R v Grant [2016] NTSC 54

PARTIES:	THE QUEEN
	v
	GRANT, Donald
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21604766
DELIVERED:	31 October 2016
HEARING DATES:	28 October 2016
JUDGMENT OF:	GRANT CJ

CATCHWORDS:

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – SIMILAR FACTS – PROPENSITY EVIDENCE – TENDENCY EVIDENCE

Evidence of conduct on the part of the accused which would establish a tendency to engage in verbal abuse and physically violent behaviour and/or that he has a violent and controlling disposition – must satisfy the requirements of ss 97 and 101 of the *Evidence (National Uniform Legislation) Act* 2011 (NT) ("ENULA") – could evidence rationally affect to a significant degree the assessment of the probability of a fact in issue? – if so, does the probative value of that evidence substantially outweigh any prejudicial effect it may have on the accused? – the evidence may have significant force in refuting the defence case that the complainant had attempted to

hang herself and that the injuries constituting the serious harm were occasioned in the course of that attempt and the accused's actions in cutting her down – the evidence therefore had significant probative value within the meaning of s 97 of the ENULA – the risk that the jury may use the evidence improperly accommodated by suitable directions – not a case in which the jury's reaction to the totality of the evidence likely to be so extreme that directions would not eliminate, or substantially reduce, the risk of prejudice – that the accused had displayed a tendency in similar circumstances to respond with violence might lead a jury to assess the defence case as unreasonably improbable – the evidence therefore had a high degree of probative value – probative value of the evidence substantially outweighs its prejudicial effect – conclusion made it unnecessary to consider the operation of the other exclusionary provisions in the ENULA – evidence admissible

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – RELATIONSHIP EVIDENCE

Whether "relationship" evidence admissible – in order for "relationship" evidence to be relevant it must be shown that the evidence would make the complainant's version of the particular incident subject to the charge more capable of belief when seen in the context of that relationship – admissible where necessary to avoid the circumstances of the alleged offence appearing inexplicable or being misunderstood in isolation, and to negative the defence case of self-inflicted injury – evidence concerning the prior infliction by the accused of physical violence on the complainant relevant in the proceedings – evidence could rationally affect to a significant degree the assessment of whether the accused jumped on the complainant's torso and placed the rope around her neck and dragged her along the floor by the rope, or whether the complainant's injuries were self-inflicted – without the evidence the jury would be called upon to decide the case in a vacuum, and may be left with the false impression that the event was an isolated one – the probative value of the evidence as "relationship" evidence not outweighed by the danger of unfair prejudice to the accused – evidence has a high degree of probative value in negativing the defence case of self-inflicted injury, and any unfair prejudice to the accused may be ameliorated by appropriate directions to the jury – evidence admissible

Criminal Code (NT) ss 1, 181, 186
Evidence (National Uniform Legislation) Act 2011 (NT) ss 97, 101, 135, 137

AE v The Queen [2008] NSWCCA 52, *Ainsworth v Burden* [2005] NSWCA 174, *BC v R* [2015] NSWCCA 327, *Boney v The Queen* [2008] NSWCCA 165, *Bryant v The Queen* [2011] NSWCCA 26, *CEG v The Queen* [2012] VSCA 55, *Doklu v R* (2010) 208 A Crim R 333, *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349, *Dupas v The Queen* (2010) 241 CLR 237, *Gilbert v The Queen* (1999) 201 CLR 414, *Gonzales v R* (2007) 178 A Crim R 232, *HML v The Queen* (2008) 235 CLR 334, *Hoch v The Queen* (1988) 165 CLR 292, *IMM v The Queen* (2016) 90 ALJR 529, *Lodhi v R* (2007) 179 A Crim R 470, *McDonald v The Queen* [2014] VSCA 80, *Papakosmas v The Queen* (1999) 196 CLR 297, *Pfennig v The Queen* (1995) 182 CLR 461, *R v AH* (1997) 42 NSWLR 702, *R v Andrews* [2003] NSWCCA 7, *R v Atroushi* [2001] NSWCCA 406, *R v BD* (1997) 94 A Crim R 131, *R v Ellis* (2003) 58 NSWLR 700, *R v F* (2002) 129 A Crim R 126, *R v Fletcher* (2005) 156 A Crim R 308, *R v Ford* (2009) 201 A Crim R 451, *R v Harker* [2004] NSWCCA 427, *R v Joiner* (2002) 133 A Crim R 90, *R v Li* [2003] NSWCCA 407, *R v Lisoff* [1999] NSWCCA 364, *R v Lock* (1997) 91 A Crim R 356, *R v Lockyer* (1996) 89 A Crim R 457, *R v Milton* [2004] NSWCCA 195, *R v Mokbel* (2009) 26 VR 618, *R v Nassif* [2004] NSWCCA 433, *R v Ngatikaura* (2006) 161 A Crim R 329, *R v PWD* (2010) 205 A Crim R 75, *R v Quach* (2002) 137 A Crim R 345, *R v Shamouil* (2006) 66 NSWLR 228, *R v Smith* [2008] NSWCCA 247, *R v Suteski* (2002) 56 NSWLR 182, *R v Watkins* (2005) 153 A Crim R 434, *R v WRC* (2002) 130 A Crim R 89, *R v Zhang* (2005) 158 A Crim R 504, *Rapson v The Queen* [2014] VSCA 216, *Reza v Summerhill Orchards Ltd* [2013] VSCA 17, *RH v The Queen* [2014] NSWCCA 71, *Roach v The Queen* [2011] HCA 12, *Semaan v The Queen* (2013) 230 A Crim R 568, *Sokolowskyj v The Queen* (2014) 239 A Crim R 528, *Stubley v Western Australia* [2011] HCA 7, referred to

S Odgers, *Uniform Evidence Law*, Thompson Law Book Co, Looseleaf Service

REPRESENTATION:

Counsel:

Plaintiff:	R Micairan
Defendant:	T Collins

Solicitors:

Plaintiff:	Director of Public Prosecutions
Defendant:	Central Australian Aboriginal Legal Aid Service

Judgment category classification:	B
Judgment ID Number:	GRA1603
Number of pages:	39

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Grant [2016] NTSC 54
No. 21604766

BETWEEN:

THE QUEEN
Plaintiff

AND:

GRANT, Donald
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 31 October 2016)

[1] The accused is charged with the offence of unlawfully causing serious harm to the complainant contrary to s 181 of the *Criminal Code* (NT). He is charged in the alternative with unlawfully causing harm to the complainant contrary to s 186 of the *Criminal Code*.

[2] The offence is alleged to have taken place on 26 January 2016. The accused and the complainant had been in a relationship since in or about March 2013, and have a child together.

[3] The issues concerning tendency evidence arise from a Notice from the Crown dated 6 October 2015 and given pursuant to s 97(1) of the *Evidence (National Uniform Legislation) Act 2011* (NT) ("ENULA")

advising the Crown's intention to adduce tendency evidence. The Notice provided that the tendency evidence related to the following fact in issue in the proceedings:

> Whether the accused Donald Grant, applied physical violence to the complainant in the early morning of 26 January 2016 and/or cause of injuries [sic] to the complainant.

[4] The tendency sought to be proved was the tendency of the accused:

(a) to act in a particular way, namely engaging verbal abuse and physically violent behaviour towards the complainant; and/or

(b) to have a particular state of mind, namely a violent and controlling disposition towards the complainant upon which the accused is prepared to act in circumstances when the accused has been consuming alcohol.

[5] The evidence sought to be adduced for that purpose is particularised in the Notice in the following terms:

Conduct	**Date & Time**	**Place**	**Circumstances**
Physical violence	On or about 25 May 2013	Alice Springs	The accused was intoxicated. The accused was sitting in his car. The accused became angry and threatened to throw the complainant against the wall. The accused then slapped the complainant which resulted in a bruise to the complainant's right eye/eye lid.
Physical violence and verbal abuse	Between 7 and 8 June 2013	16 Driver Court, Alice Springs	The accused was intoxicated. The complainant was a little bit charged up. As the couple were walking home the accused made accusations that the complainant was sleeping with other men; he called the complainant 'big slut' and 'mother fucker'. At getting home at 16 Driver Court, the accused continued to accuse the complainant of

			sleeping with other men and called her 'slut, big hole and motherfucker'. The complainant argued back that she wasn't sleeping around, the accused then punched the complainant to her face to the left eye.
Physical violence and verbal abuse	On or about 12 July 2013	16 Driver Court, Alice Springs	The accused was subject to a DVO preventing the accused from approaching the complainant if the accused was consuming or under the influence of alcohol. The complainant was at her home at 16 Driver Court, Alice Springs. The accused was drunk and came into the house and pushed the complainant causing her to fall onto the ground onto her chest. The accused then called the complainant a 'fat hole' and 'fat slut'.
Physical violence and verbal abuse	On or about 10 December 2013	48 Lackman Terrace, Alice Springs	The accused was subject to a DVO preventing him from approaching the complainant if the accused was consuming or under the influence of alcohol. The accused was drunk and went to 48 Lackman Terrace where the complainant was residing. The accused then repeatedly called out to the complainant calling her a 'slut' and 'mother fucker'. The accused confronted the complainant and said that he would 'kill himself' if the complainant didn't talk to him. The accused then screamed at the complainant that he would 'cut her throat'. When police arrived, the accused continued his verbal attack upon the complainant and said 'I hate you Alena'. The accused then spat on the complainant's face and continued to repeatedly call out to the complainant 'me and you are finished cunt', 'fuck you', 'you might as well kill that baby', 'kill that kid, it's not mine', 'that kids not a stray fucking dog', 'she fucked a stray camp cunt', 'you go to fucking hell' and other verbal abuse .
Verbal abuse	On or about 29 December 2013	16 Driver Court, Alice Springs	The accused was subject to a DVO preventing him from approaching the complainant if the accused was consuming or under the influence of alcohol. The accused was drunk and attended the complainant's home, he became more drunk after drinking rum at the home. The accused then said to the complainant that he wanted the complainant to kill their unborn child as he didn't think that the baby was his. The accused then went over to the complainant, lost his balance and leant on the complainant causing the couple to both fall over.
Verbal abuse	11 November 2014	48 Lackman Terrace, Alice Springs	The accused was subject to a DVO preventing the accused from approaching the complainant if the accused was consuming or under the influence of alcohol. The accused and complainant were at 48 Lackman Terrace, Alice Springs. The accused had been consuming alcohol. Later in the night the accused screamed at the complainant and said

			'I'm going to kick your head in'.
Physical violence	18 June 2015	16/107 Bloomfield Street, Alice Springs	The accused was subject to a DVO preventing the accused from approaching the complainant if the accused was consuming or under the influence of alcohol. The complainant was at 16/107 Bloomfield Street, Alice Springs. At around midnight the accused returned home, he had been consuming alcohol. The complainant asked the accused where he had been, an argument ensued and the accused became angry and punched the complainant repeatedly to her head causing injury to her lip.

[6] In order to prove those matters, the Crown would seek to call evidence variously from the complainant, from witnesses to the events, and from police officers who attended in the aftermath of the incidents in June 2013, December 2013 and June 2015. The statements and other documents describing that evidence are contained at exhibit P1. A number of those circumstances resulted in prosecution action and the conviction of the accused. In a number of others, prosecution action was instigated and subsequently withdrawn. The Crown does not seek to adduce any evidence in relation to prosecution action or convictions.

[7] If evidence of those matters is not admissible as "tendency" evidence, the Crown seeks to have it admitted as "relationship" evidence.

The Crown case and the defence response

[8] In addition to the prior incidents of violence sought to be introduced as tendency evidence, the Crown case is prefaced by the fact that on 11 August 2014 a domestic violence order was issued for a period of 12 months restraining the accused from various conduct in relation to the

complainant and the child. In particular, the order restrained the accused from approaching, contacting or remaining in the company of the protected persons when consuming alcohol or when under the influence of alcohol; and from causing harm or attempting or threatening to cause harm to the protected persons. On 30 June 2015, that domestic violence order was varied and extended to 10 August 2020. The essential terms remained the same.

[9] The Crown case is that on the evening of 25 January 2016 the accused and the complainant consumed alcohol and became intoxicated in company with others. They returned to their home in the early hours of the morning.

[10] The accused became angry at the complainant and punched her to the face, mouth, jaw, left eye and left ear. The complainant fell to the floor and the accused jumped on her torso. The accused then took a length of rope, placed it around the complainant's neck and dragged her for a distance along the floor. The complainant managed to free herself and escape.

[11] The complainant sought assistance from a neighbour, who called the emergency number for an ambulance. The neighbour is recorded as saying during the course of that call that the complainant was sitting down with her baby in her arms and complaining of not being able to breathe properly.

[12] When the ambulance arrived the accused told the attending paramedics that he had rung for the ambulance. The Crown will seek to rely on that statement as a lie indicative of consciousness of guilt on the part of the accused. The accused also stated that the complainant had tried to hang herself and that he had cut her down.

[13] When the paramedics attended on the complainant she asked to be taken away from the accused. The paramedics observed that the complainant had ligature marks around her neck and facial swelling and abrasions. The complainant denied attempting to hang herself and stated that the accused had assaulted her. She repeated that account when treated at the Alice Springs Hospital, and when subsequently interviewed by police.

[14] The complainant suffered a complex of injuries to the face and head consistent with being punched repeatedly to that part of the body. She also suffered a pneumothorax of the left lung consistent with a sudden chest compression caused by blunt force trauma, and bruising and ligature marks to the left lateral neck consistent with an act of strangulation.

[15] The defence case in response is that the complainant attempted to hang herself. The accused found her trying to do so and cut her down. That is consistent with the account given by the accused to paramedics at the scene, and the Crown has indicated it will call paramedic Adam Ryan

to give evidence at the trial. The defence case goes further to assert that after the accused had cut the complainant down he punched her repeatedly in the head and face because she had attempted to hang herself. On that case, the pneumothorax was consistent with an injury sustained by the complainant when the accused cut her down, and the ligature marks were consistent with an attempted hanging.

[16] Counsel for the defence says that she intends to open the defence case on that basis, and to conduct the relevant part of the cross-examination of the complainant by putting those propositions to her. So far as the question of prior episodes of violence in the relationship is concerned, counsel for the defence says that she intends to open on the basis that the relationship had been a combustible one marked by episodes of violence (without going into any particular or specific detail in relation to those prior episodes), and to not suggest otherwise to the complainant in cross-examination.

The facts in issue

[17] Consistent with the manner in which the defence intends to conduct its case, the accused has indicated a plea of guilty to the charge of unlawfully causing harm to the complainant contrary to s 186 of the *Criminal Code*. By that plea the accused accepts that he unlawfully caused harm to the complainant in the form of the injuries to her face and head caused by punching her.

[18] The accused has indicated a plea of not guilty to the offence of unlawfully causing serious harm to the complainant contrary to s 181 of the *Criminal Code*. By that plea the accused does not accept that he unlawfully caused serious harm to the complainant in the form of the pneumothorax and the insult which caused the ligature marks to her neck.

[19] The term "serious harm" is defined in s 1 of the *Criminal Code* to mean "any harm (including the cumulative effect of more than one harm): (a) that endangers, or is likely to endanger, a person's life; or (b) that is or is likely to be significant and long-standing". The Crown intends to call medical evidence on the issue of "serious harm". That evidence will be to the effect that the pneumothorax suffered by the complainant could have led to her death without treatment; and that had the ligature remained in place around the complainant's neck for a longer period of time death would have been imminent. That evidence is unlikely to be disputed by the accused. The principal dispute will be in relation to the cause of those injuries.

[20] Against that background, the essential facts in issue are:

(a) whether the accused took a length of rope, placed it around the complainant's neck and dragged her for a distance along the floor, or whether the complainant had tried to hang herself and the accused had cut her down;

(b) whether the accused jumped onto the complainant's torso and so caused the pneumothorax, or whether the injury was sustained while the accused was attempting to cut the complainant down; and

(c) whether the injuries to the complainant's face and head were inflicted by the accused as part of an assault which included jumping on the complainant's torso and the act of strangulation, or whether the accused punched the complainant in the head and face after he had cut her down and because she had attempted to hang herself.

[21] So it may be seen that this is not a case in which the existence of the relevant fact is not challenged in the proceeding.[1] The relevant fact in issue in this case is not whether the accused unlawfully inflicted harm on the complainant, which is not challenged. The relevant fact(s) in issue is whether the accused unlawfully inflicted serious harm on the complainant by jumping on her torso and strangling her with a rope, which is challenged. That challenge renders the tendency evidence capable of having significant probative value, but is not determinative of the question whether it does in fact have that character.

1 Cf *Stubley v Western Australia* [2011] HCA 7 at [12], [64]-[65].

Tendency evidence

[22] Section 97 of the ENULA provides for the admissibility of tendency evidence subject to the requirements of notice and significant probative value. It provides:

> **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
>
> (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.
>
> *Note for section 97*
>
> *The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.*

[23] Section 101 of the ENULA has application to criminal proceedings and provides, so far as is relevant for these purposes, that tendency evidence cannot be used against a defendant unless its probative value substantially outweighs any prejudicial effect. It provides:

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.

[24] The Dictionary in the ENULA defines "probative value" of evidence to mean "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue".

[25] The regime for the admission of tendency evidence under the ENULA replaces the common law rules in relation to "propensity" or "similar fact" evidence. The common law rules in relation to this type of evidence no longer govern (but may inform) the assessment of the probative value and admissibility of tendency evidence under the ENULA. A number of matters warrant some preliminary comment in this context.

[26] First, the common law generally required a "striking similarity" or "underlying unity" between the similar facts in order for them to

qualify as admissible.[2] The ENULA creates its own regime for the admission of tendency evidence. The existence of "similarity" is not a necessary requirement for tendency evidence. That said, the consideration of similarity remains a guide in determining in some circumstances whether tendency evidence has sufficient probative value to pass the test for admissibility under the statutory regime.[3] It may also be noted that the requirement for striking similarity or underlying unity remains important to the question of admissibility in cases where the identity of the offender is in issue, but is less significant in cases where the accused is known to the complainant and no issue of identity arises.

[27] Secondly, propensity and similar fact evidence is excluded under the common law where there is "a rational view of the evidence that is inconsistent with the guilt of the accused".[4] In making that determination the trial judge was required to apply the same test as a jury. Where there was a rational view of the evidence consistent with the accused's innocence, the probative force of the evidence was considered to be automatically outweighed by its prejudicial effect. The ENULA introduces a legislative formulation for balancing probative value against prejudicial effect which displaces the "no

2 See, for example, *Pfennig v The Queen* (1995) 182 CLR 461 at 485; *HML v The Queen* (2008) 235 CLR 334.

3 *R v Fletcher* (2005) 156 A Crim R 308, [60]. See also *AE v The Queen* [2008] NSWCCA 52; *R v Milton* [2004] NSWCCA 195; *R v Harker* [2004] NSWCCA 427; *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89.

4 *Hoch v The Queen* (1988) 165 CLR 292 at 296.

rational view" test.[5] Under that formulation, the probative value is to be assessed by the trial judge on the assumption that the jury will accept the evidence, thus precluding any consideration of whether the evidence is credible or reliable for that purpose.[6]

[28] Thirdly, under the common law it was necessary to exclude the possibility of contamination, collusion, concoction or other influence before propensity and similar fact evidence is admitted. Under the ENULA the possibility of concoction will not automatically or necessarily deprive propensity evidence of the requisite level of probative value to qualify it for admission.[7] That notion notwithstanding, there may be objective facts and circumstances surrounding a particular piece of propensity evidence which renders it too weak or unconvincing to have any real probative force.

