



Defence Tendency Applications

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Speakers



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Overview

- The tendency rule – quick recap
- How the tendency rule operates for a defence tendency application
- The advantages of making a defence tendency application
- Case studies
- Practical tips
- Questions?

Tendency evidence – what is it?

Tendency evidence is....

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

Hughes v The Queen [2017] HCA 20 at [70] (Gageler J)

Tendency evidence

- Is a species of circumstantial evidence
- It relies on an inference to connect it to a conclusion of fact – ‘because X did it before, it is more likely that X did it again during the event in question’

*“Tendency evidence is a **stepping stone**. It is **indirect evidence**. It allows for a form of **sylogistic reasoning**.”*

Elomar v The Queen [2014] NSWCCA 303 at [359] (quoted with approval in *Townsend (a pseudonym) v The King* [2022] VSCA 201 at [120])

Section 97 EA – the tendency rule

- Tendency evidence is **not** admissible **unless**:
 1. Reasonable notice: s 97(1)(a)
 2. Significant probative value (either by itself or in combination with other evidence): s 97(1)(b)
- Onus on party seeking to adduce evidence to satisfy preconditions
- Court can dispense with notice requirements: s 100

Hughes v The Queen [2017] HCA 20

- Important authority for tendency evidence
- **Two-step test** for determining significant probative value in the context of a **prosecution application**:
 1. The extent to which the evidence supports the tendency; and
 2. The extent to which the tendency **makes more likely the facts making up the charged offence**

How does the tendency rule operate for defence applications?

- The tendency rule operates differently for a defence application
- Why? Because in a defence application, you are **not** adducing it to ‘make more likely the facts making up the charged offence’ – that is the prosecution onus, not the defence
- Rather, you are adducing it to support, **as a ‘reasonable possibility’**, the existence of facts that are consistent with the innocence of the accused
- Important conceptual distinction when applying the significant probative value test in s 97(1)(b)

*“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 ... 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.**”*

DPP v Campbell (Ruling No 1) [2013] VSC 665 at [41] (Kaye J)

Why use defence tendency?

- Can be used, where appropriate, to bolster a defence case theory at trial such as self-defence, alternate suspect, consent, duress etc
- Creates a pathway for the admissibility of evidence relating to a particular witness/person that would not otherwise be available
- The power of a judicial direction should not be underestimated
- Imprimatur from the court to allow the jury to reason in a certain manner that is favourable to the defence

Examples of defence tendency apps

- *‘The deceased has a tendency to be easily angered, and to display aggressive, threatening, and violent behaviour, particularly when taking stimulant drugs and steroids’* □ **SELF-DEFENCE CASE THEORY**
- *‘The [alternate suspect] has a a tendency to act out in a violent and/or injurious manner towards women, including by grabbing the throat’* □ **ALTERNATE SUSPECT CASE THEORY**
- *‘The complainant has an interest in acts of violence during sexual intercourse, including erotic asphyxiation and dominant / submissive BDSM activity (involving applications of force to the body), and a willingness to act on that interest’* □ **CONSENT TO VIOLENT SEX CASE THEORY**

3 main advantages of defence tendency applications vs prosecution applications

1. 'Significant probative value' test is easier to satisfy as the evidence only needs to support a 'reasonable possibility' consistent with innocence of the accused
2. Safeguard in s 101(2) does not apply
3. Discretionary exclusion in s 135 should 'rarely' be exercised to exclude defence tendency evidence

1. The significant probative value test is easier for defence to satisfy

Prosecution	Defence
Tendency evidence needs to make more likely the facts making up the charged offence	Tendency evidence only needs to support a reasonable possibility of facts consistent with innocence of the accused

*“... the test for the admission of tendency evidence is **easier to satisfy** where the evidence is sought to be adduced by the defence than where tendency evidence is sought to be adduced by the prosecution.”*

The Queen v Majak [2022] NTSC 57 at [43] (Brownhill J)

2. Safeguard in s 101(2) does not apply

- Another advantage that a defence application has over a prosecution application is that the ‘safeguard’ in s 101(2) does **not** apply – as s 101(2) is expressed in terms as only applying to a prosecution application ‘about an accused’

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

3. Discretion in s 135 should rarely be exercised against defence application

- Another advantage is that there is authority that the discretionary exclusion in s 135 should ‘rarely’ be exercised by a trial judge to exclude a defence tendency application

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

R v Cakovski [2004] NSWCCA 280 at [72] (Hidden JA)

Helpful authorities

- *DPP v Campbell (Ruling No 1)* [2013] VSC 665 (Kaye J) □ duress
- *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743 (Kaye J) □ self-defence
- *DPP v Wilson (Ruling)* [2021] VSC 766 (Taylor J) □ self-defence
- *R v Holmes (No 5)* [2021] NSWSC 115 (Campbell J) □ self-defence
- *DPP v Duckworth* [2022] VCC 1733 (Judge Hassan) □ ‘didn’t happen’
- *R v Carberry (No 3)* [2023] NSWSC 166 (Hamill J) □ self-defence

