

High Court examines tendency evidence in *Hughes v The Queen*

By Lizzie McLaughlin



Lizzie McLaughlin is a barrister at Hunter Street Chambers, Newcastle.

Between 1995 and 2014, there was an almost doubling in the reporting of child sexual abuse or child sexual assault offences in NSW. (The reports went from 2625 in 1995, to 5200 in 2014. See Cashmore et al, 'The impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases', *University of Sydney Law School*, August 2016, 58.) Consequently, child sexual assault cases have become 'essentially the bread and butter of most of the ... intermediate court trials' (*Hughes v The Queen* [2017] HCATrans 016). These matters (along with adult sexual assault cases) generate particular evidentiary and procedural challenges, and over time both criminal law and trial procedure have developed and adapted accordingly. (See for example the Child Sexual Abuse Pilot Program; sexual assault communications privilege provisions in the *Criminal Procedure Act 1986* (NSW) and clarification of the *Murray* direction in *Ewen v R* [2015] NSWCCA 117). The most recent of these decisions is *Hughes v The Queen* [2017] HCA 20 ('*Hughes*') which focuses on the criteria for 'significant probative value' in s 97(2)(b) of the *Evidence Act 1995* (Cth) ('the Act').

Background

The appellant, Robert Hughes, faced 11 counts of sexual offences committed against five female children aged between six and 15 years between 1984 and 1990. The sexual acts varied. For example, two counts involved digital penetration, another involved kissing and touching over clothing, some involved masturbation of the appellant by the victims, whereas others involved exposure by the appellant of his penis. Their contexts varied also: some offences occurred at the appellant's home in his lounge room or daughter's bedroom, others at the beach, some were at night, some were in the daytime.

The Crown gave notice that it would seek to adduce evidence from each victim and from other women as 'tendency evidence'. (A detailed explanation of the tendency notice prepared by the Crown pursuant to s 97(1)(a) can be found in the judgment of Nettle J in *Hughes*). The uncharged tendency evidence came from two sources: women who, as children, were subjected to

Snapshot

- In order to have 'significant probative value' it is not a requirement that tendency evidence be similar to the charged conduct.
- Identifying the facts in issue in each particular matter is a critical step when determining if tendency evidence is of 'significant probative value'.
- Consider the tendency notice prepared by the Crown, the proposed tendency evidence, the entire Crown case and your instructions before identifying the facts in issue. Then determine whether or not the tendency evidence needs to be similar to the charged conduct at all, and if so, to what degree, in order to meet the test of 'significant probative value'.

indecent touching by the appellant when in his care or at his home; and women, who, as adults, were employed to work in the costume department on the set of '*Hey Dad*', and who asserted that they had been indecently touched or were subjected to indecent behaviour by the appellant. The appellant challenged the admissibility of the tendency evidence on the basis that the charged and uncharged tendency evidence lacked sufficient similarity to have 'significant probative value'. The trial judge, Zahra DCJ, held that the probative value of the tendency evidence was significant in circumstances in which the fact in issue in each count was whether the charged sexual conduct occurred. In that context, Zahra DCJ found that there was a pattern of behaviour, which, if not striking, was manifest.

Court of Criminal Appeal

In the NSW Court of Criminal Appeal ('NSW CCA'), the appellant argued that the tendency evidence did not possess 'significant probative value' and relied on the decision in *Velkoski v The Queen* [2014] VSCA 121 ('*Velkoski*') to support the proposition that in order to be significantly probative, tendency evidence *must* possess 'sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct' (*Velkoski v The Queen* [2014] VSCA 121 at [3]).

Beazley P, Schmidt and Button JJ declined to follow *Velkoski* and instead held that, consistent with NSW authority (see *Saoud v R* [2014] NSWCCA 136; *R v Ford* [2009] NSWCCA 306; *Doyle v R*; *R v Doyle* [2014] NSWCCA 4; and *R v PWD* [2010] NSWCCA 209), there is no requirement that the purported evidence of tendency display similar features to the charged conduct. They noted that the language of the Victorian CCA in *Velkoski* was reminiscent of the common law relating to similar fact evidence and failed to recognise that Part 3.6 and s 97 of the Act make no reference to the need for a 'pattern of conduct' or 'underlying unity' etc. Accordingly, there was no basis for reliance on those terms to the extent urged by the appellant.