[29] On proper characterisation, the evidence sought to be adduced by the Crown in this matter is evidence of conduct on the part of the accused which would establish that he has a tendency to engage in verbal abuse and physically violent behaviour towards the complainant; and/or that he has a violent and controlling disposition towards the complainant

5 *R v Ellis* (2003) 58 NSWLR 700 at [89].

6 *IMM v The Queen* (2016) 90 ALJR 529 at [42], [43], [49]-[50] and [52] per French CJ, Kiefel, Bell and Keane JJ. It should be noted in this context that proceeding on the assumption the jury will accept the evidence does not preclude the trial judge from determining that the circumstances surrounding the evidence render it too weak to have any probative force.

7 *IMM v The Queen* (2016) 90 ALJR 529 at [59] per French CJ, Kiefel, Bell and Keane JJ.

which he sometimes acts on when he has been consuming alcohol.[8] In order to be admitted for that purpose, the evidence must satisfy the requirements in ss 97 and 101 of the ENULA. Accepting that to be so, two questions arise in determining the admissibility of that evidence, *viz*:

(a) Could that evidence rationally affect to a significant degree the assessment of the probability of whether the accused jumped on the complainant's torso and placed the rope around her neck and dragged her along the floor by the rope?

(b) If so, does the probative value of that evidence substantially outweigh any prejudicial effect it may have on the accused?

Significant probative value

[30] The first condition imposed on admissibility (leaving aside the requirement for notice) requires the Court to be satisfied that the evidence will have significant probative value. That test is higher than that required to establish relevance under s 55 of the ENULA.[9] The use of "significant" as a qualifier in this context connotes something

8 See, for example, *R v Andrews* [2003] NSWCCA 7. The appellant had been convicted of the murder of his wife. The Crown had led evidence that during their marriage Andrews had displayed extreme jealousy and violence towards the deceased and men who the appellant thought were showing an interest in her. That evidence was tendered and admitted as "relationship" or "context" evidence. The accused appealed on the ground that this evidence was really tendency evidence and that it did not satisfy the tests for admissibility of tendency evidence. Hulme J (with whom Heydon JA and Hidden J agreed) said that there was 'much to be said' for the view that this evidence was tendency evidence, but that because there was an overwhelming case, even if the tests for tendency evidence had not been met, the proviso should be applied.

9 *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 180 ALR 569 at [72]–[73].

more than mere relevance but something less than a substantial degree of relevance.[10]

[31] Having already determined that the evidence is capable in theory of having significant probative value having regard to the facts which remain in issue, the question is whether the jury could rationally regard the evidence as bearing to a significant extent on the probability of the existence of those facts. This resolves to a judicial evaluation of whether the hypothetical jury would rationally think it likely that the evidence is important in relation to the determination of the facts in issue.[11] In conducting that evaluation the Court assumes that the evidence will be accepted by the tribunal of fact (at least in these circumstances where no issue of concoction or contamination arises).[12]

[32] The question whether the evidence significantly bears on the facts in issue is "a matter of fact and degree, and will be influenced by the nature of the fact in issue sought to be proved (or disproved)".[13] That requires the conduct said to constitute the alleged offence to be identified with some specificity, rather than generalised in a manner which fails to have regard to the elements of the offence.[14] So, by way

10 S Odgers, *Uniform Evidence Law*, Thompson Law Book Co, Looseleaf Service, [EA.97.120]; *R v Lockyer* (1996) 89 A Crim R 457; *R v Lock* (1997) 91 A Crim R 356 at 361; *R v AH* (1997) 42 NSWLR 702.

11 Odgers, op cit, [EA.97.120]; *R v Zhang* (2005) 158 A Crim R 504 at [46]; *R v Ford* (2009) 201 A Crim R 451 at [52]; *DSJ v Director of Public Prosecutions (Cth)* (2012) 215 A Crim R 349 at [67], [71], [72].

12 *R v Shamouil* (2006) 66 NSWLR 228 at [51]–[65]; *Lodhi v R* (2007) 179 A Crim R 470 at [174]; *IMM v The Queen* (2016) 90 ALJR 529.

13 *Semaan v The Queen* (2013) 230 A Crim R 568 at [38].

14 *Sokolowskyj v The Queen* (2014) 239 A Crim R 528 at [44].

of example, in this particular case the fact in issue is not whether the accused behaved violently towards the complainant. It is whether the accused acted in a particular manner involving kicking (or jumping) and strangulation which caused serious harm; or whether that serious harm was essentially self-inflicted by the complainant. It follows that the evaluation of probative value is directed to the capability of the tendency evidence to bear on the probability that the accused engaged in that particular conduct.

[33] That the evidence must have the capacity to inform the question whether the accused engaged in particular conduct does not mean that it must also demonstrate a tendency on the part of the accused to commit a particular crime. The tendency rule applies in relation to evidence showing a tendency "to act in a particular way" – for example, to use violence with a person in order to achieve what is wanted.[15]

[34] The relevant test is whether "the features of commonality or peculiarity which are relied upon are significant enough logically to imply that because the offender committed previous acts or committed them in particular circumstances, he or she is likely to have committed the act or acts in issue".[16] Otherwise, the evidence does no more than suggest

15 See, for example, *R v Li* [2003] NSWCCA 407 at [11].

16 *CEG v The Queen* [2012] VSCA 55 at [14].

that the accused is a sort of person who is more likely to commit this kind of offence, and is no more than “rank” propensity evidence.

[35] Turning then to the assessment of the strength of the tendency inference, the number and frequency of the particular incidents sought to be relied upon by the Crown is apt to establish that the accused behaved in a violent manner towards the complainant throughout the period of the relationship. The accused and the complainant entered into the relationship in or about March 2013. The incidents relied on for the tendency inference are said to have occurred on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013, 29 December 2013, 11 November 2014 and 18 June 2015. They comprise seven incidents in a period of approximately 2 ½ years prior to the offence charged.

[36] In the context of the period over which incidents are said to have occurred, the gaps between them are not of sufficient duration to suggest that these were isolated aberrations or otherwise not reflective of the relevant tendency on the part of the accused. The incidents are also not so remote in time from the circumstances of the offence charged as to undermine their probative value in permitting an inference of tendency to be drawn.

[37] The conduct in question is general in the sense that it is said to demonstrate a tendency on the part of the accused to engage in both verbally abusive and physically violent behaviour towards the

complainant. On the other hand, the conduct is relatively specific in the sense that on each occasion it took place in the domestic context, on each occasion it was directed towards the complainant, on each occasion the accused was intoxicated by alcohol or had been consuming alcohol, and on each occasion the accused became angry for no apparent reason and either assaulted the complainant and/or threatened her with violence and/or subjected her to violent and demeaning abuse. To the extent there is a lack of specificity in the alleged conduct or tendency, it is not such as to significantly diminish the probative value of the evidence for these purposes.

