

# FOLEY'S | LIST

## TENDENCY AND COINCIDENCE EVIDENCE: The significance of *Velkoski*

Author: His Honour Christopher Beale QC

Date: 12 February, 2015

**© Copyright 2015**

This work is copyright. Apart from any permitted use under the *Copyright Act 1968*, no part may be reproduced or copied in any form without the permission of the Author.

Requests and inquiries concerning reproduction and rights should be addressed to the author c/- [annabolger@foleys.com.au](mailto:annabolger@foleys.com.au) or T 613-9225 6387.

# 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*<sup>1</sup>

## 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 the ....sense 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 Memorandum<sup>2</sup>). It means “of consequence, important.”<sup>3</sup>

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

---

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

<sup>2</sup> “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.

<sup>3</sup> 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]<sup>5</sup>) 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]<sup>6</sup>).

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.<sup>7</sup>

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]<sup>8</sup>).

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

---

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

<sup>5</sup> 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.”

<sup>6</sup> 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.”

<sup>7</sup> 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 probative .....because it showed a specific propensity for such conduct.”

<sup>8</sup> “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]).

### **AUTHORITIES**

*Dupas v R* [2012] VSCA 328; 218 A Crim R 507

*Middendorp v R* [2012] VSCA 47

*PNJ v DPP* [2012] VSCA 88

*Rapson v R*, 29 April 2014, unreported application for leave to appeal (Nettle JA, as he then was)

*Rapson v R* [2014] VSCA 216

*Velkoski v R* [2014] VSCA 121

Australian Law Reform Commission Report No 26

Heydon, Dyson “Is the weight of evidence material to admissibility ?” (2014) 26 (2) Current Issues in Criminal Justice 219