CITATION:	*R v Williams* [2017] NTSC 80
PARTIES:	THE QUEEN
	v
	WILLIAMS, KEITH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21721898
DELIVERED ON:	8 November 2017
DELIVERED AT:	Alice Springs
HEARING DATE:	6 November 2017
JUDGMENT OF:	Reeves J

CATCHWORDS:

CRIMINAL LAW

Charge of unlawfully causing serious harm – evidence – application to admit tendency evidence and relationship evidence – evidence of conduct on the part of the accused which would establish a tendency to act violently or with anger or jealousy towards domestic female partners – requirements of ss 97 and 101 of the *Evidence (National Uniform Legislation) Act* (NT) – whether the tendency evidence has significant probative value – whether the probative value of the tendency evidence substantially outweighs its prejudicial effect – refusal to consider application to admit relationship evidence in the interests of justice.

Criminal Code (NT) s 181
Evidence (National Uniform Legislation) Act (NT) s 55(1), s 56(1), s 97, s 97(1), 97(1)(a), 97(1)(b), s 101, s 101(2), s 135, s 137
Supreme Court Rules r 81A

Hughes v The Queen [2017] HCA 20, *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51; [2000] FCR 1886, *R v Grant* [2016] NTSC 54, *R v MM* [2014] NSWCCA 144, *Reza v Summerhill Orchards Ltd* [2013] VSCA 17, *Richards v Macquarie Bank Ltd (No 3)* (2012) 301 ALR 653; [2012] FCA 1523

Cross on Evidence (Heydon JD, 10th ed, LexusNexus)

REPRESENTATION:

Counsel:

Plaintiff:	B Rositano
Defendant:	S. Lapinski

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Ree1701
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

R v Williams [2017] NTSC 80
No. 21721898

BETWEEN:

THE QUEEN
Plaintiff

AND:

KEITH WILLIAMS
Defendant

CORAM: REEVES J

REASONS FOR JUDGMENT

(Delivered 8 November 2017)

Introduction

[1] The accused has pleaded not guilty to a charge that on 6 May 2017 at Alice Springs in the Northern Territory of Australia he caused serious harm to Louise Egan, contrary to s 181 of the *Criminal Code* (NT).

[2] As well, he has pleaded guilty to a separate charge that at the same time and place he contravened a domestic violence order: by (1) approaching Ms Egan when under the influence of alcohol; and by (2) approaching the place where Ms Egan was living while under the influence of alcohol.

[3] To prove the charge of causing serious harm against the accused, the Crown has sought to adduce, as tendency evidence, evidence of the accused's

involvement in four incidents as a result of which he was convicted of, variously, assault and causing serious harm. In the alternative, the Crown sought to have that evidence admitted as "relationship evidence".

[4] Through his counsel, the accused has objected to the tender of this evidence on both bases.

The tendency evidence in contention

[5] Accepting that the evidence in question was tendency evidence within the terms of s 97(1) of the *Evidence (National Uniform Legislation) Act* (NT) (the ENUL Act), the Crown served a written notice on the accused's counsel as required by s 97(1)(a). That notice identifies:

(a) the details of the tendency evidence;

(b) the tendency that evidence is said to demonstrate; and

(c) the facts in issue in the present proceeding to which that tendency is said to relate.

[6] The details of the tendency evidence are set out in a schedule to the tendency notice. There are four incidents described:

Conduct	Date	Place	Circumstances
Assault	29 August 2016	Alice Springs	Throughout the evening of Sunday 28 August 2016, and into the early morning of Monday 29 August 2016, Keith Williams consumed an unknown quantity of alcohol in the Alice Springs town area and became intoxicated. At some time before 3.00am on Monday 29 August 2016 Louise Egan, was in a motor vehicle parked outside 11 Elliott Street, Alice Springs, seeking assistance for a flat tyre.