[38] There is a degree of similarity, although not a unity, between the conduct on each occasion and the circumstances of the alleged offence. The incidents on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013 and 18 June 2015 each involved the accused physically assaulting the complainant. On some occasions that assault took the form of hitting her in the region of the face and head. On other occasions the assault took the form of pushing her to the ground. On one occasion it consisted of the accused spitting in the complainant's face and threatening to cut her throat. The incidents on 29 December 2013 and 11 November 2014 stand somewhat apart in the sense that they did not involve any physical assault on the complainant. The first incident involved the accused saying to the complainant that he wanted to kill her unborn child as he didn't believe he was the father. The

second incident involved the accused threatening the complainant by saying that he was going to “kick your head in”.

[39] As noted at the outset, there does not need to be an absolute conformity between the incidents relied on for the tendency inference – either between themselves or with the conduct comprising the offence charged. Evidence is not deprived of the character of tendency evidence because the inference sought to be drawn from the prior behaviour does not conform exactly to the conduct charged. It is not necessary to establish significant probative value that the incidents must show a pattern of behaviour on the part of the accused which specifically involved acts of strangulation or jumping on the complainant’s torso. It is enough to show that the incidents are probative of the question whether the subject injuries were inflicted by the accused or self-inflicted; but the degree of similarity is a matter also properly taken into account in the determination of whether the probative value of the tendency evidence substantially outweighs any prejudicial effect it may have (discussed further below).

[40] There is also a degree of similarity between the circumstances in which the conduct on each occasion took place and the circumstances of the alleged offence. As already detailed, these incidents invariably took place in circumstances where the accused was intoxicated by alcohol or had been consuming alcohol, and involved the infliction of abuse and/or violence on the complainant. Even if the conduct on the various

occasions is not identical, and not even particularly similar, the similarity of the surrounding circumstances may be such as to lead to the conclusion that the evidence has significant probative value.[17] That is so in the present case.

[41] Perhaps most significantly for these purposes, the use to which the tendency evidence is sought to be put is to prove conduct rather than to identify the accused. As already noted, striking similarity or underlying unity is more important to the question of admissibility where its purpose is to identify the offender, but is less significant in cases where the accused is known to the complainant and no issue of identity arises. In particular, the proposed use in this case has a dual purpose, being to assist in establishing that the accused engaged in particular conduct which caused serious harm to the complainant and to rebut the defence proposition that the injuries were self-inflicted by the complainant.

[42] The New South Wales Court of Criminal Appeal had occasion to consider a similar, but not identical, situation in *R v Joiner*.[18] In that case the accused had an argument with his wife and struck her on the head causing her death. In his defence, the accused admitted striking his wife but denied that he intended to cause injury. During the trial,

17 Odgers, op cit, [EA.97.120]; *R v Smith* [2008] NSWCCA 247; *R v PWD* (2010) 205 A Crim R 75 at [79]; *RH v The Queen* [2014] NSWCCA 71 at [141]-[143]; *Rapson v The Queen* [2014] VSCA 216 at [18], [32], [47].

18 (2002) 133 A Crim R 90.

the Crown led evidence of the accused's violence during three prior relationships which was said to establish a tendency on his part to attack the head of his spousal partners without provocation. The accused subsequently appealed against his conviction on the basis that the tendency evidence was improperly admitted and that the trial judge erred in his directions to the jury regarding the tendency evidence.

[43] The circumstances of the offence in question in that case occurred in October 2000. The tendency evidence from the accused's former spouses related to incidents in 1995, 1995/1996 and 1996/1997 respectively. The trial judge had found that the evidence had significant probative value because:

> It demonstrates the high degree of unlikelihood that the deceased met her death in any other way than following an explosive outburst of anger by the accused, the infliction of forceful blows on the deceased that were intended to cause at least serious bodily harm.

[44] In particular, the evidence was significant because it went directly to rebut any suggestion that the death was not caused directly by the striking by the accused, and to rebut the accused's assertion that he did not mean to harm the deceased. The trial judge concluded:

> The evidence is available to rebut accident or unintended act in relation to the charge of murder and may also be relied upon in relation to the issue of unlawful and dangerous act in relation to the possible alternative verdict of manslaughter.

[45] The Court of Criminal Appeal found that evidence had significant probative value. The appeal court concluded in that respect:[19]

> On that question, in my opinion, the evidence did have significant probative value. Evidence of inability to control anger, and a tendency to respond to minor irritations with violence against women with whom the appellant was having a relationship, was powerful evidence to refute the version of events given by the appellant, and to support an inference that the injury suffered by the deceased were caused by a violent assault.

[46] Having made that finding, the Court of Criminal Appeal considered that the main issue was whether the probative value of the tendency evidence outweighed its prejudicial effect.

[47] A similar situation was considered, again by the New South Wales Court of Criminal Appeal, in *R v Li.*[20] In that case, the accused was charged with one count of detaining for advantage and one count of common assault. The circumstances surrounding the charge occurred on 23 July 2001. The Crown case, in short compass, was that the accused struck the complainant with a belt, threatened her with a knife, and refused to let her leave the unit in which they were staying. The complainant went onto the balcony and tried to leave the unit by climbing down from it, and fell.

[48] The defence case was that the accused had argued with the complainant, but the accused denied assaulting her, threatening her

19 *R v Joiner* (2002) 133 A Crim R 90 at [36] per Hodgson JA, with whom Simpson J and Smart AJ concurred at [51], [52].

20 [2003] NSWCCA 407.

with a knife or trying to prevent her from leaving. He said that at the time she fell from the balcony he was in the shower, and suggested that she may have attempted suicide.

[49] The Crown led evidence of three earlier incidents. The first was an incident which occurred in March 1998 in which the accused was said to have slapped the complainant. The second was an incident in June 1998 in which the accused was said to have assaulted the complainant and then detained her in her office. The third was an incident in mid-July 2001, shortly before the incident giving rise to the offence charged, in which the accused was said to have asked the complainant to remarry him and to have slapped her in the face when she refused.

[50] The Crown expressly disavowed reliance upon these incidents as tendency evidence. Rather, the Crown put it that the evidence disclosed a relationship, marred by violence, in which the accused sought to dominate the complainant and was possessive of her. This was said to explain the accused's behaviour on the night in question as the complainant described it. In addition, the fact that the accused had on previous occasions sought to prevent the complainant getting away from him and seeking help was said to elucidate his state of mind for the purpose of the detaining charge, as well as explaining her resort to the balcony to escape from him on this occasion.

[51] The Crown position notwithstanding, the trial judge admitted the evidence as tendency evidence and directed the jury primarily on that basis.

[52] The accused subsequently lodged an appeal contending that the evidence was improperly admitted and the jury improperly directed. On appeal, the accused conceded that the evidence of the incident in mid-July 2001 (but not the earlier incidents) was properly admitted as "relationship" evidence. Otherwise, he argued, the evidence went beyond relationship or context and amounted to tendency evidence, as it disclosed a propensity on the part of the appellant to behave in a particular way when feelings of jealousy were aroused in him. As such, it would need to have not only significant probative value but also a probative value which substantially outweighed its prejudicial effect. The accused's submission was that the evidence did not satisfy either test.

[53] The Court of Criminal Appeal held that the evidence was admissible generally as "relationship" evidence, and as tendency evidence in respect of Count 1 (because the Crown had, in effect and despite its disavowal, used the evidence for that purpose in respect of that charge).

[54] So far as the admissibility of the material as “relationship” evidence was concerned, the court found:[21]

> In my opinion the evidence, which his Honour admitted of the previous events, was all admissible as relationship and background evidence. It showed a deteriorating marriage which had at times been accompanied by some violence and attempts by the appellant to control the complainant (e.g. the incident at Sydney University in 1998), allegations of affairs, separation, divorce, requests by the appellant to revive the marriage and the complainant's refusal.

[55] So far as the admissibility of the material as tendency evidence was concerned, the court found:[22]

> His Honour found that the evidence had significant probative value (s 97(1)(l)) and its probative value substantially outweighed its prejudicial effect (s 101(2)), noting that the [mid-July 2001] incident shortly before the final incident was "probably admissible" as part of the relationship evidence. I consider these findings were open to his Honour and I would not upset them, adding only that in my view all the evidence his Honour admitted as tendency evidence was properly admissible as relationship evidence and was therefore before the Jury in any event.
>
> I am also satisfied that the evidence was admissible as tendency evidence on the first count notwithstanding that it did not tend to establish a tendency or propensity to detain. Section 97 is not directed only at evidence showing a tendency to commit a particular crime but showing a tendency "to act in a particular way". In this case it was directed to showing that the appellant had a tendency to use violence to the complainant and to seek to control her in stressful marriage situations, and was relevant to whether he did by his actions on the night in question effectively "detain" her; but it was not necessary for this purpose to show that he had detained her on any other occasion.
>
> For these reasons I am satisfied that the evidence in question was properly admissible not only as relationship evidence, but also as tendency evidence, at least in relation to the first count.

---

21 *Rv Li* [2003] NSWCCA 407 at [3] per Dunford J, with whom Spigelman CJ concurred (Hidden J dissenting).

22 *Rv Li* [2003] NSWCCA 407 at [10]-[12] per Dunford J, with whom Spigelman CJ concurred (Hidden J dissenting).

[56] Although Dunford J expressed agreement with Hidden J that the evidence was not admissible as tendency evidence in relation to the charge of common assault, that view appears to have been formed on the basis that there was nothing in issue on the assault charge that gave the evidence any force or probative value beyond rank propensity. That being so, it could not be said that the probative value of the evidence substantially outweighed its prejudicial effect.[23]

[57] It may be noticed that in this case the tendency evidence discloses an inability on the part of the accused to control his anger, and a tendency to perpetrate violence against the complainant with whom he was in a relationship – either with or without irritation or provocation. The incidents covered by the evidence stretch over a period of two years, and continue to a point approximately six months prior to the circumstances giving rise to the offence charged. That evidence has significant force in refuting the defence case that the complainant had attempted to hang herself and that the injuries constituting the serious harm were occasioned in the course of that attempt and the accused's actions in cutting her down.

23 Hidden J's reason for finding the evidence inadmissible as tendency evidence was because the mid-July 2001 incident, standing alone, could not amount to evidence of that kind. It could do so only in combination with the earlier incidents. The age of those earlier incidents was an important matter bearing upon admissibility, together with the fact that there was no incident of violence for the two year period leading up to July 2001, leading to the conclusion that the probative value of the evidence did not outweigh its prejudicial effect.

[58] Having regard to those matters, the evidence identified in the Crown's tendency notice which discloses the infliction of physical violence by the accused on the complainant, both by itself and having regard to the other evidence to be adduced by the Crown (most notably the complainant's evidence and the medical evidence), has significant probative value within the meaning of s 97 of the ENULA in determining the question whether the accused caused the complainant's injuries.

[59] That leaves the incidents on 29 December 2013 and 11 November 2014, which did not involve any physical assault on the complainant. The gravamen of the issue in dispute in this case is whether the accused intentionally inflicted the relevant physical injuries on the complainant. Whilst one can accept the Crown submission that violence may take a number of forms, including verbal abuse and threats, that form of violence is too far removed from the matter at issue in this case. Accordingly, evidence of the incidents which took place on 29 December 2013 and 11 November 2014 do not have significant probative value in the assessment and determination of the question whether the accused inflicted serious harm to the complainant or whether that the injuries were self-inflicted by the complainant. That evidence is not admissible as tendency evidence.

[60] It falls then to consider whether the probative value of the evidence which is admissible "substantially outweighs" any prejudicial effect within the meaning of s 101 of the ENULA.

Prejudicial effect

[61] The dominant consideration in balancing probative value against prejudicial effect remains ensuring that an accused is not deprived by prejudice of a fair trial. The notion of prejudice in this context "means the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate".[24] In other words, evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted. Prejudice will be unfair if there is a real risk that the evidence will be misused by the jury in some unfair way.[25] The test of a danger of unfair prejudice is not satisfied by the mere possibility of such prejudice. There must be a real risk of unfair prejudice by reason of the admission of the evidence.[26]

[62] There are two potential risks of unfair or improper use in this case.

[63] The first potential risk is that the admission of the evidence concerning aspects of the accused's prior conduct may provoke some irrational, emotional or illogical response in the jury. That response might take

---

24 *HML v The Queen* (2008) 235 CLR 334 at [12] per Gleeson CJ.

25 *R v BD* (1997) 94 A Crim R 131 at 139; *Papakosmas v The Queen* (1999) 196 CLR 297 at [91]–[92]; *Ainsworth v Burden* [2005] NSWCA 174 at [99]; *Gonzales v R* (2007) 178 A Crim R 232 at [70]; *R v Ford* (2009) 201 A Crim R 451 at [56]; *Doklu v R* (2010) 208 A Crim R 333 at [45].

26 *R v Lisoff* [1999] NSWCCA 364 at [60].

the form of the jury inclining to punish the accused for that prior conduct, rather than confining its attention to the question whether the Crown has established the elements of the offence in question beyond reasonable doubt.

[64] The second potential risk is that the jury might give the evidence more weight than it deserves. In the context of tendency evidence, that risk is that the ordinary person will think that someone with the accused's established tendency to act in a certain way will yield to that tendency whenever the opportunity arises. Putting it another way, the danger of unfair prejudice is the risk that knowing of the prior criminal conduct of the accused, the jury might be diverted from a proper consideration of the evidence and simply assume the accused's guilt.[27]

[65] That is not to say that any propensity reasoning is prejudicial and unfair. As the New South Wales Court of Criminal Appeal observed in *BC v R*,[28] in some cases it is not improper, and thus not prejudicial, for a jury to reason that if the accused is a person who has demonstrated the asserted tendency then he is more likely to have acted in the manner alleged, and thus more likely to have committed the alleged offence. Beech-Jones J observed relevantly:[29]

---

27 *R v Suteski* (2002) 56 NSWLR 182 at [116]); *R v AH* (1997) 42 NSWLR 702 at 709; *R v Watkins* (2005) 153 A Crim R 434 at [49]-[50].

28 [2015] NSWCCA 327.

29 *BC v R* [2015] NSWCCA 327 at [81].

> To the contrary, that is the very reasoning that the tendency evidence supports and is the very basis upon which it is admitted.

[66] This is such a case in so far as the jury will be called upon to determine, in conjunction with the other evidence in the Crown case, whether the complainant's injuries constituting serious harm were self-inflicted or inflicted by the accused. The risk that the jury may be emotionally affected or may use the evidence improperly can be accommodated by suitable directions.[30] This is not a case in which the jury's reaction to the totality of the evidence is likely to be so extreme that directions will not eliminate, or substantially reduce, the risk of prejudice.

[67] The relevant direction in relation to tendency evidence will include the caution that the accused is charged only with the offence(s) contained in the indictment; that the evidence cannot be used to conclude simply that the accused is the sort of person who is more likely to commit this kind of offence; that the tendency evidence may only be taken into account if the Crown proves beyond reasonable doubt that the acts said to demonstrate the tendency actually took place; and that the tendency evidence may only be taken into account if, having proved that matter beyond reasonable doubt, the Crown has also proved beyond reasonable doubt that it may be inferred or concluded from those acts

30 See, for example, *Gilbert v The Queen* (1999) 201 CLR 414 at 425; *Reza v Summerhill Orchards Ltd* [2013] VSCA 17 at [50]; *R v Mokbel* (2009) 26 VR 618 at [90]; *Dupas v The Queen* (2010) 241 CLR 237 at [22], [26], [29], [38].

that the accused did in fact have the tendency asserted by the Crown. It is only if those matters are satisfied that the jury may use the tendency evidence in assessing whether the charge(s) contained in the indictment have been proved beyond reasonable doubt.

[68] It falls then to consider the relative strength of the probative force of the tendency evidence for the purpose of balancing it against prejudicial effect. That inquiry focuses on whether the tendency evidence reveals such a pattern of conduct that it raises as a matter of common sense and experience the objective improbability of the complainant's injuries having been sustained other than as alleged by the prosecution.[31] Conversely, if the only probative value of the evidence is to invite the reasoning that "he has done it before, so he probably did it on the night in question", the probative value of the evidence will not substantially outweigh its prejudicial effect.[32]

[69] In undertaking that analysis in *R v Joiner*,[33] the New South Wales Court of Criminal Appeal concluded that the only reasonable doubt surrounded whether the accused had intended to cause serious bodily injury. It held that the tendency evidence, when taken in combination with the other evidence led in the Crown case, would operate to obviate any reasonable possibility that the highly improbable scenario put by

31 *R v Fletcher* (2005) 156 A Crim R 308 at [59]–[60].

32 *R v Li* [2003] NSWCCA 407 at [13].

33 (2002) 133 A Crim R 90.

the defence had in fact occurred. Given the use to which the evidence was put in the case, its probative value substantially outweighed any prejudicial effect. That analysis was undertaken in the following terms:[34]

> … In my opinion, it is plain that, even without the tendency evidence, there was a strong Crown case of murder. There were the extensive injuries to the deceased, which, even apart from the fatal injuries that might conceivably have been caused by the deceased falling backwards onto a rock, strongly suggested an attack of such violence as must have involved an intention to inflict really serious bodily injury. Next, there was the appellant's failure to seek help, and placing the body in the boot, coupled with his implausible explanations of these matters. Then, there was his injured right hand, and the implausible explanation offered for this. In all these circumstances, if there was a reasonable doubt about the appellant's intention, it must be to the effect that the possibility that all these things happened in circumstances where the appellant did not have an intention to cause really serious bodily injury, although very remote, was not excluded beyond reasonable doubt, because highly improbable things can sometimes happen.
>
> However, if one adds to the above the circumstance that the appellant had a tendency to respond to minor irritations with violence against women with whom he was having a relationship, it is in my opinion no longer reasonable to regard such a highly improbable scenario as a reasonable possibility: it may still be a possibility, but not a reasonable possibility.
>
> For those reasons, in my opinion the probative value of the evidence did substantially outweigh its prejudicial effect, and the evidence was therefore admissible.

[70] Similar considerations arise in the present case. The Crown case is relatively strong. The complainant will give evidence. Evidence will be led as to the accused's allegedly deceptive assertion that he had called the ambulance. There is no doubt that the complainant sustained

34 *R v Joiner* (2002) 133 A Crim R 90 at [39]-[41]. Although the earlier analysis included reference to the decision in *Pfennig*, that reference does not undermine the analysis.

the injuries alleged. The medical evidence will suggest that those injuries are more consistent with the facts alleged in the Crown case. If there is any reasonable doubt, it lies in the defence contention that those injuries were self-inflicted rather than inflicted by the accused. If one adds to the Crown evidence the fact that the accused has displayed a tendency in similar circumstances to respond with violence against the complainant during the course of the relationship, the defence case in that respect might be assessed by a jury as unreasonably improbable. That clothes the evidence with a high degree of probative value.

[71] For these reasons, the proper conclusion is that the probative value of the evidence substantially outweighs its prejudicial effect. The evidence identified in the Crown's tendency notice concerning the incidents on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013 and 18 June 2015 is admissible in the trial as tendency evidence for the purposes identified in the Crown's tendency notice.

[72] That conclusion removes any need to consider the operation of the other exclusionary provisions in the ENULA. After the application of ss 97 and 101 to tendency evidence, there is no room for the operation of either ss 135 or 137.[35]

35 *R v Nassif* [2004] NSWCCA 433 at [59]–[60] per Simpson J (with whom Adams J and Davidson AJ agreed); *R v Ngatikaura* (2006) 161 A Crim R 329 at [70]–[71], [74]; *R v Ford* (2009) 201 A Crim R 451 at [59].

