

**IN DEFENCE OF TENDENCY:
ADDUCING TENDENCY EVIDENCE FOR THE DEFENDANT**

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I. THE WHY

Introduction

1. When I was a defence solicitor, I dreaded receiving emails from the prosecutor announcing the service of a tendency notice.
2. Like many an enthusiastic lawyer, I would run through the options to respond. Can I attack the probative value per s97 of the *Evidence Act*? Unfair prejudice per 101? How do I persuade the court that prejudice is unfair, when I need to show something more than the fact the evidence makes a conviction more likely?
3. Mainly, I just felt on the back foot (and that was before section 97A was enacted).
4. Since being called to the bar, I would like to think I'm more philosophical about it. Tendency evidence is often a feature of the Crown's case. But I've begun to wonder why it isn't a more common feature of defence cases. And I've started to utilise it more when acting for defendants.
5. This paper, and the presentation it was prepared for, is intended by way of encouragement to people acting for defendants in criminal matters to consider whether tendency evidence can be marshalled to your client's advantage, and if so, to pursue it.

Why use tendency evidence?

6. Advocacy is about persuasion. Tendency evidence adduced by the defence can powerfully shift the narrative of a trial or hearing.
7. The law operates so as to create a lower threshold for admission of tendency (and coincidence) evidence by an accused person in criminal proceedings than for the admission of tendency evidence by the Crown against the accused. This is because tendency evidence adduced by the defendant is not subject to section 101 of the *Evidence Act*.

II. THE WHAT

What is the relevant law?

8. Section 97 is the key legislative provision. It is not strictly a provision governing the *admissibility* of evidence, but rather the *use* of evidence for a particular purpose – to engage in tendency reasoning:
 - (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.
9. The operation of this provision in applications by the defendant to adduce evidence has been considered in a limited number of cases.
10. In *R v Cakovski* [2004] NSWCCA 280, the appellant was charged with murder. The issue on appeal was whether evidence that the deceased

had previously killed 3 people was admissible, whether as tendency evidence or otherwise.

11. Hodgson JA at [36]-[37] considered that the evidence was not tendency evidence, but had probative value because it made the defence case less improbable. Hulme J at [56] considered the evidence was not admissible as tendency evidence, but was admissible as relevant to a fact in issue in the trial; namely, it rendered *'more probable, or perhaps more accurately, less improbable'* that the deceased had behaved in the manner asserted on the defence case.

12. Hidden J at [70], dissenting, was of the view that because the evidence made the defence case less improbable by *'demonstrat[ing] a propensity on the part of the deceased,'* the evidence was tendency evidence. His Honour considered it was admissible on this basis; a trial judge would *'have to think long and hard'* before excluding it ([71]-[72]).

13. All three judges held the evidence was admissible.

14. In *DPP v Campbell (Ruling No 1)* [2013] VSC 665, Kaye JA conceptualised the test for admissibility of tendency evidence for accused persons (at [41]):

"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."

15. In *R v Holmes (No 5)* [2021] NSWSC 115, Campbell J considered that the application of the tendency rule for evidence sought to be adduced by defendants differed from evidence sought to be adduced by the Crown, opining (at [44]):

"[T]he 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."

16. Recently, in *R v Carberry (No 3)* [2023] NSWSC 166, the accused was charged with murder. Hamill J admitted evidence that the deceased had, some years earlier, behaved in a violent manner. This was adduced in support of the accused's account that the deceased was the aggressor on the night he was killed. Hamill J determined (at [41]) the evidence was relevant as tendency evidence and (at [42]) that it was also relevant and admissible for the reasons articulated in *Cakovski*. His Honour remarked, '*[i]n reaching this conclusion I have not*

found it necessary to resolve the issue of whether tendency evidence adduced by an accused person is subject to some less stringent test' as discussed in Holmes.

How can the evidence be used?

17. Evidence that satisfies the relevance test in section 56 of the *Evidence Act* is admissible, provided it is not excluded by some other provision.

18. The tendency rule does not operate to exclude evidence that is relevant, but does not meet the higher test in section 97. Instead, it provides that the evidence is not admissible *to prove that a person has or had a tendency* unless it meets the requirements of section 97. In other words, evidence may be admissible even if it does not meet this test, if it is admissible for some other purpose. In that case, the evidence will be admitted but an 'anti-tendency' direction may be appropriate.