Instead, the NSW CCA found that the evidence must demonstrate that the accused had a tendency to act or think in a par-

ticular way, following which, the question the Court must focus upon is whether or not that evidence has 'significant probative value'. They found that the nature and extent of any similarity is still relevant to that question – but is not determinative.

High Court

In the High Court, the appellant argued that the NSW CCA:

- set the standard of admissibility for tendency evidence too low by removing any requirement of specificity or similarity; and
- gave insufficient weight to the statutory requirement that the evidence not only be relevant but be of 'significant probative value'.

The majority (Kiefel CJ, Bell, Keane and Edelman JJ) neatly articulated that the issue to be determined could be synthesised into one question:

'Whether proof that a man of mature years has a sexual interest in female children under 16 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' (at [2]).

The majority went on to answer this question in the affirmative. They found that the tendency evidence was imbued with significant probative value not because the sexual acts between the victims and the tendency witnesses were identical or sufficiently similar, but because:

'the unusual interactions which the appellant was alleged to have pursued involved courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by' (at [57]).

The majority went on to find that it was this 'level of disinhibited disregard of the risk of discovery by other adults' which was 'even more unusual as a matter of ordinary human experience' than an inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination (at [57]). This particular feature of the appellant's conduct was what moved the evidence of tendency from having simply probative value to the requisite *significant* probative value *because* the fact in issue in the trial was whether or not the conduct occurred at all (i.e. the appellant denied each of the offences occurred at all):

'The force of the tendency evidence as significantly probative of the appellant's guilt was not that it gave rise to a likelihood that the appellant, having offended once, was likely to offend again. Rather its force was that, in the case of this individual accused, the complaint of misconduct on his part should not be rejected as unworthy of belief because it appeared improbable having regard to ordinary human experience' (at [60]).

The majority found that the test in s 97(1)(b) as to significant probative value was as set out in the New South Wales line of authority (not Victoria and *Velkoski*), specifically *Ford (R v Ford)* [2009] NSWCCA 306). The majority found that the Victorian position was predicated upon the erroneous assumption that the probative value of the tendency evidence lay in the degree of similarity of

the 'operative features' of the act which prove the tendency. To the contrary, the majority held that 'a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it' (*Hughes v The Queen* [2017] HCA-Trans 016, per Kiefel CJ, Bell, Keane and Edelman JJ).

The majority found that, nonetheless, similarity between the conduct evidencing the tendency and the offence *may be* determinative of the probative value of the tendency evidence, but whether or not that is the case in any particular matter will depend on the facts in issue in relation to which the tendency evidence is adduced to prove. For example, if the fact in issue is identity, the probative value will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence. In contrast, where the fact in issue is whether or not offences of child sexual abuse occurred at all, the similarity of the conduct evidencing the tendency and the offence/s may not be a consideration.

How to apply *Hughes* to your practice

Hughes demonstrates the importance of criminal lawyers going back to the touchstone of relevance and in clearly identifying the facts in issue when assessing whether or not the proposed tendency evidence has 'significant probative value' and meets the criteria in s 97(1)(b). Consider approaching the issue by asking the following six questions:

1. **What is the tendency that the Crown is purporting to rely upon?** Read the notice carefully. Observe the generality or specificity of the tendency asserted.
2. **What is the evidence of that tendency?** Prepare a table outlining the key features of the proposed tendency evidence. Include all relevant variables for each separate offence. Look for patterns and differences.
3. **Compare the evidence of tendency (2 above) with the tendency outlined in the notice (1 above).** Does the evidence of tendency (2 above) support the tendency/tendencies set out in the notice (1 above)?
4. **Identify the facts in issue in the trial.** Start with those facts that establish the elements of the offence.
5. **Is the evidence of tendency relevant to the facts in issue?** Compare (1) and (2) with (4). Assume the tendency evidence is accepted, ignore questions of reliability or credibility and simply ask yourself: could the tendency evidence rationally affect the assessment of the probability of the existence of a fact in issue?
6. **If the tendency evidence is relevant – how relevant?** Apply the test in *Ford*: Does the disputed evidence (alone or in combination with other evidence) make more likely, to a significant extent, the facts that make out the elements of the offence charged? Consider the degree of generality or particularity of the tendency expressed and all the evidence contained in the brief. **LSJ**