Relationship evidence

[73] As is apparent from the foregoing discussion, it is the Crown's contention that the evidence in question is admissible to prove that the accused had the tendency particularised in its notice. The operation of s 95 of the ENULA is that the evidence cannot be used to prove that the accused had a relevant tendency unless that evidence is admissible under the tendency rule. For the reasons that are set out above, the Crown has established admissibility for that purpose.

[74] Subject to that qualification, the evidence may also be admitted for a non-tendency purpose. The admissibility of evidence for those purposes is governed by the general test of relevance in s 55 of the ENULA, and the discretions and obligations contained in Part 3.11 of the ENULA (particularly ss 135 and 137).[36]

[75] One example of a non-tendency purpose is "relationship" or "context" evidence that is not relied on for a tendency inference. *HML v The Queen*[37] is authority for the proposition that evidence of other conduct by an accused may, depending upon the circumstances, be admissible for non-tendency purposes, including the following purposes:

36 *R v Quach* [2002] NSWCCA 519; *Conway v R* (2000) 172 ALR 185; *FDP v R* [2008] NSWCCA 317; *R v Cornwell* (2003) 57 NSWLR 82; *R v Lock* (1997) 91 A Crim R 356.

37 (2008) 235 CLR 334. See also *Wilson v The Queen* (1970) 123 CLR 334 at 344; *R v Beserick* (1993) 66 A Crim R 419; *R v Anderson* (2000) 111 A Crim R 19 at [30].

(a) as affecting the plausibility of other evidence or to assess the credibility and coherence of the complainant's evidence (at [6], [155]–[156]);

(b) as essential background against which the evidence of the complainant and the accused necessarily falls to be evaluated, to show the continuing nature of the conduct and to explain the offences charged (at [425], [431]);

(c) to overcome a false impression that the event was an isolated one, that the offence happened "out of the blue", where the acts are closely and inextricably mixed up with the history of the offence (at [500], [513]);

(d) to ensure that the jury are not required to decide issues in a vacuum (at [428], [498]); and

(e) as negativing issues raised such as accident or mistake (at [430]).

[76] Although *HML v The Queen* was a case involving sexual offences, "relationship" evidence may also be admissible in cases involving violence, including assault-type offences. In *R v Cornelissen and Sutton*,[38] for example, the accused were charged with manslaughter by unlawful and dangerous act. At trial, evidence was given of four previous incidents involving physical violence between the deceased

38 [2004] NSWCCA 449.

and one of the accused. The New South Wales Court of Criminal Appeal held that this evidence was intended to be, and could be, admitted as "relationship" evidence. *Atroushi v R*[39] considered a case in which the accused had been charged with stalking and possessing a loaded firearm. Evidence was led at trial to show that the accused had previously made threatening phone calls to the complainant and persistently followed and threatened her and members of her family. This evidence was held to be "relationship" evidence and admissible in order to place the evidence of the offence charged into a true and realistic context, and in order to assist the jury to appreciate the full significance of what would otherwise appear to be an isolated act occurring without any apparent reason.

[77] In order for "relationship" evidence to be relevant it must be shown that the evidence would make the complainant's version of the particular incident subject to the charge more capable of belief when seen in the context of that relationship. There needs to be a clear articulation of the precise manner in which the evidence is relevant. It is not enough to say that the evidence shows the background to the alleged offence.

[78] The Crown asserts that in this case the evidence identified in the tendency notice is additionally, or in the alternative, relevant and

39 [2001] NSWCCA 406.

admissible as "relationship" or "context" evidence because it is necessary to avoid the circumstances of the alleged offence appearing inexplicable or being misunderstood in isolation;[40] to negative the defence case of self-inflicted injury;[41] and to show the state of mind of the accused at the time of the alleged offence.[42]

[79] For largely the same reasons as are canvassed in the foregoing discussion concerning tendency evidence, the evidence concerning the prior infliction by the accused of physical violence on the complainant is relevant in the proceeding. In particular, that evidence could rationally affect to a significant degree the assessment of whether the accused jumped on the complainant's torso and placed the rope around her neck and dragged her along the floor by the rope, or whether the complainant's injuries were self-inflicted. It is also the case that without that evidence the jury would effectively be called upon to decide the case in a vacuum, and may be left with the false impression that the event was an isolated one which happened "out of the blue" (even with a concession by the defence in opening that the relationship was a turbulent one).

[80] Again, it is to be noticed that the incidents on 29 December 2013 and 11 November 2014 did not involve any physical assault on the

40 *Roach v The Queen* [2011] HCA 12 at [45].

41 *R v Quach* (2002) 137 A Crim R 345 at [15], [22]-[45]; *Bryant v The Queen* [2011] NSWCCA 26 at [92]; *McDonald v The Queen* [2014] VSCA 80 at [28]-[29].

42 *R v Atroushi* [2001] NSWCCA 406 at [33], [45], [47]; *Boney v The Queen* [2008] NSWCCA 165 at [29].

complainant. The purpose of admitting "relationship" evidence in this case is to provide the essential background against which the evidence of the complainant and the accused falls to be evaluated, and to show the continuing nature of the conduct and to explain the offences charged. The focus remains on the accused's conduct, and there must be the requisite nexus between the circumstances of the offence charged and the conduct disclosed in the "relationship" evidence. Evidence of verbal abuse and threats does not disclose a sufficient nexus for this purpose. Accordingly, evidence of the incidents which took place on 29 December 2013 and 11 November 2014 is not admissible as "relationship" evidence.

[81] If relevance is established, "relationship" evidence may still be excluded in criminal proceedings if its probative value is outweighed by the danger of unfair prejudice to the defendant.[43] This gives rise to the same considerations concerning prejudice that have already been discussed in the context of the tendency evidence.

[82] For largely the same reasons as are canvassed in the foregoing discussion concerning tendency evidence, the probative value of this evidence as "relationship" evidence is neither outweighed by the danger of unfair prejudice to the accused, nor substantially outweighed by the danger that the evidence might be unfairly prejudicial to the

43 ENULA, s 137.

accused. In particular, the evidence has a high degree of probative value in negativing the defence case of self-inflicted injury, and any unfair prejudice to the accused may be ameliorated by appropriate directions to the jury.

Rulings

[83] The rulings on the *voir dire* hearing are:-

(a) The evidence identified in the Crown's tendency notice concerning the incidents on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013 and 18 June 2015 is admissible in the trial as "tendency" evidence.

(b) The evidence identified in the Crown's tendency notice concerning the incidents on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013 and 18 June 2015 is admissible in the trial as "relationship" or "context" evidence.
