

Tendency and Coincidence Evidence

Legal Aid Commission
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Some Facts

Charge: D and G are charged with larceny - June 2006

- D worked at a hotel. He told police he was robbed, after hours, at gunpoint by a masked man, abducted and driven to a location where he was told to get out of the car with the other offender, G, driving off. A large amount of money was stolen. Crown case is that G and D staged the robbery. There is evidence of association and phone calls between G and D in June 2006 and of an admission made by both accused to a prison informer.

The coincidence evidence – November 2006

- G and D pleaded guilty to a robbery offence that occurred in November 2006. G and D robbed a hotel, after hours, detaining two staff in the process. The robbery was carried out by arrangement with C who was working at the hotel and signalled to the offenders when to come. G & D served a period of imprisonment. It was during that time that the alleged admission was made to the prison informer about the June 2006 offence.

Tendency Evidence

Tendency evidence which is admitted will mean a judge specifically telling the jury that the evidence may disclose a pattern of behaviour by the accused that shows that he or she has a tendency to act in a particular way, with a particular mindset and making it more likely that the accused committed the offence (a specific direction is set out in the Bench Book which should be read).

FB [2011] NSWCCA 217 per Whealey JA (Buddin and Harrison JJ agreeing):

[23] It is clear law that evidence that a person has or had a particular tendency is adduced in order to render more probable the proposition that, on a particular occasion relevant to the proceedings, the person acted in a particular way or had a particular state of mind. The section proceeds on the basis of inferential reasoning that people behave consistently in similar situations. The evidence is used to provide a foundation for an inference to that effect...

Coincidence evidence

Coincidence evidence which is admitted will mean a judge specifically telling the jury that because of the similarity between the relevant acts and the improbability of those acts occurring coincidentally, the evidence may be used to establish that the accused committed the offence (a specific direction is set out in the Bench Book which should be read).

Purpose of the evidence?

It is important to understand what the purpose of the tender of the evidence is.

What will the evidence be used for?

The Judge or Magistrate will initially be concerned with the relevance and purpose of the tender of the evidence.

An Approach

A court may approach an argument about the admission of tendency or coincidence evidence by considering:

- a) Whether the evidence is relevant;
- b) Whether there has been notice;
- c) Whether the evidence has significant probative value;**
- d) Whether the probative value of the evidence substantially outweighs the prejudice to the accused of the admission of the evidence.

Significant probative value

A Court will often be concerned with two areas when considering whether tendency or coincidence evidence has significant probative value:

- Similarities and Contamination.

Concentrating on Similarities.

Similarities

The “similarities” submission will likely address the similarities and differences in the alleged offending behaviour when compared to the suggested tendency or coincidence evidence.

To demonstrate by using again a passage from **Fletcher** at [50]:

... an examination must be made of the nature of the sexual misconduct alleged and the degree to which it has similarities with the tendency evidence proffered. There will be cases where the similarities are so overwhelming as to amount to what, in pre-Evidence Act days was called ‘similar fact’ evidence, showing ‘a striking similarity’ between the acts alleged; and there will be cases where the similarities are of so little moment as to render the evidence probative of nothing. And there will be cases where reasonable minds may differ as to the extent to which proof of one fact or circumstance may rationally affect the assessment of the probability of the existence of another fact”.

Striking similarities?

The absence of close or striking similarities does not necessarily mean that the evidence will be excluded. It may be sufficient if the purported tendency evidence is capable of establishing a pattern of behaviour on the part of the accused.

BP [2010] NSWCCA 303 per Hodgson JA (Price and Fullerton JJ agreeing):

[108] It is not necessary in criminal cases that the incidents relied on as evidence of the tendency be closely similar to the circumstances of the alleged offence, or that the tendency be a tendency to act in a way (or to have the state of mind) that is closely similar to the act or state of mind alleged against the accused; or that there be a striking pattern of similarity between the incidents relied on and what is alleged against the accused: Ford at [38], [125], PWD at [64] - [65]. However, generally the closer and more particular the similarities, the more likely it is that the evidence will have significant probative value.

A useful practical tool – unusual similarities

Hennessy [2001] NSWCCA 36, a case involving the coincidence section before it was amended, approved of a direction in the following terms at [18]:

Similarities which go beyond ones you would expect to find as between crimes of this type.
That is to say armed robberies on financial institutions. Similarities so marked and destructive that they cannot be mere coincidence..

Section 101 - probative and prejudice

If the Court finds the evidence has significant probative value, practically, your submission will need to address why directions cannot cure the prejudice to the accused.

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Gale & Duckworth [2012] NSW CCA 174:

[25] At its heart, s 98 is a provision concerning the drawing of inferences. The purpose sought to be achieved by the tender of coincidence evidence is to provide the foundation upon which the tribunal of fact could draw an inference. The inference is that a person did a particular act or had a particular state of mind. The process of reasoning from which that inference would be drawn is:

- two or more events occurred; and
- there were similarities in those events; or there were similarities in the circumstances in which those events occurred; or there were similarities in both the events and the circumstances in which they occurred; and
- having regard to those similarities, it is improbable that the two events occurred coincidentally;
- therefore the person in question did a particular act or had a particular state of mind.

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A court may approach an argument about the admission of tendency or coincidence evidence by considering:

- a) Whether the evidence is relevant;
- b) Whether there has been notice;
- c) Whether the evidence has significant probative value;**
- d) Whether the probative value of the evidence substantially outweighs the prejudice to the accused of the admission of the evidence.

At [34]: significant probative value

- (v) there is little doubt, in my opinion, that evidence that, just five months after the Nimbin Hotel event, each respondent was involved in the Park Ridge Tavern event, which was a robbery committed by arrangement with the manager of that Tavern, would have significant probative value. (That is without any consideration of similarities other than the nature of the events and criminal involvement of the two respondents);

- (vi) accordingly, the final, and central, question is whether the probative value of the evidence "substantially outweighs" its obvious prejudicial effect (s 101(2))...

At [49] - substantial probative value & prejudice

In those circumstances, it is my opinion that the evidence is capable of having significant probative value (s 98). Section 101 raises a more difficult issue. Plainly, the coincidence evidence has substantial probative value. But it is also highly prejudicial. I am unable to conclude that the probative value substantially outweighs the potential prejudice.

A Way to Think

Thought be given to how the receiver of the information, in an application to have the evidence admitted, will be thinking. Ask yourself the questions:

- a) What is the Judge or Magistrate actually thinking?
- b) What is the essential point that will decide the issue?

Concentrate on those points.

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