			Lekira Egan was nursing a small baby (Oliver Williams 24.01.15) in the rear seat while Louise was sitting in the driver's seat. While the pair were seated in the vehicle Keith Williams approached the driver's side window and yelled 'You bin dump me!'. Keith Williams moved to the driver's side window and punched Louise Egan twice in the face through the open front window, causing her to scream in pain. As a result of the punches to the face/ Louise Egan received cuts and bruising to her face. Keith Williams moved his face towards Louise Egan and bit her once to the left cheek and then let go and scratched her face in the same place on that same cheek.
Assault	10 August 2015	Yuendumu	On Monday 10 August 2015 at around 2.30pm, Louise Egan was at the Yuendumu 'Mining Store' managing paperwork with the help of the store manager. Keith Williams approached the victim and struck her to her right cheek. It caused her immediate pain. The store manager positioned himself between the victim and defendant to prevent any further assault. The victim attended the police station a short time later to provide her statement/ photographs of bruising to the right upper cheek area and a victim impact statement. The defendant said 'she started and she was swearing at me'. On Sunday 9 August 2015, Keith Williams took Louise Egan's phone off her to look through it as he told her she was talking to other men online. Keith Williams kept her phone. On Monday 10 August 2015, when Keith Williams came into the shop he was yelling at Louise Egan to give him her passwords and everything for her phone.
Assault	6 September 2009	Alice Springs	Keith Williams, the offender/ and Rosabella Wako, the victim, were in a defacto relationship for three years. On the evening of Sunday 6 September 2009, the offender was drinking intoxicating liquor at Warlpiri Camp, Alice Springs. The offender decided to walk to Trucking Yards Camp where the victim was residing. The offender attended House 19 Trucking Yards Camp where he asked that the victim come with him to House 7 and go to sleep. A verbal argument commenced between the victim and offender.

			The offender and victim went outside the house and during a struggle the offender used a 5cm stick that he had in his right hand to stab the victim in her left eye. This caused the victim's eye to bleed, closing the eye and making it impossible for her to see from it. The offender then went to sleep at House 7 Trucking Yards camp. As a result the victim suffered great pain and was admitted into the Alice Springs Hospital. The victim underwent surgery and lost the sight in her left eye.
Assault	4 September 2009	Alice Springs	Keith Williams, the offender, was drinking intoxicating liquor with the victim, Rosabella Wako, at House 4 Warlpiri Camp, Alice Springs. At around 4pm the offender commenced having a verbal argument with the victim about having another boyfriend. The offender then punched the victim with his right clenched fist to the victim's right eye with such force that it knocked the victim to the ground. The offender kicked the victim twice to the back whilst she was lying on the ground. He then picked up a large rock (the size of a tennis-ball) and threw it at the victim, striking her on the left knee. The offender stopped assaulting the victim when two residents of Warlpiri Camp intervened and conveyed the victim to hospital. The victim suffered: -swelling and bruising to the face; -abrasions and scratches to the arms and legs; -pain to the facial area and to her back.

[7] The tendencies that this evidence is said to demonstrate are set out in the tendency notice in the following terms:

> (a) the accused's tendency to act violently towards his female partners to exert control over them, over the issues of jealousy and their failure to behave in accordance with his wishes; and
>
> (b) the accused's tendency to cause physical injury to his female partners in the course of those violent acts;

[8] The facts in issue in this proceeding to which these tendencies are said to relate are identified in the tendency notice to be:

> (a) whether and how the accused caused serious harm to the complainant Louise Egan;
>
> (b) whether the accused intended to cause serious harm in so doing, or foresaw the causing of serious harm as a possible consequence of his conduct; and
>
> (c) whether the accused had any legal justification or excuse for so acting;

[9] This statement identifies the elements of the offence with which the accused has been charged, rather than the relevant facts in issue in this proceeding. Ms Rositano, for the Crown, sought to address this in oral submissions by pointing to the following facts as set out in the Outline of Crown Case:

> (a) as to intoxication:
>
> 1. On Saturday 6 May 2017 the accused was at House 1, Walpiri Camp, Alice Springs with the complainant. The accused consumed approximately four bottles of chardonnay and became heavily intoxicated.
>
> 2. At approximately 8:30pm the accused and the complainant were sitting in the front yard of House 1, Walpriri (sic) Camp, Alice Springs. The accused was wearing brown steel-capped boots.
>
> 3. For no reason the accused called the complainant a "dirty dog". The complainant told him to go and lie down because he was full drunk.
>
> (b) as to verbal abuse – 3 above plus 4, and 6:

4. The accused said that the complainant was an “anybody fucker” and stood up.

6. The complainant heard her arm snap and yelled out in pain. The complainant started crying and the accused called her a “fucking mother fucker”.