19. For example, in a self-defence case, evidence from the accused that the complainant had previously attacked them may be admissible as relevant to the circumstances in which the accused perceived them, which is part of the law of self-defence. Such evidence would not necessarily be tendency evidence and would be admissible whether or not the test in section 97 was met.

20. However, if a defendant proposed to use the same evidence to invite the jury to reason that the complainant was more likely to have acted violently at the time of the alleged offence, because of their earlier violence, this would be tendency reasoning. To be used in this way, the evidence must satisfy section 97.

21. Adducing evidence for a tendency purpose requires notice: s 97(1)(a). In some cases, you may decide that the forensic advantage of surprise

is more important than the value of the tendency reasoning. In that case, because the evidence may still be admissible as relevant to a fact in issue (s 56), or relevant as credibility evidence (if it meets the test in s 102), you may determine not to file a tendency notice. At trial or hearing, you may choose not to rely on the evidence for a tendency purpose, or seek that the Court dispense with notice requirements pursuant to section 100. The latter option is more suited to circumstances where the evidence fell in an unexpected way; as opposed to taking a deliberate approach of 'taking your chances' on the day.

III. THE HOW

How can the evidence be obtained?

22. Section 97(1)(a) requires service of notice the intention to adduce tendency evidence. The requirements of the notice are in the regulations to the Evidence Act and set out at **Annexure A** to this paper. A blank template for this is **Annexure B** to this paper.

23. Some attention will need to be paid to the evidence required to establish the tendency. Potential sources include:

- (i) Oral evidence of the accused or another witness;
- (ii) COPS event entries;
- (iii) Criminal histories;
- (iv) Fact sheets; and
- (v) Hospital records.

24. Methods of obtaining such evidence include:

- (i) Crown disclosure of material relating to Crown witnesses;
- (ii) For matters falling outside the Crown's duty of disclosure, subpoena to police;

- (iii) Review of court files for previous proceedings – this can contain facts sheets, criminal and custodial histories, or reports of relevance;
- (iv) Subpoena to hospitals or other health providers (remember to consider whether this engages the Sexual Assault Communications Privilege provisions in ss295-306 of the *Criminal Procedure Act*);
- (v) Subpoena telco providers; and
- (vi) Social media material.

How can the evidence be adduced?

Tender the document

25. Documents that meet admissibility requirements of the *Evidence Act* can simply be tendered.¹

Adduce by calling a witness

26. Witnesses can give evidence of the conduct of another person they have witnessed. If it is proposed that the witness is to give evidence caught by the hearsay rule in section 59 of the *Evidence Act*, consider whether any exceptions apply.

Adduce in cross-Examination

27. The material obtained in preparation for trial or hearing can be used as a basis for cross-examination.

28. Section 43 of the *Evidence Act* provides a procedure for questioning the witness about a prior inconsistent statement. Note that a document containing a prior inconsistent statement *alleged* to have been made

¹ Consider the hearsay rule and its exceptions when determining the admissibility of the document. See also *Gregg v The Queen* [2020] NSWCCA 245; 355 FLR 348 at [362] ff. for guidance on whether the document requires authentication.

by the witness may be tendered if the witness does not accept they made the statement.²

IV. SOME I PREPARED EARLIER

29. The following are examples of the use that could be made of tendency evidence for the defendant in practice.

Case study 1 - tendency of an alleged victim

30. *Scenario*: the defendant was accused of wounding her ex-husband with a knife. The defendant's case was that this was a fabrication. The defendant instructed that the complainant perpetrated domestic violence upon the accused and their son over many years and the police had been involved. There was also a prior complaint by the complainant of domestic violence by the accused. This earlier complaint against the accused was dismissed after hearing.

31. *Material obtained*: COPS event entries, briefs of evidence for the earlier charge matters, copies of prior applications for Apprehended Domestic Violence Orders, transcripts for prior hearings during which the complainant and defendant gave evidence, the child's school records, Family Court documents.³

43. *Tendency alleged*: 'a willingness to falsely claim to police that [the defendant] perpetrated domestic violence upon him, in an attempt to cause police to take action against [the defendant].

44. *Admissibility*: Evidence which tends to show the complainant previously lied about the accused perpetrating violence upon the complainant,

² This means material can be admissible even if the witness being cross-examined does not accept the accuracy of that material.

