necessary to call witnesses to prove that the prior offending occurred.[111]

[111] Refer to footnote 108 which considers the application of s 91 in this context.

162. As noted earlier, the Crown has a duty to act as a model litigant in conformity with its duty as a minister of justice.[112] This standard is said to apply to the Crown because of its unique position as the "source and fountain of justice".[113] There is authority that the Crown should cooperate with and assist the defence where necessary to adduce relevant proofs of the tendency evidence.[114] Failure by the Crown to conduct itself in accordance with its duties may form the basis for a stay application to prevent an abuse of process.[115]

163. One way in which the Crown can assist the defence is by agreeing facts pursuant to s 191 of the Act. This will nearly always be necessary where the defence seeks to adduce evidence about the violent history of a person who is no longer alive (such as the deceased in a murder trial).

164. Where evidence is sought to be adduced in respect of electronic communications from an overseas witness (who is not available to give evidence in the jurisdiction of the trial court), then the Crown may also need to assist with its proof. This was the situation that arose in *Castaneda* where the defence sought to adduce evidence of emails and Facebook messages from the ex-partner of the deceased. The court ruled that the tendency evidence was admissible, but that it was not admissible in its current form of email and Facebook communications. The Crown in that case agreed facts pursuant to s 191 to allow the evidence to be adduced.

165. Finally, it may also be necessary to call witnesses in the defence case to adduce tendency evidence of uncharged acts. In *Smiler (No 2)* the defence were permitted to call a hotel manager who had witnessed the complainant assault a man one year earlier. The complainant had not been charged in respect of the previous assault. The defence were permitted to lead evidence of the uncharged assault through the hotel manager.[116]

166. It will ultimately be a matter for the jury whether they accept the tendency evidence and whether it gives rise to a reasonable doubt in the prosecution case. There is no standard of proof to which the defence tendency evidence must be established.[117]

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[112] The Crown's obligation to act as a model litigant is rooted in the relationship between the Crown and its subjects. In *Melbourne Steamship Co Ltd v Morehead* (1912) 15 CLR 342, Griffith CJ described the obligation of the Crown in litigation as: "[T]he old-fashioned, traditional and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary."

[113] *Sebel Products v Commissioner of Customs and Excise* [1949] 1 All ER 729; Ch 409, 413.

[114] See *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743 at [137].

[115] For a helpful overview of the authorities that govern when an abuse of process will warrant a stay application, refer to Stephen Lawrence's paper titled *Abuse of Judicial Process in Criminal Proceedings* (available at www.criminalcpd.net.au).

[116] Leave was initially granted to adduce evidence of the uncharged assault through cross-examination of the complainant, with Kelly J "reserve[ing] judgment on the question of what other evidence (if any) to allow in": *R v Smiler (No 2)* [2017] NTSC 31 at [22]. Subsequent enquiries have confirmed that defence counsel was permitted to call the hotel manager as well.

[117] *R v Basanovic, Michael; R v Basanovic, Wade* [2018] NSWCCA 246 at [62].

VI. Conclusion

167. This paper has sought to outline the legislative framework and relevant principles of case law that govern the admissibility of tendency evidence adduced by an accused in a criminal trial. While defence tendency applications are still relatively novel, they are gaining traction as an effective means of advancing – and supporting – a defence case theory at trial.

168. It is expected that over time and with the development of further case law, the frequency of defence tendency applications will increase as more defence practitioners become alive to their potential. Turning the tables on what has otherwise been a dominant area of evidence for the prosecution.

Acknowledgment

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170. Feedback and comments are welcome. Please email the author at: gabriel.chipkin@vla.vic.gov.au

Gabriel Chipkin
Public Defender
Victoria Legal Aid Chambers

Schedule 1

Sample defence tendency notice

IN THE SUPREME COURT
OF VICTORIA
AT MELBOURNE

CASE No.: CR-21-12345
INDICTMENT No.: K1234567

THE DIRECTOR OF PUBLIC PROSECUTIONS

-v-

SAMANTHA SMITH

NOTICE: TENDENCY EVIDENCE

1. Notice is hereby given pursuant to s 97(1) of the *Evidence Act* ("the Act") that Samantha Smith ("the accused") intends to adduce "tendency evidence", that is, evidence of the character, reputation or conduct of a person, or tendency that a person has or had, to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind.

2. The person whose "tendency" is the subject of the evidence is: Joe Bloggs (complainant).

3. The tendency evidence relates to the following fact(s) in issue in the proceeding:

   (a) Whether Joe Bloggs or the accused initiated the physical altercation; and

   (b) Whether the accused was acting in self-defence when she stabbed Joe Bloggs with the knife.

4. The tendency sought to be proved is the tendency of Joe Bloggs to:

   (a) act in a particular way, namely:

   to initiate physical violence towards a domestic partner in the context of an argument, with the violence directed towards the partner's upper body (including head).

   (b) have a particular state of mind, namely:

   to readily anger and develop feelings of aggression in response to perceived slights or signs of disrespect by his domestic partner.

Table A – Particulars of Conduct and Substance of Evidence

5. The conduct of which evidence will be adduced, and particulars of the date, time & place at & the circumstances in which that conduct occurred, and the name of each person who saw, heard or otherwise perceived that conduct, are:

Conduct	**Date & Time**	**Place**	**Circumstances**	**Witness(es) / document**
Following an argument with his partner at the time (Ms Meaney), Mr Bloggs followed her into a laneway, slammed her up against a fence and punched her twice to the face.	1am on 2 January 2015	Mickleham Melbourne, Victoria	Mr Bloggs and Ms Meaney were in a relationship. They consumed alcohol together and were at a friend's house in Mickleham. Mr Bloggs wanted to smoke cannabis and an argument unfolded. Mr Bloggs began swearing at Ms Meaney to give him money to buy cannabis. Ms Meaney got up and walked away down the street into a laneway. Mr Bloggs followed her. Mr Bloggs grabbed her around the collar of her shirt and slammed her up against a fence. He held Ms Meaney with his left hand and punched her twice in the face. Ms Meaney then tried to walk away and Mr Bloggs threatened to break her legs.	Kim Meaney (victim) Refer to the agreed facts in relation to Matter [X] for which Mr Bloggs pleaded guilty at Ringwood Magistrates' Court on 5 April 2015
Mr Bloggs accused Ms Meaney of cheating on him. He threatened to stab her with a knife, grabbed her by the shirt,	3pm on 25 March 2016	Craigieburn, Melbourne, Victoria	Mr Bloggs had been accusing Ms Meaney of cheating on him. They caught a bus together and whilst on the bus Mr Bloggs began to swear at her and said, "wait til we get	Kim Meaney (victim) Refer to the agreed facts in relation to Matter [Y] for which Mr Bloggs pleaded

pushed her onto the ground and kicked her in the head.			off this bus motherfucker. I am going to stab you dead". Mr Bloggs also pulled out a knife and held it in his hands. Once they got off the bus Mr Bloggs said, "I'll kill you. I'll stab you right now". Ms Meaney tried to run away. Mr Bloggs grabbed her by the shirt, pushed her onto the ground and kicked her in her head.	guilty at Broadmeadows Magistrates' Court on 27 May 2016

7. In addition to the documents outlined in Table A, the defendant intends to adduce the substance of the tendency evidence from cross-examination of Mr Bloggs.

Signed:

_____
[insert name]
Counsel for the accused

Dated: