Admissibility of Tendency and Coincidence under the uniform *Evidence Act*

Justice R A Hulme[†]

Introduction

The commencement of the *Evidence Act 2008* (Vic) from 1 January 2010 will be a significant development for the law of evidence in this State and represents a critical step in the shift toward the uniformity of evidence legislation in Australia. Victoria will join the Commonwealth, New South Wales and Tasmania as states to have adopted the uniform legislation. The Act codifies the common law in some respects, however there are many aspects, including those relating to tendency and coincidence evidence, which diverge from the common law position that applied previously.

I have been asked by the organisers of this session to discuss the way in which tendency and coincidence evidence has been approached in New South Wales, particularly the way in which judges have ruled on the admissibility of such evidence and the directions that are subsequently required to be given to the jury. This paper deals with the first of those matters.

The proper use of tendency ("propensity") and coincidence ("similar fact") evidence has been the subject of considerable debate for a long time, both at common law and following the introduction of the uniform legislation. The application of a clear, principled approach to these types of evidence has not occurred. In large part this is due to the fine questions of degree that are inevitably raised by evidence that may be introduced on a tendency or coincidence basis.

It is important from the outset to understand the distinction that exists between tendency and coincidence; they cannot be construed as equivalents. Each will be adduced on different bases with the consequence being that there are distinct requirements for admissibility and that different inferences can be drawn from the evidence in relation to the likelihood of the existence of a fact in issue. *Gardiner v Regina*[1] provides an example of where the treatment of tendency and coincidence as being the same or overlapping can result in error. Simpson J

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[1] [2006] NSWCCA 190; 162 A Crim R 233

observed in that case, almost 11 years after the *Evidence Act* 1995 (NSW) commenced, that "Tendency (and coincidence) evidence remain largely misunderstood".[2]

The legislative scheme

To consider the way in which the tendency and coincidence provisions have been applied under the *Evidence Act*, it is necessary to first have regard to the structure of the relevant legislative provisions. The dictionary to the Act defines both "tendency evidence" and "coincidence evidence" by reference to their respective substantive provisions:

> "***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.
>
> ***coincidence evidence*** means evidence of a kind referred to in section 98 (1) that a party seeks to have adduced for the purpose referred to in that subsection."

The rules in respect of tendency and coincidence evidence are addressed by Part 3.6 of the Act, which relevantly provides:

> "**97 The tendency rule**
>
> (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.
>
> (2) Subsection (1) (a) does not apply if:
>
> (a) the evidence is adduced in accordance with any directions made by the court under section 100, or

[2] *Gardiner v R* at [117]

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

98 The coincidence rule

(1) Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:

(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.

Note. One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party."

Section 101 places a further restriction on tendency and coincidence evidence tendered in a "criminal proceeding", which is defined by the dictionary to the Act:

"**101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution**

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) 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 substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

The dictionary to the Act includes a definition of "criminal proceeding":

> ***criminal proceeding*** means a prosecution for an offence and includes:
>
> (a) a proceeding for the committal of a person for trial or sentence for an offence, and
>
> (b) a proceeding relating to bail,
>
> but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the *Taxation Administration Act 1953* of the Commonwealth."

Relevance – a threshold requirement

It is necessary to acknowledge that the threshold requirement for tendency evidence, as with all evidence, is relevance. Subject to other rules of admissibility within the Act, relevant evidence is admissible;[3] evidence that is not relevant to the proceeding is not admissible.[4] Relevant evidence is "evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding."[5] In recommending the definition that now forms s 55(1) the Australian Law Reform Commission noted the broad interpretation that was intended to be given to the requirement of relevance:

> "The definition requires a minimal logical connection between the evidence and the `fact in issue'. In terms of probability, relevant evidence need not render a `fact in issue' probable, or `sufficiently probable' - it is enough if it only makes the fact in issue more probable or less probable than it would be without the evidence - i.e. it `affects the probability'. The definition requires the judge to ask `could' the evidence, if accepted, affect the probabilities."[6]

[3] s 56(1) *Evidence Act*.
[4] s 56(2) *Evidence Act*.
[5] s 55(1) *Evidence Act*.
[6] Australian Law Reform Commission, *Evidence,* Report No 26 (Interim) (1985), vol 1, [641].

Gaudron and Kirby JJ noted in *Papakosmas v The Queen*[7] at 312 that the statutory concept of relevance does "not involve any real departure from the common law." At the point of assessing whether or not the evidence is relevant, there is no scope for assessing the reliability or otherwise of the evidence at that stage. McHugh J noted in *Papakosmas* at 321-322, the words "if it were accepted" in s 55(1) make it clear that a court assesses "the probability of the existence of a fact in issue" on the assumption that the evidence is reliable.[8] Once the relevance of the evidence is established it becomes necessary to consider the elements of s 97.

Requirements for admissibility - tendency

"Tendency evidence" may be adduced by a party in civil or criminal proceedings, by reference to the character, reputation, conduct or a tendency that the person has or had, for the purpose of proving that a person has or had a tendency to act in a particular way or to have a particular state of mind, such that the existence of the tendency propounded bears upon the existence of a fact in issue in the proceedings. The tendency that is said to exist must relate to the conduct or state of mind of that person on an occasion relevant to the present proceedings, i.e. the tendency must be assessed in relation to the conduct or state of mind that is in issue.

Tendency evidence is adduced for the purpose of proving, either of itself or in conjunction with other evidentiary material that the person in question acted in a particular way or had a particular state of mind on a given occasion. The establishment of the tendency to act in a particular way or to have a particular state of mind is then open to be applied by the tribunal of fact in drawing an inference that the person acted in a certain way or had a certain state of mind on the occasion that is the subject of the current proceedings.

The common law principles applicable to tendency evidence have largely been displaced by the *Evidence Act*. Particularly in regard to civil proceedings, the previous position presented a low standard to be met by a party seeking to adduce tendency evidence. In *Mood Music Publishing Co Ltd v De Wolfe Ltd*, [9] Lord Denning MR said:

[7] [1999] HCA 37; (1999) 196 CLR 297.
[8] *Jacara* at [47] per Sackville J.
[9] [1976] Ch 119

> "In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side: and also that the other side has fair notice of it and is able to deal with it."

Under the Act however, mere "logical relevance" is not sufficient to see purported tendency evidence admitted. A higher standard is required; this is particularly so in criminal proceedings. Simpson J provided a useful summary of the exercise to be undertaken when applying s 97 in *Gardiner v R*:[10]

> "Where tendency evidence is tendered, the judicial process involves:
>
> (i) determining whether the evidence has probative value; that is, determining whether it is capable rationally of affecting the assessment (by the tribunal of fact) of the probability of a fact in issue;
>
> (ii) if it is determined that the evidence is so capable (and therefore has probative value), determining whether that probative value is capable of being perceived by the tribunal of fact as significant (as explained in *Lockyer*);
>
> (iii) (in a criminal case) if it is determined that the evidence is capable of being so perceived, applying the s101(2) test, and determining whether the probative value of the evidence substantially outweighs any prejudicial effect upon the defendant.
>
> The first step in the process necessarily further involves the identification of the fact in issue the probability of the existence of which is said to be affected by the evidence tendered as tendency evidence."

Purpose of the evidence

The statutory definitions of both tendency and coincidence confirm that both forms of evidence are to be characterised by having regard to the purpose for which they are to be adduced. If the evidence is not tendered to prove a tendency of a person, or to prove the improbability of two events occurring coincidentally, they will not be subject to the

[10] [2006] NSWCCA 190 at [125]; 162 A Crim R 233.

restrictions created by ss 97 and 98. If not tendered for the prescribed purpose, it follows that the evidence will not be properly characterised as tendency or coincidence evidence at all.

It is therefore necessary to determine the purpose for which the evidence is sought to be adduced; is the evidence designed to prove that the person in question has a tendency to have a particular state of mind or to have acted in a particular way, and to have acted in conformity with that tendency on the occasion presently under consideration? If so, then the evidence will come within the scope of s 97. Regarding the purpose for which tendency evidence is adduced, Sackville J said in *Jacara Pty Ltd v Perpetual Trustees WA Ltd*:[11]

> "The critical question in a case in which the tendency rule stated in s 97(1) is said to apply to evidence of conduct is whether the evidence is relevant to a fact in issue because it shows that a person has or had a tendency to act in a particular way. To adopt the language of Cowen and Carter, the question is whether the evidence of conduct is relevant to a fact in issue via propensity: insofar as the evidence establishes the propensity of the relevant person to act in a particular way, is it a link in the process of proving that the person did in fact behave in the particular way on the occasion in question?"

Evidence can be adduced on a non-tendency basis (i.e. for a purpose other than applying evidence of a person's "character, reputation, or conduct" to establish a tendency) if the evidence is relevant to a fact in issue by a process of reasoning that "does not involve the drawing of an inference from evidence of 'tendency' to conforming behaviour.[12] In such circumstances where evidence that might otherwise be capable of application to "tendency reasoning" is admitted on some other basis without being subjected to the admissibility requirements of s 97 (or which would not satisfy the requirements of that section), the evidence is not admissible for the purpose of proving a tendency on the part of a person; it's use is limited to the non-tendency basis on which it was admitted.[13]

See further discussion of evidence adduced on a context basis and associated issues below.

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[11] (2000) 106 FCR 51 at [61]

[12] S. Odgers, (2009) *Uniform Evidence Law* (8th ed), LexisNexis Butterworths, [1.3.6660]; *Jacara* at [65] per Sackville J.

[13] s 95(1) *Evidence Act*.

Notice requirement

The notice requirements of s 97(1)(a) which must be satisfied by the party seeking to have tendency evidence admitted are notable for the infrequency with which they arise as an issue in practice. Nonetheless there has been some attention paid to the process that must be made in disclosing the nature of the tendency evidence to the opposite party.

"Reasonable notice" in writing is required to be given by the party seeking to adduce tendency evidence.[14] That notice must be given in compliance with s 99 of the *Evidence Act* which requires that there be compliance with any regulations or rules of court made for the purposes. Clause 5(2) of the *Evidence Regulation* 2005 (NSW) provides:

> "(2) A notice given under section 97 (1) (a) of the Act (relating to the tendency rule) must state:
>
> (a) the substance of the evidence of the kind referred to in that subsection that the party giving the notice intends to adduce, and
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> (b) if that evidence consists of, or includes, evidence of the conduct of a person, particulars of:
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> (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 they are known to the notifying party."
>
> (emphasis added)

Clause 5(3) makes similar provision in respect of notices relating to coincidence evidence.

Of the required content of the tendency notice, Giles JA said:

> "The purpose of a reg 6(2)[15] notice is first, to ensure that attention is given to specific conduct and the circumstances of the conduct, and secondly, to enable the person whose conduct is in question to meet the

[14] s 97(1)(a) *Evidence Act.*

[15] This was the relevant clause at the time. It was expressed in the same terms as the current cl 5(2).

> tendency evidence. The purpose is linked with the decision upon probative value to be made by the court, since only with knowledge of specific conduct and the circumstances of the conduct can a proper assessment be made of the probative value of the evidence in relation to the conduct alleged in the trial."[16]

In *Gardiner v R*[17] Simpson J described a "notice" which identified the accused as the person whose "tendency" was the subject of the evidence sought to be adduced, and then listed the prosecution statements containing the evidence upon which it proposed to rely, as "to put it mildly, terse".[18] Her Honour discussed briefly the required content of a tendency notice:[19]

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

In *R v AB*[20] it was contended that there was a failure to comply with the notice requirement and so there was error in admitting the tendency evidence. There was no suggestion that the evidence was inadmissible for any other reason. The notice set out the prosecution intention to adduce tendency evidence, specified that the person whose tendency was the subject of the evidence was the accused, and then referred to various statements previously served where the substance of the evidence was set out.[21] Adams J, with the agreement of Spigelman CJ and Sully J, rejected the contention that the substance of the evidence must be within the notice itself rather than in documents referred to in the notice.[22] The notice did not identify the tendency sought to be proved, a requirement that Simpson J identified in *Gardiner v R*, but no point was taken and no comment was made.

It is to be noted that there is no explicit requirement in either ss 97 – 99 of the Act or cl 5 of the *Evidence Regulation* that the tendency (coincidence) sought to be proved be stated in the notice. It is the respectful view of the author that there is much to commend the view

[16] *Martin v State of NSW & Anor* [2002] NSWCA 337 at [91].
[17] [2006] NSWCCA 190; (2006) 162 A Crim R 233.
[18] *Gardiner* at [130]
[19] *Gardiner* at [128].
[20] [2001] NSWCCA 496
[21] *R v AB* at [11]
[22] *R v AB* at [13 – [15]

of Simpson J to this effect set out above. It would promote the attention of the party seeking to adduce the evidence to the precise tendency (or coincidence) it is concerned to establish and would permit the opposing party, and the trial judge, to make an assessment of probative value. See, for example, the tendency notice given in *R v Fletcher*.[23]

Section 97(2) provides that notice will not be required to be given where the notice requirements are dispensed with in accordance with s 100(1) of the *Evidence Act* (s 100(2) has the same effect in respect of coincidence evidence) or where the tendency evidence in question is adduced to explain or contradict tendency evidence adduced by another party. Failure to provide notice in compliance with the *Regulation*, which is required by s 97(2) will result in the proposed tendency (or coincidence) evidence being ruled inadmissible.[24]

"Significant probative value"

Section 97(1)(b) requires that to be admissible tendency evidence must have "significant probative value." It follows then, consistent with the observation of Simpson J in *Gardiner*, that it is first necessary to determine whether the evidence has "probative value" within the meaning of the Act, and secondly whether the probative value of the evidence is "significant."

