

***Tasmania v Finnegan (No 2)* [2012] TASSC 1 (19 January 2012) – Supreme Court of Tasmania**

‘Admissibility’ – ‘Evidence - relationship’ – ‘Evidence - tendency’ – ‘Motive’ – ‘Physical violence and harm’ – ‘Probative value’ – ‘Unlawful wounding’

Charge: Unlawful wounding

Proceeding: Ruling as to the admissibility of evidence

Facts: The accused was charged with unlawfully wounding the complainant (his partner) by striking her to the face with a glass. He pleaded not guilty. The Crown sought to lead evidence from the complainant given on a *voir dire* about the accused’s conduct towards her on other occasions, both before and after the alleged wounding. The accused objected to the admission of some of the evidence ([6]).

Issues: Whether some of the evidence given by the complainant should be ruled inadmissible on at least one of the following bases:

1. Irrelevance;
2. Failure to satisfy the common law rule established in *Pfennig v R* whereby propensity or similar fact evidence is not admissible if, viewed in the context of the prosecution case, there is a reasonable view of that evidence that is consistent with innocence;
3. The danger of unfair prejudice to the accused outweighing the probative value of the evidence: s 137 *Evidence Act 2001 (Tas)*; or
4. The probative value of the tendency evidence not substantially outweighing any prejudicial effect that it may have on the accused: s 101(2) *Evidence Act 2001 (Tas)*

Decision and Reasoning: The appeal was dismissed. The evidence led from the complainant as to the conduct of the accused was admissible. It was relevant on a number of bases: as ‘relationship evidence’, enabling the jury to assess the evidence as to what occurred at the time of the alleged wounding; as evidence of motive (jealousy); as evidence explaining why the complainant asserted she was injured because of a fall and why there was delay in her reporting what occurred; and as tendency evidence, showing that the accused had a tendency to be jealous of anyone who had a friendship/relationship with the complainant and to be generally violent towards her ([11]-[15]).

Further, the probative value of all the evidence under consideration substantially outweighed the prejudicial effect and danger of unfair prejudice to the accused. In this regard, Blow J noted at [30]-[31]:

'In my view the danger of unfair prejudice to the accused is not great... [A] properly instructed jury, having heard all the evidence of jealousy and violence, is unlikely to be distracted from its duty of impartiality and its duty to give a true verdict in accordance with the evidence.

'In my view the evidence of jealousy has substantial probative value. Without that evidence the jury might well take the view that the accused had not given any indication of jealousy on any other occasion. If the only evidence available for the jury as to violence on other occasions was the evidence of the three charged assaults, two of which shortly preceded the first report to the police of the accused wounding the complainant with the glass, that could result in the jury overestimating the likelihood of the complainant having fabricated the critical allegations. Having regard to that factor, and to the various bases on which the evidence of violence is relevant, I consider that all the evidence of violence also has substantial probative value'.

Here, there was nothing about the facts that made it one where s101(2) or s137 [Evidence Act 2001 (Tas)] required the *Pfennig* test to be applied (at [32]).