

Tendency Evidence

ss97 & 101 Evidence Act (NSW) 1995

Tendency evidence can be highly prejudicial to an accused person. So, every criminal defence lawyer needs to know how to respond to an application by the prosecutor to adduce it. This article seeks to assist legal practitioners in the Local Court of NSW.

Tendency v Coincidence

Tendency evidence relates to a person – it shows that person's character, reputation or conduct. Coincidence evidence relates to events – that on two or more occasions, a person did a particular act or had a particular state of mind because of similarities in the event or the circumstances in which it occurred.

In either case, the prosecutor is required to give reasonable notice in writing and then bears the onus of proving that:

1. The evidence is Relevant to a Fact in Issue,
2. The evidence has 'significant probative value',¹ and
3. That the significant probative value '*substantially outweighs any prejudicial effect it may have on the Defendant.*'²

1. Relevance

Once evidence is admitted it can be used for any purpose. So, prosecutors will often attempt to bypass s97 and s101 by claiming that the evidence is relevant for a non-tendency purpose. For this reason, in every case, Defence counsel must press the prosecutor to explain how the proposed material is relevant to any particular fact in issue.

An example would be where the police stop and search a man who is known to have a criminal record. Police will claim that the record is relevant to explain why the police stopped him. There are two ways to respond:

1. If the legality of the search is not challenged, then it is not a fact in issue and the material has no relevance other than tendency,
2. The other alternative is that the legality of the search is challenged and the defence seeks to exclude the results under judicial discretion.³

In the latter case, the tendency material can be admitted on a voir dire (in the absence of the jury) concerning the search but excluded from evidence as irrelevant in the substantive hearing.

¹ s97 Evidence Act (NSW) 1995

² s101 Evidence Act (NSW) 1995

³ s137 Evidence Act (NSW) 1995

2. Significant Probative Value

If the evidence is found to be relevant only for tendency purposes, then s97 provides that the prosecutor bears the onus of showing that the material has significant probative value. This will depend entirely on the nature of the material and the tendency that is being alleged. In general, the probative value of the material will increase with the specificity of the tendency that is being alleged.⁴

3. Substantially Outweighs Prejudicial Effect

If the prosecutor can persuade the court that the material has significant probative value, then s101 requires the court to consider the prejudicial effect of the material. Note that the statute refers to prejudicial effect and not to 'unfair' prejudicial effect. The court must find that the probative value substantially outweighs its prejudicial effect.

Submissions

Submissions should attack all three elements that the prosecutor carries the onus of proving. These are relevance, probative value and prejudice. For example:

It is unclear what fact in issue the prosecutor is attempting to prove with this evidence. This dearth of relevance suggests that the material could not have sufficient probative value to overcome the test in s97.

The tendency appears to be nothing more than a bare allegation that the Accused is a bad person who has committed crimes in the past. I submit that the tendency alleged lacks sufficient particularity and is too general to carry significant probative value.

I further submit that whatever probative value it does have is heavily outweighed by the clear and undeniable prejudice that the material will cause to the Accused. Admitting this evidence would undermine the Accused's entitlement to a presumption of innocent which is an inviolable cornerstone of the criminal law in state of New South Wales.

If you have any interesting issues, I'm available every day.

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⁴ Hughes v The Queen [2017] HCA 20 (14 June 2017)