Probative value is defined in the dictionary to the Act:

> "***probative value*** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue."

The present approach in New South Wales when assessing whether the proposed evidence has probative value, having regard to the text of the definition, requires a trial judge to exercise his or her own judgement about the extent to which the evidence *could* affect the probability of the existence of a fact in issue. In respect of the word "could", Simpson J concluded in *R v Fletcher*[25] that it required the trial judge to make "an assessment and prediction of the probative value that the jury might ascribe to the evidence."[26] This

[23] *R v Fletcher* [2005] NSWCCA 338; 156 A Crim R 338 at [24]
[24] *R v AN* [2000] NSWCCA 372; (2000) 117 A Crim R 176 at [62] per Kirby J.
[25] [2005] NSWCCA 338; (2005) 156 A Crim R 308.
[26] *Fletcher* at [33].

predictive exercise is undertaken with regard to both the material that is presently in evidence and material that will be adduced at a later stage in the proceeding.[27] Simpson J adopted the same approach in *Zhang*[28] when considering the equivalent requirement of "significant probative value" in respect of coincidence evidence. Her Honour relevantly said in *Zhang* (at [139]):

> "In *Fletcher* (at [32] – [35]) I analysed the processes by which the tender of tendency evidence under s97 of the *Evidence Act* is to be determined. The analysis is no different in the case of evidence tendered under s98.
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> …
>
> [T]he task of the judge in determining whether to admit evidence tendered as coincidence evidence is therefore essentially an evaluative and predictive one. The judge is required, *firstly*, to determine whether the evidence is ***capable of*** rationally affecting the probability of the existence of a fact in issue; *secondly* (if that determination is affirmative) to evaluate, in the light of any evidence already adduced, and evidence that is anticipated, the likelihood that the jury would assign the evidence significant (in the sense explained by Hunt CJ at CL in *Lockyer* (1996) 89 A Crim R 457) probative value. If the evaluation results in a conclusion that the jury would be likely to assign the evidence significant probative value, the evidence is admissible. If the assessment is otherwise, s98 mandates that the evidence is not to be admitted." (Emphasis in original)

Stephen Odgers takes the view that the determination of "probative value" for the purposes of ss 97 – 98 should not be understood as requiring a predictive exercise on the part of the trial judge.[29] Rather, it is argued that the exercise should be "logical, based on experience, in the sense that the court is required to determine the degree of impact on the probability of the existence of a fact in issue that the tendency evidence could rationally have." Odgers draws an analogy with the exercise undertaken when considering "relevance" under s 55,[30] where the definition of relevance is prefaced by the similarly prospective words "if it were

[27] *Fletcher* at [35].
[28] [2005] NSWCCA 437; (2005) 158 A Crim R 504.
[29] See S Odgers (2009) *Uniform Evidence Law* at [1.3.6680].
[30] In drawing that analogy it must be borne in mind that the test of whether evidence has "significant probative value" is necessarily higher than the requirement of relevance. There may be "tendency" evidence which is relevant but lacks significant probative value and is therefore inadmissible.

accepted." He cites the approach proposed by the ALRC to the interpretation of the definition of "relevance" in support of the argument:

> "The definition requires the judge to ask 'could' the evidence, if accepted, affect the probabilities. Thus, where a judge is in doubt whether a logical connection exists between a fact asserted by evidence and a 'fact in issue', he should hold that the evidence is relevant if satisfied that a reasonable jury could properly find such a logical connection."[31]

Basten JA made a similar argument in dissent in *Zhang*, where his Honour rejected the "predictive" exercise described by Simpson J (with whom Buddin J agreed):

> "A separate concern relates to the five principles identified by her Honour in undertaking the exercise required under s 98 of the *Evidence Act*, at [139] below. The first two principles set out are unexceptionable. The third principle introduces a concept of the "actual probative value" of evidence, being the probative value assigned by the jury. The decision under s 98 is then said to be a two stage process by which the trial judge first identifies whether evidence is "capable of" rationally affecting the probability of a fact in issue, and, secondly, evaluating the likelihood that the jury would assign the evidence significant probative value. I do not agree with that approach, nor do I think it is supported by the judgment of Hunt CJ at CL in *R v Lockyer*. His Honour's discussion in *Lockyer*, at least at 460, was concerned with the exercise required by s 135 (and one might add, relevantly for present purposes, s 101(2)), namely the assessment of whether the probative value outweighs any prejudicial effect. It is true that the concept of prejudicial effect requires an assessment of the misuse of the evidence which might be made by a jury, comprising people without legal training. On the other hand, I do not think that the assessment of "probative value" requires such an exercise. That conclusion follows from the definition of "probative value" in the Dictionary to the Act, namely "the extent to which the evidence *could* rationally affect the assessment of the probability" of a fact. Evidence has significant probative value if it *could* have such an effect, to a significant extent. The trial judge is not required to second-guess the jury: the judge must make his or her own assessment of probative value for the purposes of s 98."

[31] Australian Law Reform Commission, *Evidence,* Report No 26 (Interim) (1985), vol 1, [641].

Notwithstanding these minority views however, the present approach in NSW is for the trial judge to follow the approach set out by Simpson J in *Fletcher* and *Zhang*,[32] namely that the trial judge must engage in an evaluative and predictive process as to the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Special leave to appeal was refused in *Zhang*.[33] It is notable, however, that Gummow J observed that "there are a number of difficulties and doubts about the meaning and application of section 98 of the *Evidence Act* (NSW)" which might, in an appropriate case, attract a grant of special leave to appeal.

The factors which may be regarded when assessing the probative value of the proposed evidence are various. Sackville J, referring to *Cross on Evidence*[34] summarised the considerations that may be relevant to the judgement of probative value:

> "The factors to take into account will usually include the cogency of the evidence relating to the conduct of the relevant person, the strength of the inference that can be drawn from that evidence as to the tendency of the person to act in a particular way and the extent to which that tendency increases the likelihood that the fact in issue occurred."[35]

"Significant"?

"Significant" is not defined by the dictionary to the Act. The word has been characterised by Hunt CJ at CL in *R v Lockyer*[36] as meaning "important" or "of consequence":

> "One of the primary meanings of the adjective 'significant' is 'important', or 'of consequence'. In my opinion that is the sense in which it is used in s 97. To some extent, it seems to me, the significance of the probative value of the tendency evidence … must depend upon the nature of the fact in issue to which it is relevant and the significance (or importance) which that evidence may have in establishing that fact."[37]

[32] Most recently at the appellate level in *Samadi and Djait v R* [2008] NSWCCA 330
[33] *Zhang v The Queen* [2006] HCATrans 423
[34] J D Heydon (2000) *Cross on Evidence* (6th ed) at [21095], [21100], [21105].
[35] *Jacara* at [76].
[36] (1996) 89 A Crim R 457.
[37] Lockyer at 459.

His Honour observed that "significant" probative value must mean something more than mere relevance but something less than a "substantial" degree of relevance.[38] His Honour also referred to the rejection of the ALRC recommendation in its interim report that tendency evidence have "substantial probative value" in favour of the present definition.[39] This appeared to have some significance for his Honour in ascertaining the boundaries of the word "significant".

The formulation propounded in *Lockyer*, or close variants, has been applied on many occasions in New South Wales and other *Evidence Act* jurisdictions. It was recently restated in the Court of Criminal Appeal by Latham J (with whom Bell JA and Fullerton J agreed) in *AW v R* at [47]:[40]

> "The evidence must have significant probative value, that is, it must be evidence that is meaningful in the context of the issues at trial. The provision is concerned with the qualitative aspects of the evidence, not quantitative ones. The extent to which such evidence is objectively proved, as in *MM*, has less to do with s 97(1) than it has to do with s 101(2). It must be more than merely relevant, but may be less than substantially so: *R v Lockyer*. The question for the trial judge was whether the evidence was important in establishing the facts in issue, namely whether the appellant committed the charged sexual offences against the complainant."

If the judge is satisfied at this stage in a civil proceeding that the evidence of character, reputation or conduct ("tendency") of a person has significant probative value, then the evidence will be admissible at this point.

Confusion with "context" evidence

The admissibility of tendency evidence, where the tendency and its relationship to a fact in issue is clearly identified, is a simple enough process. Serious difficulties arise however where evidence capable of being (improperly) applied to tendency reasoning is adduced on some other, "non-tendency" basis.

[38] Lockyer at 459.
[39] Australian Law Reform Commission, *Evidence,* Report No 26 (Interim) (1985), vol 1, [810].
[40] [2009] NSWCCA 1

The lack of distinction between tendency evidence and context (previously described as evidence of "uncharged acts"[41] and often incorrectly referred to as "relationship") evidence is a particularly prominent issue. The concern usually arises in criminal trials for sexual offences where there is alleged to be a history of impropriety on the part of the accused towards the complainant. To some extent this derives from that fact that tendency evidence is defined by reference to the *purpose* for which it is adduced. If some alternative purpose is identified, then the s 97 requirements are not applied for the purpose of admissibility, despite the use to which the evidence may be put by the tribunal of fact.

There is a danger that evidence adduced for a different purpose (often of exposing the context of the alleged offences) will be impermissibly used by the jury by applying tendency reasoning to the evidence.[42] Juries cannot be blamed for this; it is a result by and large consistent with human experience to reason that if conduct has happened repeatedly in the past, it is more likely to have happened on the occasion in question.[43] Careful direction is therefore necessary to ensure the integrity of the reasoning process. Notwithstanding the criticism of the distinction between tendency and context evidence that was made by Hayne J (with whom Gummow and Kirby JJ agreed) in the common law context in *HML*,[44] the position in New South Wales under the *Evidence Act* is that the two categories of evidence continue to exist independently and remain subject to different admissibility requirements.[45] It is therefore critically important that care be taken to identify with precision the purpose for which the evidence is contended and to ensure that it is applied accordingly.

Difficulties arise where the Crown serves a tendency notice as required by s 97(1)(a) and upon the objection by the accused to the admission of the evidence on the basis that it does not satisfy s 97, changes its position and seeks to have the evidence admitted as shedding

[41] This label was criticised in *HML v The Queen* [2008] HCA 16; (2008) 245 ALR 204 at [129] per Hayne J and [399] per Crennan J.
[42] Such use is prohibited – s 95.
[43] This exemplifies tendency reasoning, which would be permissible if the evidence were to be subjected to the requirements of s 97. Where the evidence is admitted on some other basis however, such reasoning is impermissible. See the comments of McClellan CJ at CL in *DJV v R* [2008] NSWCCA 272 at [31], referring also to Kirby J in *HML* at [57].
[44] at [113] – [116].
[45] *DJV* at [28] – [30] per McClellan CJ at CL.

light on the "context" of the relationship between the complainant and the accused.[46] Such a practice reinforces the importance for careful identification of the true purpose of the evidence from the outset, and that the jury be directed accordingly. The evidence may be admitted on this basis if it is capable of explaining the context in which the offences charged took place, which may include evidence as to the pre-existing relationship between the parties. Considerable difficulties arise in circumstances where evidence is adduced by the Crown that is capable of being understood as revealing a tendency on the part of the accused, but that purpose is disavowed by the Crown in favour of tendering the evidence on some alternative (admissible) basis. The issues were discussed by McClellan CJ at CL in *Qualtieri v R*[47] and subsequently in *DJV v R*.[48]

Evidence admitted on a context basis must be relevant in that it must provide a context in which to understand a narrative, or it explains a lack of complaint, or demonstrates that the complainant's will has been overborne, or it is capable in some other way of assisting a jury evaluate other evidence going to a fact in issue.[49] Such evidence (as can also be the case with tendency and coincidence evidence) is likely to be highly prejudicial to an accused person, and the jury must be carefully directed as to the extent to which it may legitimately use the evidence when determining the facts in issue. Section 136 of the *Evidence Act* will be engaged, which allows a trial judge to limit the extent to which evidence may be used by the tribunal of fact. McClellan CJ at CL set out the correct approach in NSW to the admission of context evidence in trials for sexual offences in *DJV* at [17] – [18]:

> [17] The difficulties faced by a court when considering the admissibility of evidence which demonstrates a tendency but where the Crown disavows the tender for that purpose have been discussed in relation to the *Evidence Act* on a number of occasions. I considered them in *Qualtieri* where I said at ([80] and [82]):
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> > "80 To my mind it is essential in any trial where the Crown seeks to tender evidence which may suggest prior illegal acts by the accused, especially where the charges relate to alleged sexual acts, that a number of steps are followed. Although the circumstances of the particular trial may

[46] *DJV* at [14] per McClellan CJ at CL.
[47] [2006] NSWCCA 95, in particular see [72] – [80].
[48] [2008] NSWCCA 272, in particular see [16] – [18].
[49] *HML* at [6] per Gleeson CJ; [431] – [434] per Crennan J; see also, Judicial Commission of New South Wales, *Sexual Assault Handbook* at [3-080].

require some modification the relevant steps will generally be -

- Identification of the evidence which the Crown seeks to tender and the purpose of its tender.