Case study #1 – Murder case with alternate suspect

- Body of deceased found with significant head and neck trauma in staircase of public housing high rise. Accused man was next-door neighbour. **Alternate suspect** also lived in the same building.
- There existed demonstrated acrimony between the deceased and the accused, including a police call-out 48 hours before her death.
- Police activated BWC upon establishing a crime scene around her body – the spontaneous interaction between police and the **alternate suspect** was captured and he volunteered: *“There’s only one kind of person who would do this, **it’s either me when I flip out cos I’ve had my troubles with police or it’s him (the accused) the bloke next door.**”*



Case study #1 – Murder case with alternate suspect

- Disclosure revealed that the **alternate suspect** had pleaded guilty to 9 separated offences of violence over the last 5 years. This included:
 - a) Punching the **deceased** to the face;
 - b) Attempting to strangle his intimate partner;
 - c) Spontaneously assaulting a paramedic; and
 - d) Spontaneously assaulting a menu log delivery driver.

Case study #1 – Lessons learnt?

- Don't just act on criminal priors alone – dig deeper!
- The significant value of the evidence often turns on the degree of generality or specificity in which the tendency evidence is stated; the specificity of the tendency has a direct impact on the strength of the inferential mode of reasoning: *Cross on Evidence*
- Lay the foundations for your application **early** – e.g. gather the evidence early and consider deploying it at the pre-trial stage (198B hearings etc)

Case study #2 - *DPP v Duckworth*

- Accused (39 y.o.) charged with rape and sexual assault of girl (13 y.o.) that he was babysitting. Previously unknown to each other.
- Complainant gave a VARE and said that accused sexually assaulted her when they were alone watching TV
- Accused gave ROI and said that the complainant unexpectedly jumped into his lap and said “*I’d like to suck your dick*”, an offer which he firmly rejected. After he rejected her sexual advance, the complainant then became upset and ran away. Exculpatory account in ROI – essentially ‘sexual assault didn’t happen’

DPP v Duckworth [2022] VCC 1733

- Defence became aware that complainant had a history of approaching random adult men online (8 in total) and initiating sexually explicit conversation with them (including sending nudes and offering to meet up for sex)
- This evidence bolstered the exculpatory account given by the accused in his ROI that the complainant had approached him ‘out of the blue’ and initiated a sexually explicit conversation – which he rejected

DPP v Duckworth [2022] VCC 1733

The tendency sought to be proved is the tendency of the **complainant** to:

- a) **Act in a particular way**, namely: to approach, initiate and pursue sexually explicit activity with adult men considerably older than her (generally 20-40 years older) and not previously known to her; and
- b) **Have a particular state of mind**, namely: a sexual interest in adult men considerably older than her (generally 20-40 years older) and not previously known to her, and a willingness to act on that interest.

DPP v Duckworth [2022] VCC 1733

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

- a) Whether the accused sexually assaulted and sexually penetrated the complainant;
- b) Whether the complainant approached the accused, without prompting, and initiated a sexually explicit conversation by jumping into his lap and saying “I’d like to suck your dick”; and
- c) **Whether the exculpatory account given by the accused in his record of interview is reasonably possible.**

DPP v Duckworth [2022] VCC 1733

- *‘The prosecution will no doubt suggest to the jury that the accused’s exculpatory account is fanciful and implausible, and contrary to ordinary human experience, particularly for a 13-year-old girl to approach an adult man (3 times her age) whom she did not previously know and ‘out of the blue’ offer to suck his penis.’*
- *‘Yet the tendency evidence **strongly supports the reasonable possibility that the exculpatory account is true** – it demonstrates that that the exculpatory account is not fanciful and implausible, but rather reasonably possible in light of the complainant’s prior sexual interactions with adult men considerably older than her whom she did not know.’*

DPP v Duckworth [2022] VCC 1733

- Outcome?

[40] I accept the defence submission that the evidence provides strong support for the reasonable possibility that the accused's exculpatory account is true, and that the evidence is capable of rebutting the argument that the accused's account of the behaviour of the complainant is fanciful, implausible and even offensive.

- Defence tendency application ruled admissible (along with related 342 application to permit cross-examination of complainant)
- DPP discontinued prosecution shortly after tendency ruling

Practical tips

- Collect evidence to investigate viability of defence tendency application
- Request disclosure of criminal records for deceased / witnesses
- Obtain prosecution opening / facts admitted on the plea
- Request transcripts of plea hearings to see if concessions were made by counsel
- Locate witnesses who may be able to give evidence of uncharged or contested acts
- Google the names of witnesses – never fails to surprise

Procedural steps

- Prepare your tendency notice (see example)
- Make sure to give “reasonable notice” when serving it: s 97(1)(a)
- Check filing and timeline requirements of your particular jurisdiction
- Prepare written submissions to file in support of application
- Be prepared to adduce the tendency evidence in admissible form (i.e. for uncharged or contested acts you will need to subpoena witnesses to give evidence in the trial, as you cannot rely on a finding of fact from an earlier court proceeding: per s 91(1))

Questions?

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Moya is a highly experienced trial advocate in both the Supreme and County Courts. In addition to this she has appeared as counsel assisting various tribunals, has appeared for multiple clients in the Royal Commission into Institutional Sexual Abuse and regularly appears for clients in coercive matters.



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