(c) as to anger – 3 above

(d) as to scratching:

7. The accused was angry and kicked the complainant to the head with his right foot. The complainant got dizzy. The accused then scratched the complainant’s face with his fingernails, causing blood to bleed down her face.

(e) as to hitting her with a stick:

16. Sarah Wayne and Ingrid Williams were protecting the complainant. The accused came over and was trying to hit the complainant with a little stick, saying “you walked away from me, you shouldn’t walked away”. Sarah Wayne told the accused to go away and stop fighting.

(f) as to the nature of the injury caused:

22. The complainant had a backslab cast applied and her left forearm was x-rayed on 7 May 2017, revealing a predominantly transverse fracture involving the mid shaft of the left radius with dorsal angulation and ulnar displacement of the distal fracture.

23. The complainant also underwent a brain CT on 7 May 2017 which revealed an extensive left frontal subgaleal haematoma, meaning clotted blood between the skull and the skin.

[10] Mr Lapinski, for the accused, did not outline what the defence case would be. Accordingly, this application will have to be determined by reference to all of the facts the Crown will be required to prove to establish its case against the accused.

The provisions of the *Evidence (National Uniform Legislation) Act*

[11] Section 97(1) of the ENUL Act provides:

> 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.

[12] In criminal proceedings, s 101(2) adds an additional condition for the admission of such evidence, as follows:

> 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.

[13] Also relevant in this application are ss 135 and 137. They provide:

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party; or

(b) be misleading or confusing; or

(c) cause or result in undue waste of time.

137 Exclusion of prejudicial evidence in criminal proceedings

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

The legislative framework

[14] The High Court recently considered these provisions in *Hughes v The Queen*[1] (*Hughes*). The tendency issues that arose in *Hughes* were described by the majority (Kiefel CJ, Bell, Keane and Edelman JJ) in these terms:[2]

> The issue arises in the familiar context of the trial of counts charging an accused with sexual offences against several children at which the prosecution seeks to adduce the evidence of each complainant in support of its case on each count. The issue reduces in this case to the question of whether proof that a man of mature years has a sexual interest in female children aged under 16 years ("underage girls") and a tendency to act on that interest by engaging in sexual activity with underage girls opportunistically, notwithstanding the risk of detection, is capable of having significant probative value on his trial for a sexual offence involving an underage girl. The answer is that, in a case in which the complainant's evidence of the conduct the subject of the charge is in issue, proof of that tendency may have that capacity.

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1 [2017] HCA 20.
2 [2017] HCA 20 at [2].

[15] The majority in *Hughes* therefore thought that proof of that tendency "may have that capacity" and the minority (Gageler, Nettle and Gordon JJ) thought it did not. The appeal was therefore dismissed by a majority of 4:3. This division of views in the High Court tends to highlight some of the difficulties that may arise with this tendency evidence issue.

[16] The framework of the provisions of the ENUL Act relating to tendency evidence is of some importance in determining this application. As the majority explained,[3] Parts 3.2 to 3.11, which include ss 97, 101, 135 and 137, prescribe and circumscribe a number of exclusions to the admissibility of relevant evidence as defined by ss 55(1) and 56(1).

[17] In this context, it is worth noting in passing that the starting point, the definition of relevance in s 55(1), itself sets a relatively low bar for admissibility: *Jacara Pty Ltd v Perpetual Trustees WA Ltd*,[4] *Richards v Macquarie Bank Ltd (No 3)*[5] and *Cross on Evidence*.[6]

[18] The provision which is central to the present application, s 97(1)(b), involves the prescription and circumscription I have mentioned above. That is, the evidence concerned is admissible as an exception under s 97(1)(b) if it has "significant probative value" notwithstanding that the chapeau to s 97(1) states that it is excluded or not admissible to prove that a person has a tendency of the kind described therein.

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3 [2017] HCA 20 at [13].
4 (2000) 106 FCR 51; [2000] FCR 1886 at [47].
5 (2012) 301 ALR 653; [2012] FCA 1523 at [12] to [13].
6 (Heydon JD, 10th ed, LexusNexus) at [1490].

[19] It is also important to note that the expression "probative value" in s 97(1)(b) is defined in the dictionary to the ENUL Act as "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". In this respect, the close similarity to the words used in s 55(1) to define relevance is to be noted.

[20] Putting these provisions together that means that the "[t]endency evidence will have significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent".[7]

[21] Put slightly differently, probative value is concerned with the significance of the extent to which the evidence in question is relevant to a fact in issue in the proceedings in the sense that it could rationally affect the assessment of the probability of the existence of that fact.

[22] There is a further aspect of the framework to these provisions that is important in this matter. In addition to the exclusion set by s 97(1), ss 101(2) and 137 provide a further special rule or condition that applies in criminal proceedings. That is, that the evidence in question cannot be used against an accused person in criminal proceedings unless the probative value of that evidence "substantially outweighs any prejudicial effect" the evidence may have (s 101(2)), or is "outweighed by the danger of unfair prejudice" to the accused (s 137).

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7 [2017] HCA 20 at 16 citing *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14 at [46].

[23] It can be seen that the expression "probative value" is also pivotal to these two special rules or conditions of admissibility. It follows that to be admissible within the exception stated in s 97(1)(b) the extent of the "probative value" of the evidence must be significant. And to avoid it being inadmissible under the conditions stated in ss 101(2) and 137, the extent of the "probative value" of the evidence must be such that it either substantially outweighs any prejudicial effect, or outweighs the danger of unfair prejudice to the accused, respectively. The former requires an examination of the probative quality and weight of the evidence vis-à-vis the fact in issue. As was said in *Hughes*, this "requires identifying the tendency and the fact or facts in issue which it is adduced to prove. The facts in issue in a criminal proceeding are those which establish the elements of the offence."[8] The latter requires a balancing exercise between the above described features of the evidence and its prejudicial effect.

[24] It is worth adding that Gageler J succinctly described the compounding effect of all these provisions in *Hughes* (dissenting but not affecting these observations) as follows[9]:

> The scheme of the Uniform Evidence legislation is that no evidence is admissible at all in a civil or criminal proceeding unless it is evidence that could (if accepted) rationally affect the assessment of the probability of the existence of a fact in issue. Tendency evidence adduced about a defendant by the prosecution in a criminal proceeding is subject to the special rule that it cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect on the defendant. On top of all that,

8 [2017] HCA 20 at [16].
9 [2017] HCA 20 at [69].

> a court has discretion to refuse to admit evidence the probative value of which is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, or be misleading or confusing, or cause or result in undue waste of time. And on top of all that again, a court in a criminal proceeding has an overriding duty to refuse to admit evidence adduced by the prosecution if its probative value is outweighed by the danger of unfair prejudice to the defendant…
>
> (Footnotes omitted)

[25] With these principles in mind I turn now to consider the three main issues that were raised in the submissions for and against the admissibility of the evidence described above.

Is the evidence tendency evidence at all?

[26] Mr Lapinski submitted that the tendency evidence put forward by the Crown did not meet the conditions for admissibility set by these provisions for three reasons.

[27] First, he submitted that the evidence was not tendency evidence at all because it did not relate to whether the accused would act in a particular way, or have a particular state of mind. He submitted the tendency to act violently ((a) in [7] above) or to cause physical injury ((b) in [7] above) did not involve acting in a "particular way" and the desire to exert control, or to be affected by jealousy, ((a) in [7] above), did not constitute a "particular state of mind", but was rather a circumstance of the relationship.
Mr Lapinski based these submissions on the plain meaning of the words of the chapeau to s 97(1).

[28] I do not accept these submissions. Inflicting violence or causing physical injury to another is acting in a particular way within the plain meaning of the words of that expression in s 97(1). Similarly, acting out of a desire to control one's partner, or out of jealousy with respect to her, is acting with a particular state of mind within the plain meaning of those words as they appear in s 97(1).

Does the evidence have significant probative value?

[29] Mr Lapinski's second reason for submitting that the tendency evidence is inadmissible is not so easily dismissed. It relies on the expression "significant probative value" in s 97(1)(b).

[30] On this second reason, Mr Lapinski submitted that neither the manner in which the injuries were caused by the accused, nor the character and circumstances of his conduct, as described in the evidence, was of significant probative value with respect to any of the facts in issue in this proceeding. While he accepted that some of the features of the incidents described in the tendency evidence were similar to those in the incident to which the present charge relates, he submitted that there was quite a disparity with others. In particular, he claimed that the injuries were, variously, caused by punches, biting, scratching, hitting, kicking, using a stick and throwing a rock.

[31] As to the disparity in the circumstances in which those incidents occurred, he claimed that: on some occasions he was in the relationship with his

partner; on other occasions he was separated from his partner; on some occasions he had an argument because the relationship had ended; on other occasions it was just an argument without any explanation connected with the relationship; on some occasions he was verbally abusive because his partner was contacting other men; on some occasions he was drunk; on some occasions he was sober; on some occasions the incident was in public; on other occasions it was in private; on some occasions it was against the complainant in this matter; on other occasions it was against another woman.

[32] Ms Rositano submitted that the tendency evidence "strongly supports proof" that the accused has the tendencies described in the tendency notice. That was so, she submitted, because the conduct established by the evidence was aimed at the same complainant in relation to the first two incidents and the conduct in all four incidents was directed at the accused's then current female domestic partner. She submitted that on all occasions the conduct involved the deliberate infliction of injury to the head and face of the accused's partner. She also submitted that scratching to the face was a particularly distinctive feature of the conduct. She pointed out that the conduct was usually associated with displays of jealousy, it occurred without provocation from his partner and, during three of the four incidents, the accused was intoxicated by alcohol. Finally, she submitted that the tendency evidence showed that the accused demonstrated an inability to control his anger.

[33] As to the facts in issue in this proceeding, Ms Rositano submitted that the tendencies demonstrated by the evidence will serve to rebut any suggestion that the serious harm Ms Egan sustained was not caused directly by the accused striking her. She also submitted it will serve to rebut any assertion that the accused did not intend to cause serious harm to Ms Egan. Further she submitted, the tendency of the accused to act violently and to injure the face of his victims has a high probative value because it will enhance the plausibility of Ms Egan's account of events, particularly her evidence that she was scratched on the face during the incident.

[34] Citing *Hughes*,[10] Ms Rositano submitted that the evidence of previous assaults against the same complainant may:

> rationally suggest a degree of animosity on the part of the accused towards the victim that subsequently affects the assessment of the probability that the accused committed a subsequent offence involving the intentional infliction of bodily injury upon the victim.

[35] Both counsel accepted that the effect of the judgment in *Hughes* was that similarity or related concepts, such as underlying unity, or pattern of conduct, is not the test where, as in this case, identity is not in issue in the proceeding.[11]

[36] Instead, the test as stated by the majority in *Hughes*[12] is that:

> the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged.

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10 [2017] HCA 20 at [155] (per Nettle J in dissent).
11 See [2017] HCA 20 at [34] and [39]–[41].
12 [2017] HCA 20 at [40].

[37] The only qualification to this statement is that stated in the next sentence of *Hughes*,[13] that:

> it is not necessary that the disputed evidence has this effect *by itself*. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged.
>
> (Emphasis in original)

[38] Their Honours went on to observe that two interrelated, but separate, matters need to be considered in determining whether the evidence has significant probative value. They are as follows:[14]

> The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters. By seeing that there are two matters involved, it is easier to appreciate the dangers in focusing on single labels such as "underlying unity", "pattern of conduct" or "modus operandi". In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged.

[39] The first question, therefore, is whether the tendency evidence itself, or together with other evidence, strongly supports proof that the accused has a tendency to act in a particular way and/or to have a particular state of mind. The "particular way" tendency relied upon by the Crown (see at [7] above) is a tendency to act violently towards his female domestic partners, to exert

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13 [2017] HCA 20 at [40].
14 [2017] HCA 20 at [41].

control over them and to cause physical injury to them. Further, the "particular state of mind" tendency relied on by the Crown is a tendency to display jealousy and anger towards those partners.

Does the evidence proffered by the Crown strongly support the proof of either or both of the tendencies?

[40] It is convenient to deal with the evidence in two groups: first, the evidence relating to the two incidents in September 2009; and, secondly, the evidence relating to the two more recent incidents in 2015 and 2016.

[41] The two incidents in 2009 occurred about 7 1/2 years before the incident that is the subject of the present charge. They both involved Ms Wako who was said to have been in a de facto relationship with the accused for three years, that is, since approximately 2006. Those incidents occurred approximately two days apart.

[42] In a statutory declaration she made concerning the 2015 incident, Ms Egan said that she had, at that time, been in a de facto relationship with the accused for the past four years. It can therefore be inferred that the relationship with Ms Wako ceased, at the latest, by approximately 2011.

[43] In my view, this evidence does not provide strong proof of the tendencies described above. While any incident of domestic violence is to be condemned, I consider two incidents of such violence in a different relationship, two days apart, some 7 1/2 years earlier, is too remote in time and too anomalous in occurrence to provide strong support for the proof of a

tendency by the accused to act violently, or with anger or jealousy, with respect to his domestic female partners in general.

[44] I turn, then, to the other two incidents. They are not affected by the considerations I have described above. Both of those incidents involved Ms Egan, the complainant in the present proceeding. They occurred approximately 21 months (the 2015 incident) and 9 months (the 2016 incident) before the incident the subject of the present charge. Given their relative currency, I think they are capable of providing proof of the tendencies described above. However, the critical question is whether they "strongly support" that proof.

[45] In answering that question, the first thing to be noted is that the 2015 incident has a number of features that distinguish it from the 2016 incident and therefore lessen its capacity to provide that degree of proof. Those features are that that incident occurred at Ms Egan's place of work in Yuendumu and therefore in a public setting, rather than in a domestic one such as the place where she and the accused were living. Furthermore, there is no indication that the accused was intoxicated at the time of the incident. On the other hand, the evidence discloses that the accused verbally abused Ms Egan during that incident and hit her once on the right upper cheek. Further, on the previous day, the accused accused Ms Egan of speaking to other men on her mobile phone and demanded that she provide him with the password for her phone. This provided some evidence of jealousy albeit not directly associated with the incident itself.

[46] Despite the latter features of this incident, I am not satisfied, on balance, that this evidence provides *strong* proof that the accused has of a tendency to act violently, or with anger or jealousy, with respect to his domestic female partners in general.

[47] The 2016 incident is in a different category. It occurred in a private or domestic setting, the accused was intoxicated at the time, and the incident appears to have arisen directly, at least in the accused's mind, from anger or jealousy, namely that Ms Egan had "dumped" him, or broken off their relationship. Moreover, the accused committed a number of violent assaults on Ms Egan during that incident, including punching, biting and scratching her on her head and face.

[48] Given its closeness in time to the incident in issue in this proceeding and the above described characteristics of the accused's conduct during the incident, I think, on balance, that this incident does strongly support proof of a tendency by the accused to act violently and with anger or jealousy, towards Ms Egan.

[49] There is, however, a part of this evidence that, in my view, fails this test. That is, the sentence in the second paragraph about Ms Egan's sister nursing a small baby. That information has no bearing on the proof of the tendencies advanced by the Crown. It, therefore, does not fall within the exception in s 97(1)(b) and is not admissible under s 97(1).

Do the tendencies strongly support the proof of a fact in issue?

[50] The next question is whether the tendencies proven by the evidence relating to the 2016 incident strongly support the proof of a fact which constitutes an element of the charge to which the accused has pleaded not guilty.

[51] As Grant CJ observed in *R v Grant*,[15] answering this question requires:

> … 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. 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).
>
> (Citations omitted)

[52] On this question, I agree generally with Ms Rositano's submissions (at [33]–[34] above) that the accused's tendency to act violently and with anger or jealousy towards his domestic partner, Ms Egan, is likely to be considered by the hypothetical jury to be important in assessing whether to accept any claim by the accused that he did not inflict the injuries alleged on Ms Egan, or that he did not intend to cause serious harm to her. In these respects, I consider the tendency evidence with respect to the 2016 incident strongly supports the proof of those facts in issue in this proceeding.

[53] For these reasons, I consider the evidence of the 2016 incident has significant probative value within the terms of the exception stated in s 97(1)(b) of the ENUL Act.

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15 [2016] NTSC 54 at [31].

Does the probative value of the tendency evidence substantially outweigh any prejudicial effect it may have?

[54] That brings me to Mr Lapinski's third reason for submitting that the tendency evidence is inadmissible. Relying upon s 101(2) of the ENUL Act (set out at [12] above), he submitted that the probative value of the tendency evidence does not substantially outweigh any prejudicial effect it may have on the accused.

[55] Mr Lapinski submitted that this requirement of s 101(2) sets a very high bar. He submitted that the proper approach to its application was described by the NSW Court of Criminal Appeal in *R v MM*[16] as follows:

> The prejudicial effect to which s 101(2) is directed must be understood as substantially the same as that to be considered under s 137 (*Sokolowskyj v R* [2014] NSWCCA 55 at [47]). It is not sufficient that the evidence is harmful to the interests of a defendant because it tends to establish the Crown case. That will be inevitable. Rather, the prejudice must be the risk of harm to the interests of the accused in a way that is unfair because there is a real risk that the evidence will be misused by the jury in some unfair way, such as provoking some irrational, emotional or illogical response, or giving the evidence more weight than it truly deserves (*R v Ford* [2009] NSWCCA 306; 201 A Crim R 451 at [56]; *R v Suteski* [2002] NSWCCA 509; 56 NSWLR 182 at [116]).

[56] It is important to note at the outset that this question now only concerns the evidence about the 2016 incident, excluding the paragraph mentioned above about the presence of a baby. This is important because the submissions of counsel were necessarily couched on the assumption that all of the tendency evidence had passed the barrier set by s 97. Accordingly, in his submissions,

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16 [2014] NSWCCA 144 at [43].

Mr Lapinski identified a number of parts of the tendency evidence apart from that relating to the 2016 incident and claimed that, together, those parts of the evidence held a real risk of misuse by the jury because they were likely to provoke an irrational, emotional or illogical response, or that the jury was likely to give that evidence more weight than it deserved. Further, he submitted that the tendency evidence will cause serious harm to the accused's case because he is likely to be perceived by the jury as "a bad man" and the evidence is likely to encourage the jury to engage in "rank propensity reasoning"

[57] However, the only particular part of the evidence relating to the 2016 incident that Mr Lapinski claimed may give rise to this prejudicial effect was the sentence in the final paragraph that states the accused "bit Ms Egan once to her left cheek".

[58] Ms Rositano submitted that there was, at most, a vague possibility that the jury would give the tendency evidence too much weight, or use it in an emotional way. She submitted that the evidence would be unlikely to excite an emotional response by the jury, but rather would be likely to confirm a common sense inclination that there must have been more to the relationship than the events on the night in question. In this respect, she claimed that domestic violence was regrettably all too commonplace in society. In any event, she submitted that any concern about prejudice could be cured by a suitable direction to the jury. She submitted that the court should assume

that any such direction will be duly followed by the jury, relying on the observations of Kyrou AJA in *Reza v Summerhill Orchards Ltd.*[17]

[59] I have already concluded that the tendency evidence with respect to the 2016 incident strongly supports the proof of the facts in issue in this proceeding outlined above (see at [52] above). Put differently and in the terms of the definition of the expression "probative value" (see at [20] above), that conclusion means that that evidence rationally affects the probability of the existence of those facts to a significant extent. Accordingly, under s 101(2) of the ENUL Act, it is this probative value that must be balanced against the prejudicial effect of the evidence with respect to the 2016 incident to establish whether it substantially outweighs that effect. Prejudicial effect in this context means "the danger of improper use of the evidence. It does not mean its legitimate tendency to inculpate."[18] Further, as Grant CJ observed in *R v Grant*:[19]

> Prejudice will be unfair if there is a real risk that the evidence will be misused by the jury in some unfair way. 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."

[60] With the exclusion of that part of the evidence concerning the presence of the baby (see at [49] above), the only remaining part of the evidence in relation to the 2016 incident that Mr Lapinski claimed would give rise to a prejudicial effect was the biting injury described above (at [57]).

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17 [2013] VSCA 17 at [50].
18 *HML v The Queen* (2008) 235 CLR 334; [2008] HCA 16 at [12] per Gleeson CJ.
19 See [2016] NTSC 54 at [61] and the cases there cited.

[61] The following features of this proceeding lead me to conclude that the prejudicial effect of that evidence, and the evidence relating to the 2016 incident more broadly, is substantially outweighed by the probative value of that evidence as outlined above.

[62] In the first place, the evidence in question is now confined to one of the four incidents and then only one particular aspect of it.

[63] Secondly, the accused has already pleaded guilty in front of the jury to breaching a domestic violence order concerning Ms Egan. The jury will therefore know that there is a history of violence in this relationship. In that circumstance, the evidence of the 2016 incident will provide the jury with some relatively recent details of that history so that they will not be left to consider that knowledge absent of any context. Against this background, if the jury becomes aware of the fact that the accused inflicted an unusual type of injury to Ms Egan's face, namely biting her, I do not consider the addition of that information will result in any significant prejudice to the accused. That is, I do not consider it is likely to provoke an irrational, emotional or illogical response in the jury, or that the jury is likely to give it more weight than it deserves.

[64] Finally, in addition to these features, I agree with Ms Rositano that such prejudice as may result can be overcome by a suitable direction to the jury.

[65] Having regard to these features, I consider the prejudice that may be caused by the evidence of the 2016 incident is outweighed by the probative value of

that evidence. Moreover, while the expression “substantially outweigh” does set a high test, I consider it has been met in this instance. For these reasons, I do not consider s 101(2) operates to prevent the evidence of the 2016 incident being used against the accused.

The alternative application to admit the evidence as relationship evidence

[66] Ultimately, it was not necessary, or fair and just, to deal with the Crown’s alternative application that the tendency evidence be admitted as relationship evidence. It was not necessary with respect to the two 2009 incidents because Ms Rositano subsequently clarified that she did not seek to tender the evidence of those incidents as relationship evidence because that evidence related to a different relationship to the one involved in this proceeding. Secondly, with respect to the 2016 incident, the practical effect of my ruling with respect to that evidence was that it could also be used as relationship evidence; that is, it was not excluded by the provisions of s 95 of the ENUL Act. Thirdly, while the Ms Rositano stated that the Crown did wish to pursue this alternative application with respect to the 2015 incident, in the circumstances that prevailed, I decided that the fair and just course was to reject that application and proceed with the trial.

[67] In brief summary, the factors that persuaded me to take that course are as follows. In the first place, having already assessed the probative value of the evidence relating to the 2015 incident during the tendency evidence application, I had at least tentatively concluded that it was unlikely to be

highly significant in establishing the Crown's case against the accused. Secondly, the Crown did not seek to have the tendency evidence application dealt with prior to the commencement of the trial of this matter in accordance with the General Rules of Procedure in Criminal Proceedings.[20] Plainly, one of the objects of those Rules is to ensure that criminal trials are not unnecessarily delayed by *voir dire* applications of this kind. Thirdly, as a result of the Crown's failure to make a timely pre-trial application, two days of the four days set aside for this trial were lost hearing oral submissions and considering my ruling on the Crown's tendency evidence application. In the meantime, the jury that had been sworn in on the first day of the trial was patiently waiting in the jury room. Fourthly, this delay was partly caused by the fact that the Crown did not provide any written submissions in support of its application until the morning that trial was due to commence on 6 November 2017. Nor did it file a copy of the tendency notice with the court when it was served on the accused's counsel on 23 October 2017. Hence, the court was not alerted to the possibility that such an application would be made. Furthermore, because of the Crown's desire to pursue this alternative application, a further delay was likely to occur in receiving and hearing submissions and considering its application. Fifthly, the combined effect of this delay was that it was extremely unlikely that the trial could be completed in the time allocated. In those circumstances, I was faced with the choice of discharging the jury and adjourning this trial to a

[20] See r 81A of the *Supreme Court Rules*.

future sittings, or vacating the trial that had been set down to follow this one. Both courses would have had serious adverse consequences for all involved in both trials.

[68] In the end result, since the accused, Mr Williams, was in custody and since the situation I have outlined above was entirely created by the Crown's various failures as mentioned above, I decided it was in the interests of justice to refuse to consider its alternative application and proceed with the trial.

Conclusion

[69] To sum up briefly, for the reasons outlined above, I have concluded that:

(a) the evidence concerning the two 2009 incidents and the 2015 incident does not have significant probative value. Accordingly, that evidence does not fall within the exception stated in 97(1)(b) of the ENUL Act and is therefore excluded by s 97(1) of that Act;

(b) with the exception of the sentence concerning the presence of a baby which is to be excluded, the evidence concerning the 2016 incident does have significant probative value and, accordingly, does fall within the exception in s 97(1)(b) and is therefore not excluded by s 97(1);

(c) further, the probative value of the evidence concerning the 2016 incident substantially outweighs any prejudicial effect its admission

may have on the accused and it is therefore not excluded under s 101(2) of the ENUL Act.

[70] I therefore rule that, with the exception of the sentence concerning the presence of a baby, the evidence concerning the 2016 incident be admitted. Otherwise, I dismiss the Crown's tendency evidence application.