- If the Crown asserts that the evidence is evidence of a tendency on the part of the accused the admissibility of that evidence must be assessed having regard to s 97 and s 101 of the *Evidence Act* (see *R v Fletcher* [2005] NSWCCA 338). Ireland J also provides an analysis of the relevant provisions of the *Evidence Act* in *R v AH* [(1997) 42 NSWLR 702] at 709.

- If the evidence is tendered merely to provide context to the charges which have been laid, it is first necessary to consider whether any issue has been raised in the trial which makes that evidence relevant (see *R v ATM* [2000] NSWCCA 475 at [72]). In relation to crimes of a sexual nature, particularly involving children, it may be anticipated that lack of complaint or surprise by the complainant may be an issue at the trial. If it is, it will nevertheless fall upon the trial judge to determine whether the proffered evidence should be admitted having regard to s 135 and s 137. Because the evidence will inevitably be prejudicial, great care must be exercised at this point in the trial.

- If admitted, the trial judge must carefully direct the jury both at the time at which the evidence is given and in the summing up of the confined use they may make of the evidence. They should be told in clear terms that the evidence has been admitted to provide background to the alleged relationship between the complainant and the accused so that the evidence of the complainant and his/her response to the alleged acts of the accused, can be understood and his/her evidence evaluated with a complete understanding of that alleged relationship. The jury must be told that they cannot use the evidence as tendency evidence."

[18] I would make one change to this summary. In the third dot point it would have been more appropriate to refer to "whether there is an issue

in the trial" allowing for the possibility of an issue not yet "raised" emerging at a later point in the trial process. I continued:

> "82 In the present case, the evidence of which complaint is now made was not the subject of objection at the trial. Perhaps it should have been. At the very least counsel and his Honour should have clearly identified the basis of the tender which, so it now seems, was confined to evidence establishing the nature of the relationship. That evidence of the relationship was relevant to the jury is made plain by defence counsel's criticism of the complainant's evidence in her address to the jury where counsel emphasised the lack of evidence of the complainant reporting the appellant's conduct to her mother or any other responsible adult. However, whether evidence of other sexual activity was necessary or relevant to explain this matter or merely the explanation that her lack of complaint was motivated by fear of the consequences need not be determined. I am not entirely comfortable with the proposition that in order to explain a lack of complaint, evidence of other sexual activity will necessarily be relevant or that its probative value going to the issue of lack of complaint, outweighs the obvious prejudicial value. These matters need not be resolved in this case although they may require attention in other matters when evidence of this character is sought to be tendered."

In *Qualtieri*, there is to be found in the judgment of Howie J (Latham J agreeing) a useful discussion of the probative value of context evidence and tendency evidence:

> [117] Context evidence in child sexual assault offences will normally come from the complainant because it is part of the narrative or the history of events surrounding the particular allegations in the counts set out in the indictment. Its relevance will only be found in the extent to which it does provide an understanding of the particular allegations before the jury. Where the complainant is alleging a history of assaults upon him or her by the accused, the evidence, or some of it, may need to be admitted because it would be impossible for the complainant to give an account of the particular allegations without referring to uncharged allegations that proceed or surround them. It would often be unrealistic for the complainant to be expected to give an account of the particular allegations as if they happened "in a vacuum".
>
> [118] On the other hand evidence of the relationship between the accused and the complainant that is admitted for the purposes of showing that the accused had a tendency or propensity to have sexual relations with the complainant will almost

never be found in the complainant's account of his or her relationship with the accused. That is because the complainant's account of the relationship would rarely have sufficient probative value to overcome the precondition of admissibility for tendency evidence in s 97 and s 101. It is presumably the lack of sufficient probative value of the complainant's evidence to prove a tendency on the part of the accused that led McHugh and Hayne JJ in ***Gipp v The Queen*** (1998) 194 CLR 106 at [76] to require that evidence of the complainant to be used for this purpose to be proved beyond reasonable doubt. Tendency evidence generally does not have to be proved to that standard. Evidence of the accused's sexual interest in the complainant will usually be found outside of the complainant's evidence, such as in a letter written by the accused to the complainant or some other act of the accused that shows a sexual interest in the complainant or children generally.

[119] Both context evidence and tendency evidence can bolster the credibility of the complainant but they do so in different ways. Context evidence is relevant to the credibility of the complainant only in that his or her version of the particular incident which is the basis of the charge in the indictment may be more capable of belief when seen in the context of what the complainant says was his or her sexual relationship with the accused. It may explain, on the complainant's version, why the accused and the complainant acted as they did in circumstances where without the context of the relationship those acts might be inexplicable. But other than generally assisting the complainant's credibility in this way, context evidence does not make the complainant's account more reliable than it would be in the absence of that evidence. Context evidence does not make it more likely that the accused committed any of the offences charged in the indictment.

Requirements for admissibility – Coincidence

The term "coincidence" evidence is something of a misnomer. Evidence admitted under s 98 is that which relies on the improbability of two events happening coincidentally; the party seeking to adduce evidence under s 98 seeks to prove that the events in question were anything but a coincidence.

Section 98 was significantly modified following the recommendation of the ALRC Joint Report 102.[50] The result of those amendments is the provision in its current form. Under the previous section it was necessary for a party adducing evidence of 2 "related events" that those events were substantially and relevantly similar *and* that the circumstances in which they occurred were substantially similar. It was recognised by the ALRC that s 98 was required to apply to both civil and criminal proceedings, and to place such a requirement as

[50] Australian Law Reform Commission, *Evidence,* Joint Report 102 (2005).

previously existed may have narrowed the scope of s 98 too far. The result was that highly probative evidence that did not satisfy both requirements was excluded.

Concerned to not set the threshold too high,[51] the Commission recommended that the section be amended to allow the admission of evidence revealing similarity between the occurrence of 2 or more events, or the circumstances in which they occurred, or both (subject of course to the remaining requirements of subs (1) and (2)).[52] That is the form that the current section now takes.

Purpose of the evidence

Like evidence adduced under s 97, the rules of admissibility of evidence that two or more events occurred is linked to the purpose for which the evidence is introduced. If the evidence is not adduced to prove "that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally" (i.e. it is adduced for a "non-coincidence" purpose), the evidence will not be subject to the constraints of s 98.

To reformulate the words of s 98, the party seeking to have evidence admitted under s 98 adduces evidence that "2 or more events occurred", and relies upon the "similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred" and the reasoning process that having regard to those similarities "it is improbable that the events occurred coincidentally". The result of that reasoning process, based on the improbability of the events being coincidental, is that the person in question "did a particular act, or had a particular state of mind" in relation to a fact in issue in the current proceeding. If that is the reasoning process being relied upon, then the requirements of s 98(1) will apply, namely that there being notice given in accordance with subs (a) and the evidence have "significant probative value" consistent with subs (b).

[51] Acknowledging also that s 101 would operate as a further safeguard in criminal proceedings.
[52] Australian Law Reform Commission, *Evidence,* Joint Report 102 (2005), [11.24] – [11.25].

"2 or more events"

It is noted that the word "event" is to be interpreted broadly and may include an event which is a fact in issue in the present proceeding. The Commission noted at 11.27 that this is in fact typical of cases where coincidence reasoning is employed. The Commission gave the following example at 11.27:

> "For example, if the Crown has evidence that the accused committed another substantially similar crime, the evidence could go to the jury on the basis that, if satisfied beyond reasonable doubt that: (i) the accused committed the other substantially similar crime; and (ii) that the same person committed that crime and the crime charged, the jury should be satisfied that it was the accused who committed the crime with which he or she is charged."

Notice requirements

Coincidence evidence is subject to similar notice requirements as evidence that is adduced to prove tendency, namely those contained within cl 5 of the *Evidence Regulation*. Clause 5(3) provides:

> "(3) A notice given under section 98 (1) (a) of the Act (relating to the coincidence rule) must state:
>
> (a) the substance of the evidence of the occurrence of two or more events that the party giving the notice intends to adduce, and
>
> (b) particulars of:
>
> (i) the date, time, place and circumstances at or in which each of those events occurred, and
>
> (ii) the name of each person who saw, heard or otherwise perceived each of those events, and
>
> (iii) in a civil proceeding—the address of each person so named, so far as they are known to the notifying party."

Simpson J considered what was required by cl 5(3) in *R v Zhang*:[53]

> "A properly drafted s98 Notice involves the identification of four matters. These are:

[53] [2005] NSWCCA 437; (2005) 158 A Crim R 504.

- the two or more related "events" the subject of the proposed evidence;
- the person whose conduct or state of mind is the subject of the proposed evidence;
- whether the evidence is to be tendered to prove that a person did a particular act, and, if so, what that "act" is;
- whether the evidence is to be tendered to establish that that person had a particular state of mind, and, if so, what that "state of mind" is."[54]

"Significant probative value"

The requirement of significant probative value is the same as that discussed above at in relation to s 97. The trial judge is required to determine the probative value of the evidence by reference to the capacity of the evidence to rationally affect the assessment of the probability of the existence of a fact in issue. The trial judge is then required to determine whether the probative value of the evidence is "significant."

In assessing the probative value of the events said to support the improbability of their having occurred coincidentally, close attention must be paid to the asserted similarities and the circumstances in which they are said to have occurred. To employ the language of the common law, it may be that "striking similarity" between the events or the circumstances will endow the evidence with "significant probative value" necessary to satisfy s 98. Ultimately however it will be a matter to be assessed on the facts of each case.

Examples of coincidence reasoning include:[55]

- The situation where the evidence showed that three young girls had been killed in similar circumstances and it was improbable that the killings would have been the acts of different people. The evidence established that the accused had killed the two other young girls and therefore it was highly probable, he being in the vicinity of the murder, that he had killed the third;[56]

[54] At [131].
[55] See Odgers (2009) *Uniform Evidence Law* at [1.3.6880]
[56] *R v Straffen* [1952] QB 911. This is used as an example at [11.4] in ALRC Report 102, *Uniform Evidence Law*, (2005).

- Striking similarities between two incidents involving the defendant where in the first incident there was some uncertainty as to the events that transpired and in the second incident there was uncertainty as to the accused's state of mind. Coincidence reasoning is permitted to draw inferences as to what transpired in the first incident and as to the state of mind of the accused in the second incident;[57]

- Similarities in the conduct of a person on different occasions may allow an inference to be drawn via coincidence reasoning that an accused did a particular act or had a particular state of mind on the occasion in question;[58]

  or

- Similarities in the accounts of two or more witnesses regarding the conduct of the defendant may make it improbable similar allegations would be made independently by the witnesses unless they were true (in the absence of concoction of joint contamination of their evidence). [59] Note however that if the evidence went only to the credibility of the witnesses, it would not be admissible: s 94(1).[60]

Care must be taken to ensure that the similarity between the events and/or circumstances is in fact probative of the conclusion that the coincidental occurrence of those facts/circumstances is improbable. In *Phillips v The Queen*[61] allegations of sexual assault were made by five complainants against the defendant. The issue in each event was the absence of consent. The evidence was admitted on a coincidence basis by the trial judge, citing (in the absence of evidence of concoction) the improbability of similarly untruthful accounts being given by all five complainants. There was nothing characteristic about the alleged assaults in each case; it was simply the number of complaints levelled against the defendant which was seen to support the improbability of a coincidence. The High Court (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) said:

[57] *R v Tamotsu* [1999] NSWCCA 400; (1999) 109 A Crim R 197.
[58] *R v Bell* [2002] NSWCCA 2. Lords Hailsham and Salmon gave an example in *DPP v Boardman* that a burglar entering through a ground floor window will not represent a striking similarity, but such a similarity may exist if the burglar leaves an esoteric symbol painted in lipstick on the mirror.
[59] *Director of Public Prosecutions (UK) v Boardman* [1975] AC 421; *Hoch v The Queen* (1988) 165 CLR 292.
[60] See further *Tasmania v Y* [2007] TASSC 112.
[61] [2006] HCA 4; (2006) 225 CLR 303. The case was on appeal from the Queensland Court of Appeal where the common law applies, however the reasoning therein is relevant to the assessment of probative value under the Act.

> "Whether or not similar fact evidence could ever be used in relation to consent in sexual cases, it could not be done validly in this case. It is impossible to see how, on the question of whether one complainant consented, the other complainants' evidence that they did not consent has any probative value. It does not itself prove any disposition on the part of the accused: it proves only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her."

In *Phillips* the primary issue before the jury was whether was whether the prosecution could establish that the complainants consented to the sexual activity. The accused largely accepted that the acts occurred as they claimed but it was his account that on each occasion it was consensual. Although the case involved proceedings in Queensland and not the subject of a uniform *Evidence Act* it provides a useful example of the need to retain focus upon the fact sought to be proved. Under the *Evidence Act*, coincidence evidence is adduced "to prove that a person did a particular act or had a particular state of mind". On the facts in *Phillips*, the fact that complainant A did not consent said nothing about whether complainants B, C, D and E did or did not consent.

If the judge is satisfied at this stage in a civil proceeding that the evidence of two or more events, which having regard to the similarities in the events or the circumstances in which they occurred it is improbable that they occurred coincidentally, has significant probative value, the evidence will be admissible at this point.

Tendency and coincidence evidence adduced in criminal proceedings

Section 101 of the *Evidence Act* creates a further layer in respect of admissibility for both tendency and coincidence evidence when adduced as part of a criminal proceeding. The section is designed to provide a further safeguard to accused persons, given the inevitably prejudicial nature of tendency or coincidence evidence that is adduced against them. The text of s 101 is extracted above at p3. The essence of the restriction is that otherwise admissible tendency or coincidence evidence adduced by the prosecution cannot be used against the defendant if the probative value of the evidence is *substantially outweighed by any prejudicial effect* on the defendant. Section 101(2) requires the Court to undertake a

balancing exercise between the probative value of the evidence[62] and any prejudicial effect that the evidence may have on the accused.

Despite the language employed ([evidence caught by s 101]… "cannot be used against the defendant"), s 101 is generally accepted as a rule of admissibility relating to tendency and coincidence evidence. Strictly applying the words of the section, it is possible to interpret s 101 as a provision restricting the use, rather than the admissibility of evidence.[63] However the practice has been in NSW to, despite the wording of the section, treat s 101 as placing a limitation upon the admissibility of evidence in criminal proceedings. On this issue Simpson J said in *R v Nassif*:[64]

> "Examination of the language of s101(2), particularly when contrasted with the language of ss97 and 98, yields yet another of those mysteries of the *Evidence Act* that have diverted litigation lawyers, judges and commentators for nigh on a decade. Ss97 and 98 are, in their terms, concerned with *admissibility*. Unless the evidence under consideration has significant probative value, it is not admissible to prove either tendency or coincidence.
>
> S101(2), by contrast, if literally construed, appears to envisage that the evidence is admissible and is admitted ("evidence ... that is adduced by the prosecution ..."), but then to place restrictions – restrictions to the point of annihilation – on the use that can be made of that evidence. Why s101(2) was so framed, is, as I have suggested above, a mystery. The only sensible way to approach s101(2) is to treat it, like ss97 and 98, and almost in defiance of its language, as a rule of admissibility, and put unproductive debate about its terminology to one side. It seems to me that s101(2) has generally been construed as a rule with respect to admissibility."[65]

The test for s 101(2) is similar to that at common law for admissibility of "similar fact" evidence, which was described in *Pfennig v The Queen*,[66] namely that propensity or similar fact evidence would not be admissible in a criminal proceeding unless the objective

[62] Given that s101 operates "in addition" to ss 97 and 98, the reference to "probative value" in s 101(2) should be understood to refer to "significant probative value" as required by s 97(1)(b).
[63] The words "cannot be used against the defendant" can be contrasted against the words of ss 97 – 98, which provide that evidence is "not admissible to prove that…".
[64] [2004] NSWCCA 433 at [46] – [47].
[65] See also *Ellis* at [54]
[66] [1995] HCA 7; (1995) 182 CLR 461.

improbability of the evidence having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged.[67] The Court said at 483:

> "Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. And, unless the tension between probative force and prejudicial effect is governed by such a principle, striking the balance will continue to resemble the exercise of a discretion rather than the application of a principle."

A question arose shortly after the commencement of the *Evidence Act* as to the relevance of the common law principles, set out in *Pfennig*, to the interpretation of s 101. Early decisions applying s 101 proceeded on the basis that the *Pfennig* test was relevant to determining whether the probative value was substantially outweighed by any prejudicial effect of the evidence. This saw the strict "no rational explanation" formulation being applied to the balancing task undertaken by s 101(2). At this point there was a divergence in approach between the Federal Court and the Supreme Court of New South Wales following the decision in *W v The Queen*,[68] which took the view that the *Pfennig* formulation is not to be applied in the construction of s 101. The approach taken in *W* was consistent with the dissent of McHugh J in *Pfennig*:[69]

> "If evidence revealing criminal propensity is not admissible unless the evidence is consistent only with the guilt of the accused, the requirement that the probative value 'outweigh' or 'transcend' the prejudicial effect is superfluous. The evidence either meets the no rational explanation test or it does not. There is nothing to be weighed – at all events by the trial judge. The law has already done the weighing. This means that, even in cases where the risk of prejudice is very small, the prosecution cannot use the evidence unless it satisfies the stringent no rational explanation test. It cannot use the evidence even though in a practical sense its probative value outweighs its prejudicial effect."

However, the divergence in approach to s 101 was resolved by the decision in *R v Ellis*.[70] A five-judge bench of the NSW Court of Criminal Appeal held that the regime for tendency

[67] *Pfennig* at 482-3.
[68] (2001) 115 FCR 41.
[69] *Pfennig* at 516.
[70] [2003] NSWCCA 319; (2003) 58 NSWLR 700.

and coincidence evidence provided for by the Act lays down a set of principles to cover the relevant field to the exclusion of the common law principles which previously applied.[71] The Court held that s 101 was not to be construed consistent with the previous common law approach; the section is a statutory formulation in it's own right and should be interpreted in accordance with the words employed by the provision. The observations of Spigelman CJ (with whom Sully, O'Keefe, Hidden and Buddin JJ agreed) are pertinent:

> "The words "substantially outweigh" in a statute cannot, in my opinion, be construed to have the meaning which the majority in *Pfennig* determined was the way in which the common law balancing exercise should be conducted. The "no rational explanation" test may result in a trial judge failing to give adequate consideration to the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh.
>
> Section 101(2) calls for a balancing exercise which can only be conducted on the facts of each case. It requires the Court to make a judgment, rather than to exercise a discretion. (See *R v Blick* [20] per Sheller JA; F Bennion "Distinguishing Judgment and Discretion") The "no rational explanation" test focuses on one only of the two matters to be balanced – by requiring a high test of probative value – thereby averting any balancing process. I am unable to construe s101(2) to that effect."