³ An application was made for the release of the defendant from the *Harman* implied undertaking in respect of family court documents.

as a basis to reason that it was less unlikely that he lied in the present case, is tendency evidence. Evidence of the complainant's violent conduct towards the accused is also relevant to his character, going to his credit, and whether his account should be believed. This is not tendency evidence.

43. *Adducing the evidence:* Many of the documents formed a basis for cross-examination. Some documents, such as school records, were admissible as business records. In respect of the previous matters including COPS entries and brief items, officers involved in prior complaints could be called to give oral evidence; alternatively, the documents could be tendered by consent. Conviction records satisfying section 178 of the *Evidence Act* may be obtained by enquiring with the relevant court registry.

Case study 2 – tendency of another witness

44. *Scenario:* The Crown case was that the accused had attended his ex-partner's home, kicked the door in and hit her. The complainant's evidence was supported by the evidence of her new boyfriend, who was said to be in the premises at the time. The defendant's case was that he was not present and the allegation was fabricated.

45. *Material obtained:* COPS event entries, briefs of evidence for the earlier charge matters, copies of prior applications for Apprehended Domestic Violence Orders. These documents showed there was a history of domestic violence by the new boyfriend upon the complainant, including criminal convictions and imprisonment. The new boyfriend was also on an Intensive Correction Order at the time of the offending the defendant was accused of.

46. *Tendency alleged:* (a) behave violently towards the complainant (b) damage property in circumstances of domestic violence towards the complainant; and (c) breach orders of the court

47. *Admissibility:* The evidence of the prior violence of the new boyfriend upon the complainant was admitted as tendency evidence, relevant to the jury's determination of whether to find it was a reasonable possibility that the complainant and new boyfriend had fabricated the allegation following an altercation between themselves.

48. *Adducing the evidence:* all of the tendency evidence was adduced through cross-examination.

V. CONCLUSION

49. While this paper cannot comprehensively cover every issue that might arise in your matters, it is intended as a practically-focused reference guide.

50. There is no reason to approach tendency evidence as if it were the province of the Crown. If there is some aspect of your brief, or instructions, which leads you to the view that adducing tendency evidence might assist the jury to determine the facts in issue at trial in your client's favour, I encourage you to explore this.

51. I can be contacted on Caitlin.Akthar@forbeschambers.com.au for any enquiries relating to this paper.



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March 2024

Annexure A
Requirements of a tendency Notice
Regulation 5, Evidence Regulation 2020

5 Notice of tendency evidence

- (1) A notice given under section 97(1)(a) of the Act (a **notice of tendency evidence**) must be given in accordance with the requirements of this clause.

- (2) A notice of tendency evidence must state—
 - (a) the substance of the evidence to which the notice relates, and
 - (b) if that evidence consists of, or includes, evidence of the conduct of a person, particulars of—
 - (i) the date, time, place and circumstances at or 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 so named, so far as it is known to the notifying party.

- (2) On the application of a party in a criminal proceeding, the court may make an order directing a notifying party to disclose the address of any person named by that party in a notice of tendency evidence who saw, heard or otherwise perceived conduct or events referred to in the notice.

- (4) The direction may be given on any terms that the court thinks fit.

Annexure B
Tendency Notice Template

**IN THE DISTRICT COURT
OF NEW SOUTH WALES
IN [INSERT]
COURT FILE NO.: [INSERT]**

R v [INSERT]

NOTICE BY DEFENDANT OF INTENTION TO ADDUCE TENDENCY EVIDENCE

1. Pursuant to section 97 of the *Evidence Act 1995* (NSW), the defendant advises the Crown of their intention to adduce evidence of the tendency of a [witness/person].
2. The [witness/person] is [INSERT].
3. The tendency alleged is:
 - a. To behave violently towards [the complainant];
 - b. damage property in circumstances of domestic violence towards [the complainant]; and
 - c. breach orders of the court
4. The substance and sources of the evidence of this tendency is:
 - a. That about [date and time] at [place], he damaged the property of [the complainant] in circumstances of domestic violence, in the manner described in the facts sheet for HXXXXXXXXX (attached); and
 - b. That about [date and time] at [place], he forced open a door to [the complainant's] residence, damaging the door; and thereafter remained at [the complainant's] residence with [the complainant]

in breach of an apprehended domestic violence order for her protection, in the manner described in the facts sheet for HXXXXXXXXX (attached).

Signed:

Solicitor for the accused

Dated: