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TENDENCY AND COINCIDENCE EVIDENCE: The significance of *Velkoski*

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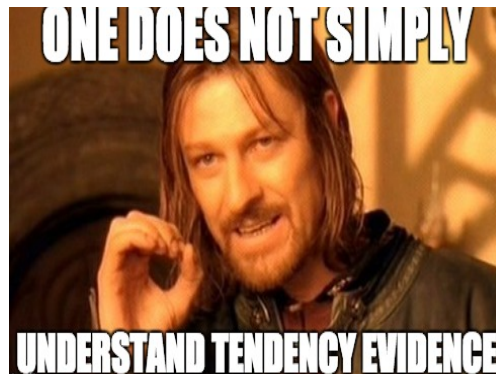
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Tendency and Coincidence Evidence – The Significance of *Velkoski* [2014] VSCA 121



Boromir from *Lords of The Rings* famously warned, “One does not simply walk into Mordor.” Similarly, one does not simply just understand tendency and coincidence evidence. It has proven to be a vexed area the law for some time. As Justice Hulme of the Supreme Court of NSW commented to the Judges of the Victorian County Court in 2009:

The proper use of tendency and coincidence 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 and coincidence basis.¹

The reason why this is a useful topic for a CPD seminar is because tendency and coincidence evidence is frequently led in criminal proceedings, for example, in trials of sexual offences. However, the law has remained unsettled in Victoria until recently, when the Court of Appeal brought clarity with *Velkoski*. The Court sitting as Justices Redlich, Weinberg and Coghlan commented in that case:

Regrettably, the law regarding the admissibility of “tendency” and “coincidence” evidence, pursuant to ss 97 and 98 of the *Evidence Act*, is regarded as being in an unsettled state ... It is remarkable that the current edition [of Odgers] requires some 80 pages of closely typed and heavily footnoted material to deal with this subject. That is so notwithstanding that these provisions have only been in force in this State for some five years or so. Previously, classic texts, such as *Cross on Evidence*, managed to address the whole of the law in this area, covering a century or more of common law development, in only a handful of pages.²

Further, the Court observed that one of the things that has changed in legal culture is that previously case law used to focus almost exclusively on the question of admissibility and little was said about the question of what directions should be given to a jury on how to treat tendency and coincidence evidence. This situation has now changed.³

¹ Paper presented to Judges of the County Court of Victoria, 27 November 2009

² *Velkoski v The Queen* [2014] VSCA 121, [25] – [27].

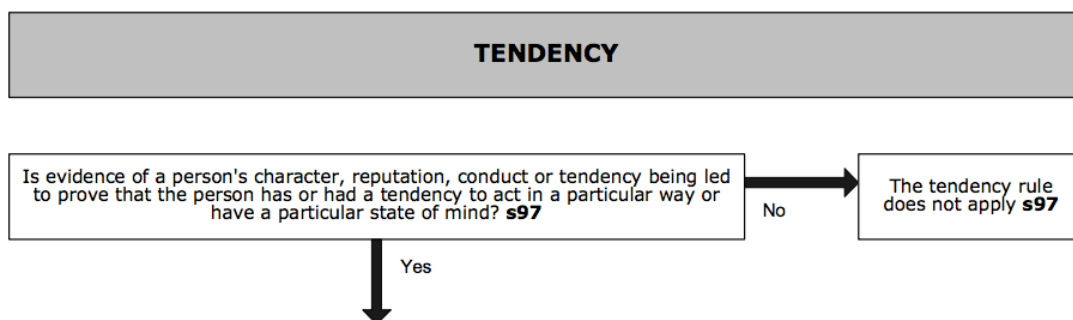
³ *Ibid*, [28].



One of the successful grounds of appeal in *Velkoski* was that the trial judge did not adequately direct the jury as to tendency reasoning. The directions were held to contain serious errors. You may be aware that in Victoria, the recent *Jury Directions Act 2013*, states as a 'guiding principle' that legal practitioners have a duty in criminal trials to assist a trial judge with determining the directions that should be given to a jury and the content of those directions.⁴ Further, the **Victorian Criminal Charge Book bench notes** state that where evidence is admissible as tendency evidence, the trial judge must direct the jury on both admissible and inadmissible uses of the evidence. So practitioners should have a firm understanding of what tendency and coincidence evidence is and how it can be used, so that they can be of effective assistance regarding jury directions and fulfill their duty.

What is tendency evidence and what is coincidence evidence? It is important to understand that while each relies on factual similarities, there is a distinction between the two. Each type of evidence relies on a different reasoning process for inferences to be drawn in relation to the likelihood of the existence of a fact in issue.

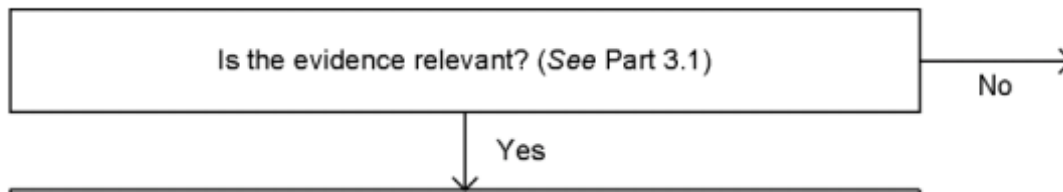
Let's look more closely at tendency evidence.



Tendency evidence is evidence relating to a person's character, reputation, or conduct that is adduced to prove that someone has a tendency to act or think in a particular way. So when is tendency evidence admissible?

⁴ *Jury Directions Act 2013*, s 5(3).

Admissibility of Evidence



It needs, of course, to be relevant. Relevance is a threshold requirement under the *Evidence Act*. The starting point for any admissibility question is to ascertain whether the evidence is relevant to a fact in issue in the proceeding.

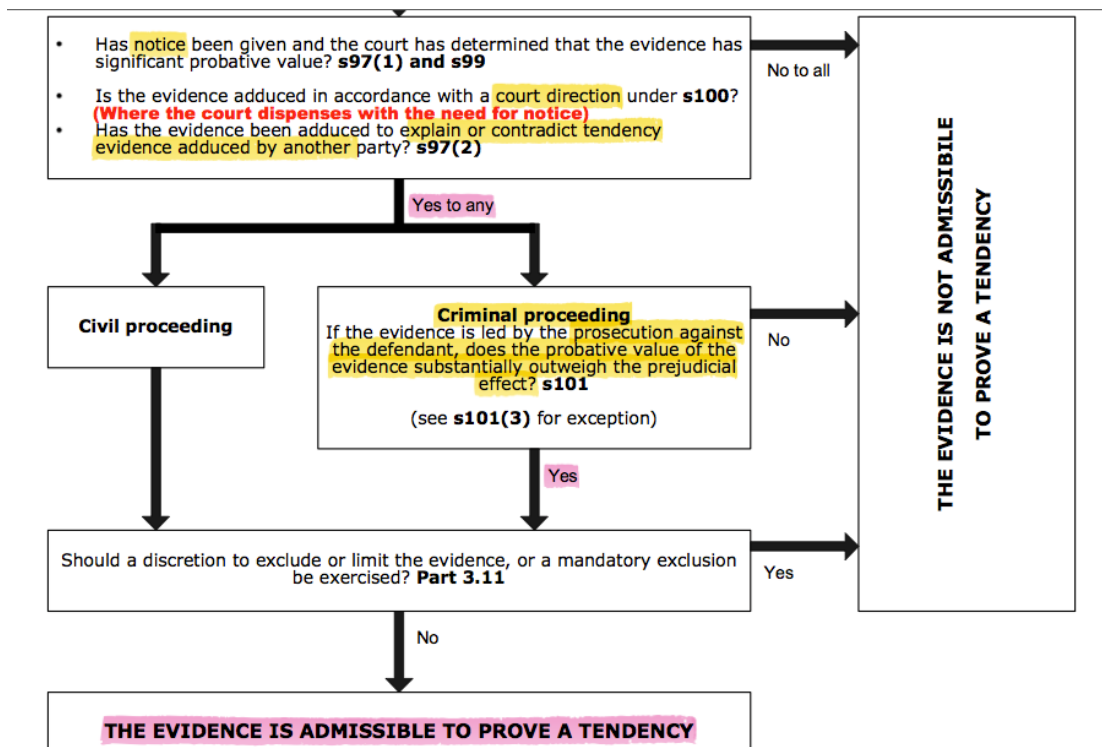
It has to **Rationally** affect the **Assessment** of the **Probability** of the **Existence of a Fact** in issue

Tendency evidence may be relevant to the fact in issue of whether an accused committed the act charged. This is because the tendency of an accused to act in a certain way or have a certain state of mind in the past, increases the probability of the existence of the fact in issue that they acted in that particular way or had that state of mind in relation to the charged act. The admission of the evidence allows the jury to infer that because of the tendency, the accused acted in conformity with their tendency in relation to the offence and did the act charged or had a particular state of mind.

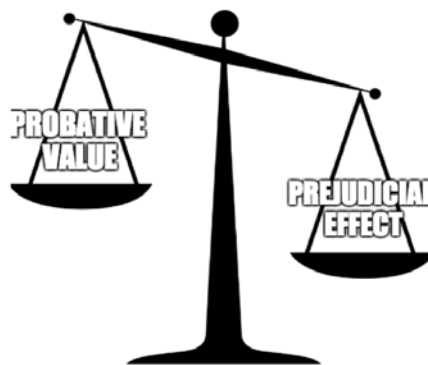
Once relevance is established, our guide to deal with the admissibility of tendency evidence is set out the tendency rule found at s 97 of the *Evidence Act*. The tendency rule broadly excludes the admission of evidence of a tendency to act in a certain way or have a certain state of mind, unless certain requirements are met.

Why are there requirements that must be satisfied before tendency evidence may be adduced? Because tendency evidence, when admitted in a criminal trial, can be a very powerful weapon for the prosecution. For example, there is a rebuttable presumption that when multiple sexual offences are brought against an accused, they should be tried together. Where there are multiple complainants in a trial, whether evidence relating to a charge of sexual offending against one complainant is permitted to be considered in relation to other charges of offences against other complainants, that is, whether it is cross-admissible, may well mean the difference between convictions and acquittals to the charges. Where the charges are allowed to be considered as a group, because of a discernable pattern of offending, the evidence is much more damning than if each charge was considered individually on the evidence pertaining to it alone.

Now we will consider the various tests that need to be satisfied before tendency evidence is admitted.

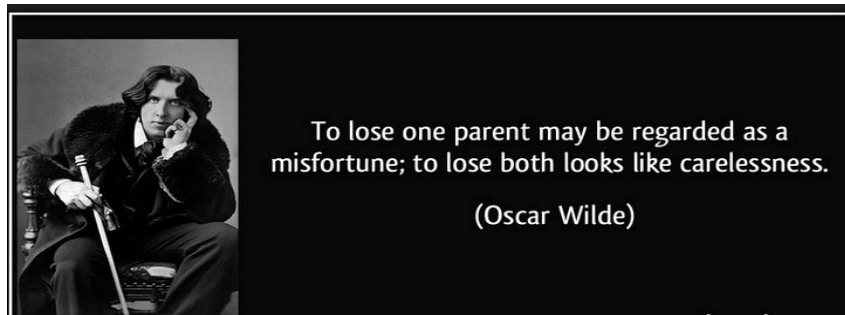


Evidence will not be admissible to prove a tendency, *unless* written notice is given *and* the evidence has been determined to have significant probative value, *or* the requirement to give evidence is dispensed by the court, *or* the evidence is adduced to contradict or explain tendency evidence adduced by another party *and* the evidence has probative value that substantially outweighs the prejudicial effect.

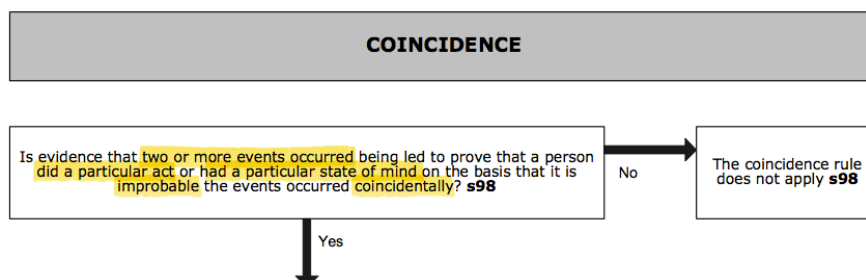


So how do courts determine whether evidence has significant probative value? By looking at the degree of similarity between the various acts that are said to constitute the tendency alleged. For example, in a sexual offences trial, by looking at the nature of the sexual acts, as well as by examining the degree of similarity in the circumstances that form the background to the offending, such as acts that tend to establish a particular modus operandi.

Now I will contrast tendency evidence with coincidence evidence.



Oscar Wilde joked, 'To lose one parent may be regarded as a misfortune; to lose both looks like carelessness.' What makes the joke clever is the logic behind it. For example, when deaths keep happening when someone is around, those losses can start to look like being due to something that person is doing, such as being careless, rather than being due to mere misfortune.⁵ The bottom line is that coincidence as an explanation for similar events has its limits.



Coincidence evidence is about accident as compared with design. It deals with evidence that relies on the improbability or implausibility of two or more events occurring coincidentally to prove that a person performed a particular act or had a particular state of mind.



Justice McHugh in *Pfennig* explained coincidence reasoning this way:

... the evidence is often admitted for the reason that the association of the accused with so many similar deaths, injuries or losses, as the case may be, makes it highly improbable that there is an innocent explanation for the accused's involvement in the matter.⁶

While the evidence that constitutes tendency evidence and coincidence both rely on factual similarities, the type of inferential reasoning used by the jury differs for each. The contrast is set out below:

⁵ *R v Handy* [2002] 2 SCR 908, [45] quoting *United States v York* (1991) 933 F2d 1343, 1350.

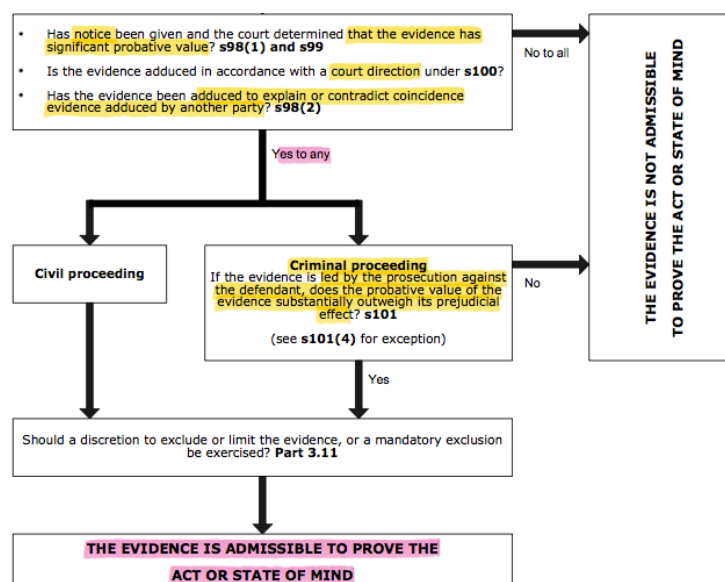
⁶ (1995) 182 CLR, 461, 530.

Tendency reasoning	Coincidence reasoning
<p>Fact in issue inferred by the fact that a person has a tendency to act in a certain way</p> 	<p>Fact in issue inferred by the improbability of the events occurring other than in the way suggested by the prosecution</p> 

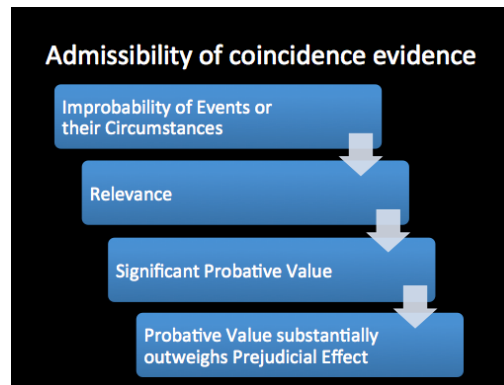
So tendency evidence is used to reason, “The accused has previously been arrested for breaking into houses and at each house, a threatening message was written in red lipstick on a mirror. Similarly, for the offence charged, the accused is alleged to have broken into a house and written a threatening message on the mirror in red lipstick. The accused therefore has a tendency to break into houses and write on the mirror with lipstick and is therefore more likely to have committed the offence charged.”

Whereas with coincidence evidence, it looks at similar improbable events and reasons that some criminal activity must have caused them apart from chance alone. As one American judgment put it: “The man who wins the lottery once is envied; the one who wins it twice is investigated.”

What is the regime for admissibility for coincidence evidence? A quick look at the coincidence flowchart brings about a sense of déjà vu. It looks a lot like the requirements for tendency evidence:



So how is this put into practice?



In the case of *CGL v DPP* [2010] VSCA 26, the Court determined there are four questions that must be answered affirmatively when determining the admissibility of coincidence evidence. They are:

1. Assess the degree of the improbability raised by the facts. Ask whether the similarities in the events themselves and/or the circumstances behind those events are such that it is *improbable* that the events occurred coincidentally?
2. If it is improbable that they would have been coincidental, assess whether the evidence is relevant. Ask would the evidence of those events and circumstances tend to prove that the accused: (a) did the charged act; or (b) had a particular state of mind, where doing that act or having that state of mind is either a fact in issue or is relevant to a fact in issue?
3. If the evidence is relevant, ask does the evidence have significant probative value, either by itself or having regard to other evidence adduced?
4. If the evidence is improbable, is relevant and has significant probative value, ask does the probative value of the evidence substantially outweigh any prejudicial effect it may have on the accused.⁷

So now that I have discussed tendency and coincidence evidence, I will move on to the case of *Velkoski*.

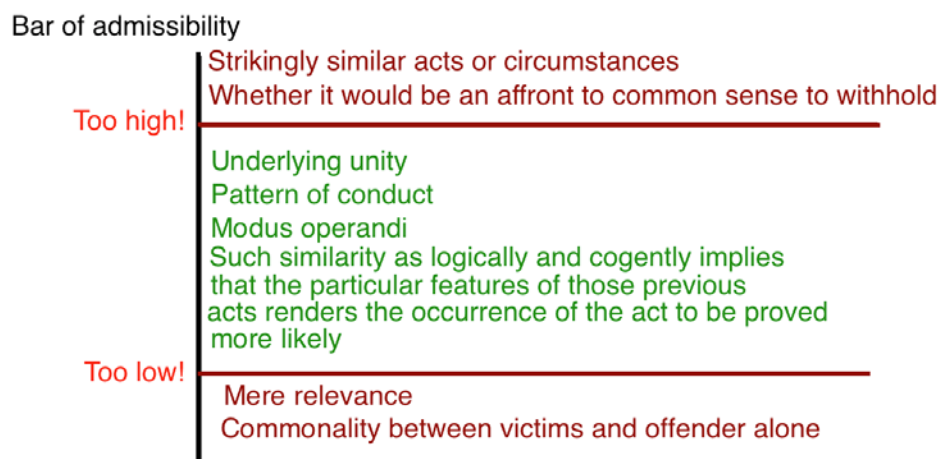
To briefly summarise the facts, Mr Velkoski's wife ran a day-care centre at their home for several years. Mr Velkoski was not a carer of the children and was not supposed to supervise the children at the centre. Nevertheless, Mr Velkoski did have contact with the children and three children later alleged that he had committed indecent acts against them. Velkoski was tried and was convicted of 15 charges of committing an indecent act with a child under 16. Mr Velkoski appealed.

⁷ At [22].