Spigelman CJ did not completely exclude the prospect of the "no rational explanation" being applied in some circumstances. He commented in *Ellis* at [96]:

> "My conclusion in relation to the construction of s101(2) should not be understood to suggest that the stringency of the approach, culminating in the *Pfennig* test, is never appropriate when the judgment for which the section calls has to be made. There may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the "no rational explanation" test were satisfied.

The Chief Justice did not elaborate on this point. However, the judgement of McHugh J in *Pfennig* is again of assistance (at 529-530):

[71] *Ellis* at [83] – [84] per Spigelman CJ

> "If the risk of an unfair trial is very high, the probative value of evidence disclosing criminal propensity may need to be so cogent that it makes the guilt of the accused a virtual certainty. In cases where the risk of an unfair trial is very small, however, the evidence may be admitted although it is merely probative of the accused's guilt. Each case turns on its own facts. But the judge must bear in mind that the admission of evidence revealing criminal propensity is exceptional. Further, as Lord Cross pointed out in *Boardman* while there remains a general rule against the admission of other acts of misconduct, "the courts ought to strive to give effect to it loyally and not, while paying lip service to it, in effect let in the inadmissible evidence".
>
> Thus, where the prosecution case depends entirely on propensity reasoning [*Perry v The* Queen (1982) 150 CLR 580 at 594], the evidence will need to be very cogent to be admitted. When propensity reasoning is relied upon, the danger is high that the tribunal will convict simply because of the accused's propensity instead of using it as an evidentiary factor. Consequently, in such a case the evidence will need to be so cogent that, when related to the other evidence, there is no rational explanation of the prosecution case that is consistent with the innocence of the accused.

Special leave to appeal to the High Court was granted, which was later rescinded. In rescinding leave however, the Court approved of the approach of Spigelman CJ concerning the construction of s 101.[72] In the ALRC Joint Report 102 it was recommended that no change be made to s 101, stating "the appropriate course to follow is that suggested by the Director of the Criminal Law Review Division of the New South Wales Attorney General's Department that the section be applied in its current form in the light of *R v Ellis* and be monitored."[73]

"Probative value…substantially outweighs any prejudicial effect"

The meaning of probative value in this contexts is the same as that ascribed to the evidence when considering it's admissibility at the stage of ss 97 or 98. It follows then that the Court will need to decide whether that probative value is substantially outweighed by any prejudicial effect that the evidence may have.

[72] *Ellis v The Queen* [2004] HCATrans 488 (1 December 2004).
[73] ALRC 102 at [11.93].

This necessarily involves a weighing exercise between probative value and prejudicial effect. The use of the word "substantially" in respect of the requisite probative value creates a high standard to be met if the evidence is to satisfy s 101(2). It can be contrasted with the inverse proposition in s 135, where evidence will only be excluded if the prejudicial effect substantially outweighs the probative value. The formulation in s 135 can be seen to be weighted in favour of the admission of the evidence, whereas s 101(2) is weighted in favour of excluding it. Section 137 provides a more neutral alternative where the evidence will be excluded if the probative value is merely outweighed by the prejudicial effect; one consideration is not required to *substantially* outweigh the other in that instance.

In *Ellis*, Spigelman CJ found the use of the word "substantially" s 101(20 to be significant in concluding that the common law approach (particularly the exclusionary rule in *Pfennig*) to similar fact evidence was not relevant to the interpretation of s 101. His Honour said at [84]:

> "Of particular importance, however, is the formulation adopted in s101(2) requiring the probative value of tendency or coincidence evidence to "substantially outweigh" its prejudicial effect. The use of the word "substantially" is a legislative formulation, not derived from prior case law. Most significantly, it introduces a legislative formulation into the very territory which the majority judgment in *Pfennig* said was the function of the formulation adopted in that case. In the overall context of the significant changes made to the pre-existing common law to which I have referred above, I find this last consideration determinative."

There has been relatively little attention paid to the meaning of "substantially", however it will inevitably require close consideration of the circumstances of the case at hand; relevant to the determination will be several factors including the assessment of the probative value, the nature of the potential prejudicial effect and the issue to which the evidence is said to be relevant.

Concerning the assessment of "prejudicial effect" as the final aspect of the s 101(2) exercise, the provision is curiously drafted. Unlike for example s 137 which is concerned with *unfair* prejudice, s 101(2) simply refers to 'prejudicial effect". It is difficult to conceive however that the assessment of prejudice under s 101(2) should be so wide as to include any prejudicial effect. Any evidence that tends to prove the guilt of the accused is by definition prejudicial to that person. The risk seeking to be averted by the section is

properly understood to be that of the jury misusing the evidence and applying it in some impermissible fashion. On this issue Barr J has observed:

> "It seems to me that there was a real danger that the jury's recognition of the appellant's prior guilt was likely to divert them from a proper consideration of the evidence as bearing on the question of his intent in the charges before them. The difficulty of obviating that risk had to be taken into account in assessing the likely prejudicial effect of the evidence."[74]

It should also be noted that when assessing the prejudicial effect of evidence, that consideration should be made bearing in mind other measures that may be taken to mitigate the risks associated with the evidence, such as a strong jury direction or an order pursuant to s 136 limiting the use to which the evidence may be put.[75]

As noted above, if the trial judge concludes that the evidence satisfies the requirements of s 101(2) then the evidence will be admissible. Given the strict requirements created by the section, it is difficult to see any scope for the application of the less demanding standards of s135 – 137 subsequent to the satisfaction of s 101.[76]

Conclusion

Ruling on the admissibility, and giving directions in relation to tendency and coincidence evidence in civil and particularly criminal proceedings can be a difficult task. Evidence adduced under these guises is often highly prejudicial to an accused person, and can have a powerful effect for the party who adduces it. It is therefore imperative to identify with precision the issue to which the proposed evidence is said to be probative of and to ensure that it satisfies the requirements of the statute. In cases involving juries, it is critical that the jury is carefully directed as to the permissible use(s) of such evidence to ensure a fair trial.

[74] *Regina v Watkins* [2005] NSWCCA 164; (2005) 153 A Crim R 434.
[75] See eg, the comments of McHugh J in *TKWJ v The Queen* (2002) 212 CLR 124 at [90].
[76] *R v Nassif* [2004] NSWCCA 433 per Simpson J at [60] – [61]