So why is *Velkoski* important? It sought to make the law clearer. The Court noted that it can be challenging to work out whether evidence has significant probative value so that it can be admissible as tendency evidence. It noted that unless there are remarkable or distinctive features so as to make it obvious that the evidence has significant probative value, a state of uncertainty has existed as to how much similarity in the commission of the offences or the circumstances that surround them is needed.

How high is the standard to show significant probative value? The principles the Court outlined give guidance. It held that the *Evidence Act* should be treated as a code as to tendency and coincidence evidence and that common law principles relating to these areas are not binding. So, for example, the tests devised to deal with this type of evidence previously set out by the HCA in *Hoch* [1988] HCA 50 and *Pfennig* [1995] HCA 7 do not apply to the *Evidence Act*.

The Court found that while common law cases have required ‘striking similarity’ between the instances of conduct to demonstrate a tendency, striking similarity is not required. Striking similarity sets the bar too high.



So we can see from this slide that not only has striking similarity been abandoned as demanding a too high standard to constitute significant probative value, but so too has the common law expression of a judge asking whether it would be “an affront to common sense” to withhold the evidence from the jury.

However, on the other end of the bar, in the “too low” spectrum, we see that commonality between multiple complainants and offender *alone* will not be enough to support tendency reasoning. For example, the fact that the complainants were pupils and their former teacher is the accused. Mere relevance is also not enough. The evidence must be capable of rationally affecting the probability of the existence of the fact in issue to a *significant* extent, meaning (at least) an extent greater than required for mere relevance. It is the degree of similarity that gives the evidence its strength.

So in the middle section of the bar, at a level the Court in *Velkoski* considered is of adequately high threshold to establish significant probative value, it should be considered whether the features of the acts reveal ‘underlying unity,’ a ‘pattern of conduct,’ ‘modus operandi,’ or ‘such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely.’

Further, the Court in *Velkoski* enumerated a number of features that may be relied on when assessing whether evidence is sufficiently similar to demonstrate a tendency. Relevant considerations include the **number of occasions** on which the alleged misconduct relied upon occurred; **the time gap** between those occasions; **the degree of similarity between the conduct on each occasion**; and the **degree of similarity between the circumstances** in which the conduct took place.

In addition, *Velkoski* elucidated the principle that where there are multiple complainants, if it is reasonably possible that they might have colluded or collaborated, concocted their stories or even innocently contaminated each other’s evidence, the tendency or coincidence evidence will be inadmissible. So an accused can raise this as an issue before a trial judge, if there is some basis on which to raise this objection. Mere speculation that any of those things might have happened because there was an opportunity for them to occur will not be enough. If the issue is raised by evidence, the Crown must negate the reasonable possibility that collusion, concoction, contamination or collaboration occurred.

So, in conclusion regarding *Velkoski*, the case is important because it reviewed the law and summarized the principles that can be distilled from the authorities. It was a case that saw the wood from the trees and identified a common principle that has been consistently applied as to whether evidence is capable of supporting tendency reasoning. It provided a resource to tell us exactly what the law is. Did it change the law? The Court of Appeal does not think so. There was some confusion after the *Velkoski* judgment was delivered whether the law had actually been changed. The subsequent Court of Appeal case *Gentry (a pseudonym) v DPP* [2014] VSCA 211 stated, ‘*Velkoski* did not change the law in this State in any respect.’⁸ However, this is not a view that is without contention and there are those who consider that *Velkoski* actually did more than just restate the law.

Let’s finally have a look at a case in which *Velkoski* was applied, the case of *Rapson* [2014] VSCA 216. This is a case in which a priest and deputy headmaster at a Roman Catholic boys’ school was tried for committing sexual offences against eight boys who had attended the school. There were five charges of rape and eight charges of indecent assault. The trial judge ruled that the evidence of each victim was admissible in proof of charges relating to each of the other victims, that is, all of the evidence was cross-admissible. Mr Rapson was convicted on all of the charges. The argument on appeal was that none of the evidence was cross-admissible.

⁸ At [23].

On appeal, in light of *Velkoski*, the Crown conceded that evidence of two of the complainants was not cross-admissible in proof of the charges relating to the other complainants. The Court found that concession was properly made, and as a result, all of the convictions were quashed and an order was made for a retrial. The reason that the concession was made in relation to the evidence of these two complainants, was that the Crown itself submitted on appeal that there was insufficient commonality either in the nature of the sexual misconduct alleged or in the surrounding circumstances to give the evidence significant probative value. The evidence was of a markedly different and graver character of sexual misconduct, that is, of rape, than the other evidence of the charges, which was non-penetrative sexual offending and so was 'some distance apart' on the spectrum of seriousness.

Additionally, the background circumstances were different; the evidence of these two complainants was that the offending occurred as a result of straight up brute force and attack, whereas the evidence of the other offending showed that the accused would 'test the waters' with his victims first, would try to ingratiate himself with the victims by offering them inducements and the offending was incremental and relatively non-violent.

The Court found that the evidence from the remaining complainants was cross-admissible. Helpful points that the Court made in its judgment include:

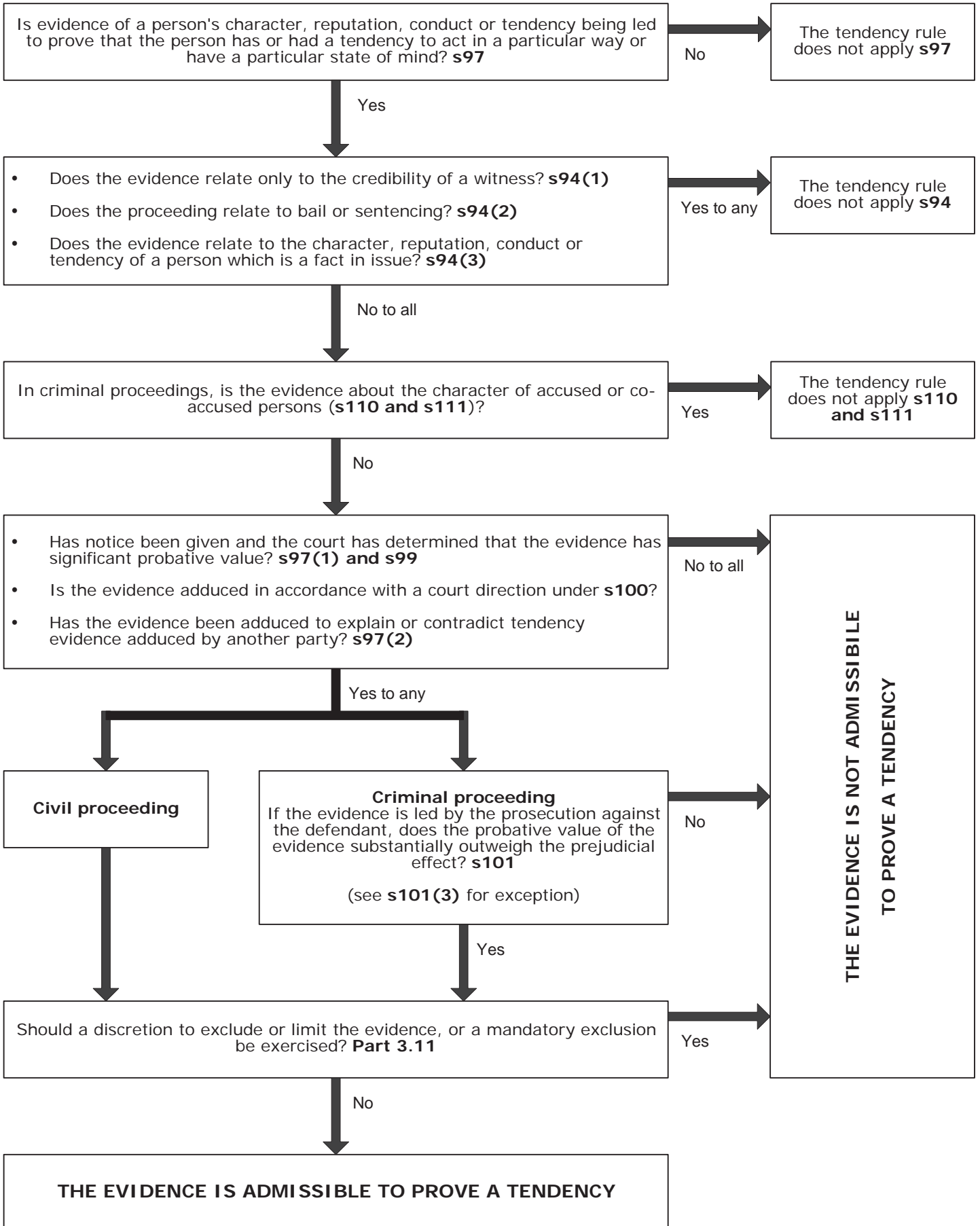
- Evidence can be used to employ tendency reasoning because of the underlying pattern of factual similarity that can be found in *either* the similarity of the nature of the offences *or* in the circumstances surrounding the offending. So just because the nature of the different acts are dissimilar, this does not necessarily preclude tendency reasoning, if, say the circumstances of the preparatory conduct before the alleged offending is very similar, this still may be enough to establish significant probative value.
- The opposite scenario is also sufficient; not very similar background circumstances in which the alleged offending occurred will not disqualify the evidence from being tendency evidence, if the nature of the offending, such as the particular form of sexual activity engaged in, is very similar.
- However, the more dissimilar one factor is, the greater the need there is for commonality in the other factor for the evidence to have significant probative value. It is all a question of fact and degree. There is no prescriptive guide as to what evidence will constitute sufficient similarity. Every case needs to be assessed on its own facts.

To conclude, the Court in *Rapson* found that *Velkoski* did not make it harder to show that tendency evidence is admissible, even though in light of *Velkoski* the Crown in *Rapson* conceded that the evidence of two of the complainants ought not to have been cross-admissible at trial. Rather, the Court found that *Velkoski* merely clarified the existing principles, (however this finding is not

without contention). The Court stated that the effect of *Velkoski* should be to assist practitioners to employ s 97 of the Act. Similarly, I hope that this seminar assists you in the future when you face tendency and coincidence evidence in your matters.

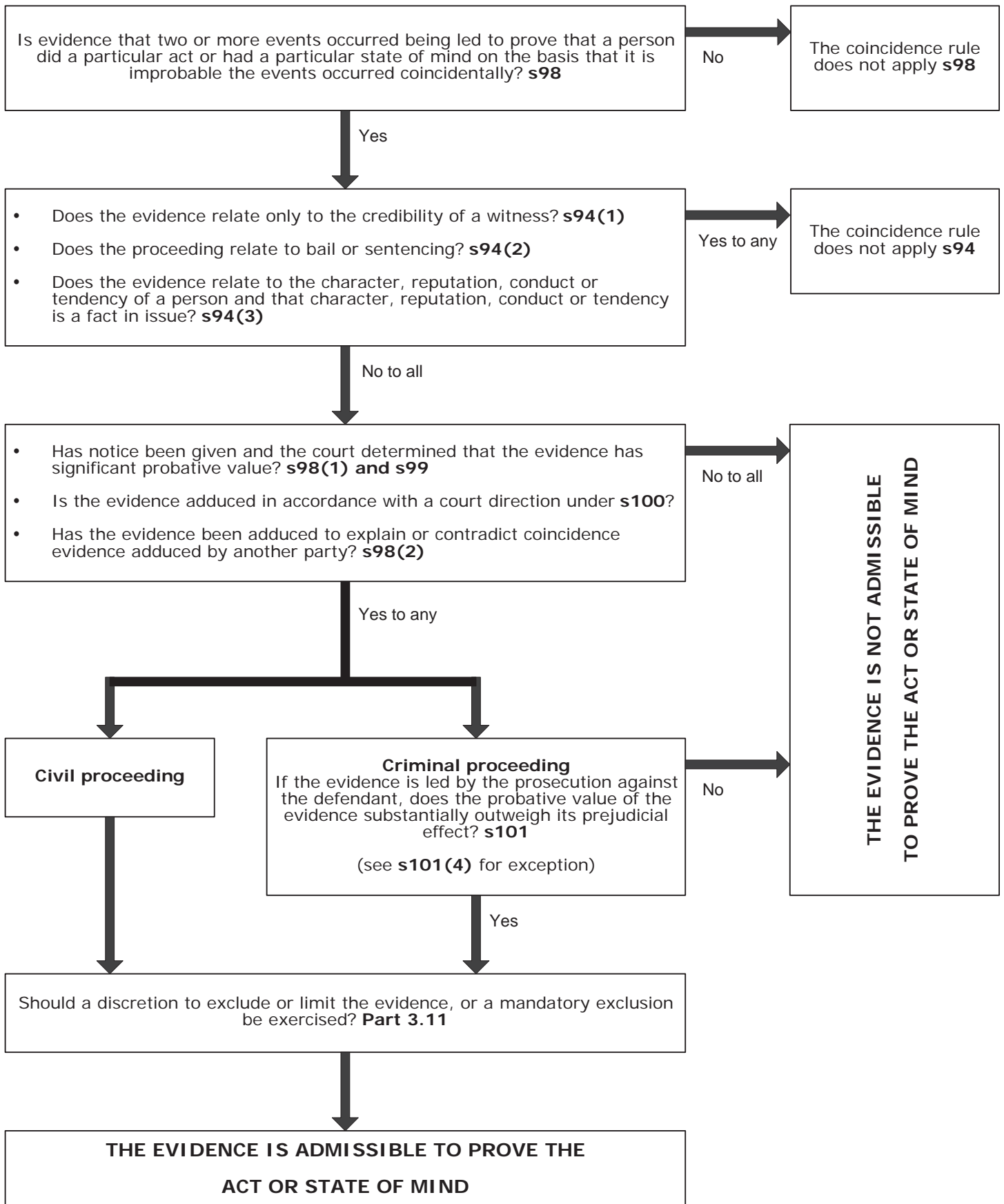
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Barrister
February 2014

TENDENCY



Note: The court may waive the rules in Parts 3.2-3.8 in certain circumstances **s190**

COINCIDENCE



Note: The court may waive the rules in Parts 3.2-3.8 in certain circumstances **s190**

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TENDENCY AND COINCIDENCE EVIDENCE: The significance of *Velkoski*

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TENDENCY EVIDENCE & *VELKOSKI*

Presentation by Justice Christopher Beale QC for Foley's List on 12 February 2015

A VEXED ISSUE

“Over the last few years a great deal has been written about ss 97 and 98 of the Uniform Evidence Act and regrettably much of it is not very helpful to the trial judges whose task it is to apply the legislation.....Since the passage of the legislation, we have had myriad decision of intermediate courts of appeal going in different directions, and many of them are not clear. This case is an example of the problem.” Nettle JA (as he then was) in *Rapson*¹

RATIONALE OF EXCLUSIONARY RULE AND EXCEPTION

“If an individual has behaved in a particular way in a particular situation, that individual is likely to behave in a similar way in a similar situation.....But the important point to note in this context is that the concept of character in thesense of general disposition has little value as a predictive tool of human behaviour”. ALRC 26 at [797], drawing on various psychological studies.

SUMMARY OF PRINCIPLES

The relevant principles are now summarised in *Velkoski* at [165-179] and *Rapson* at [16-20].

SIGNIFICANT PROBATIVE VALUE (“SPV”) (s97)

Probative value is defined in the Act's Dictionary.

Significant is not defined. It does not mean “substantial” (see Explanatory Memorandum²). It means “of consequence, important.”³

Generally, assume credibility but not reliability (*Dupas* at [63]).⁴

¹ *Rapson v R*, unreported application for leave to appeal, 29.4.2014 at [8] per Nettle JA (as he then was).

² “Although the term “significant” is not defined, it is not intended to mean “substantial”. The 2005 LRCs' Report concluded that the term is well defined in common law, and means something more than mere relevance, but less than a substantial degree of relevance”: Explanatory Memorandum, clause 97.

³ In *Velkoski*, the Court said at [171] that: “The features relied upon must in combination possess significant probative value which requires far more than ‘mere relevance’” but bear in mind that: (a) the test of SPV also applies to tendency evidence which D wishes to adduce; (b) for tendency evidence adduced by P in criminal proceedings, there is a further test or hurdle to clear, namely s 101; & (c) the test of SPV also applies in civil proceedings.

Assume neither if contamination is a real issue. If P fails to exclude contamination as a reasonable possibility, the evidence lacks SPV (*Velkoski* at [173]).

Similarities are now the touchstone of admissibility for tendency evidence (*Velkoski* at [82]⁵) as well as coincidence evidence (*PNJ* at [8]).

Not all similarities are considered relevant (*Rapson* at [35], *Velkoski* at [79-82], *PNJ* at [19-20]⁶).

Striking similarities are not required.

If no remarkable, distinctive or unusual features, similarities of conduct or surrounding circumstances will need to be close similarities (*Velkoski* at [118 -120]).

In multi complainant cases, similarity of relationship will not of itself ordinarily suffice.⁷

Dissimilarity between the conduct is not fatal to the admissibility of tendency evidence if there is sufficient similarity between the circumstances and vice versa (*Rapson* at [17-18]).

A lesser degree of similarities may suffice for tendency evidence to be admissible (*Middendorp* at [20]⁸).

Whether sufficient similarities exist is a question of degree about which reasonable minds can differ.

⁴ Dyson Heydon in a recent article (see attached list of authorities) says *Dupas* is wrong.

⁵ The Court in *Velkoski* said at [82]: “The requirement of ‘underlying unity’, ‘modus operandi’, ‘pattern of conduct’ or ‘commonality of features’ applies to similarities that cannot be described as ‘striking’. These concepts continue to be regularly used to provide guidance as to the strength of the tendency evidence. They are to be found in the preponderance of authority from this Court and permeate its decisions. They remain, in our view rightly, a primary guide to the resolution of questions of admissibility. Because each of these concepts rests upon the existence of some degree of similarity of features between the previous acts and the offences charged, the law in Victoria now follows a somewhat different path to that currently followed by the New South Wales Court of Criminal Appeal.”

⁶ In *PNJ* at [19] the Court said: “It is, in our view, a mistake to treat as relevant similarities for this purpose features of the alleged offending which reflect circumstances outside the accused’s control. In this case, a number of the asserted similarities simply reflected the setting in which the offending occurred. Each of the complainants was detained in the Centre. The limited age range of those eligible for such detention accounts for the similarity in ages, as counsel for the applicant pointed out. Likewise, the location of the alleged offending – either in the bedroom of the complainant or in the applicant’s bedroom – reflected the custodial setting.”

⁷ *Cf* ALRC 26 at [810]: “If....an accused were charged with a sexual offence relating to his daughter, and he asserts that someone else was responsible, evidence of his prior convictions of incest with other daughters would be substantially probativebecause it showed a specific propensity for such conduct.”

⁸ “In any event, the scope of tendency evidence is not as narrow as the applicant contends. The Act is not framed in the terms, as recommended by the Australian Law Reform Commission, that ‘evidence of a person’s past conduct on some occasion should only be admitted to establish a tendency to act or think in a particular way and thereby infer similar conduct on some relevant occasion if it could be shown that the circumstances of the two occasions were “substantially and relevantly similar.”’ While evidence of this sort will frequently constitute admissible tendency evidence, it does not follow that evidence of prior conduct that is not ‘substantially and relevantly similar’ to the offending conduct cannot amount to admissible tendency evidence”

PROBATIVE VALUE v PREJUDICE (s101)

In performing the balancing exercise, take into account any directions that may be given to jury to address prejudice. Assume that juries ordinarily follow directions (*Dupas* at [114] & [177]).

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