Tendency Evidence after *Hughes v The Queen* [2017] HCA 20[1]

Introduction

1. This paper does not intend to cover the field with respect to all aspects of the law of tendency, instead focusing on the recent High Court decision in *Hughes v The Queen [2017] HCA 20*[2] ('*Hughes*'). In *Hughes* the High Court resolved a specific tension that had arisen between the NSW and Victorian Courts of Appeal: - whether or not tendency evidence needs to be similar or reflective of a pattern or modus operandi in order for it to satisfy the requirement that it contain significant probative value.

2. Despite the specificity of the issue considered by the High Court however, *Hughes* is nonetheless a decision that goes some way to explaining the application and construction of the tendency rule more generally. It forces one to re-examine the provision in the context of the Act as a whole, and in the context of first principles: relevance, facts in issue. It is worth a close read. Failing that, this paper might assist.

3. *Hughes* has been some time in the making. Jurisprudence concerning the admissibility of tendency evidence has been in a state of both flux and growth over the last decade across various state and territory jurisdictions. This is in part connected to the increase in child sexual assault offences being reported and prosecuted. Between 1995 and 2014, there has been an almost doubling in the reporting of child sexual abuse or child sexual assault offences in NSW – from 2625 in 1995, to 5200 in 2014.[3] These matters generate particular evidentiary and procedural challenges for the Crown (there is little in the way of evidence other than the complaint itself, multiple allegations, delay in complaint etc) and over time both law and procedure have developed and changed to reflect these particular demands[4].

4. This means that Crown applications for the admissibility of tendency evidence are now both necessary means for enabling the Crown to strengthen what have

[1] Prepared by L McLaughlin, Barrister, Hunter Street Chambers, 14 July 2017.
[2] *Hughes v The Queen* [2017] HCA 20.
[3] 'Cashmore, Taylor, Shackel and Parkinson, 'The impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases ', University of Sydney Law School, August 2016 at 58.
[4] Examples of these developments include the Child Sexual Abuse Pilot Program; SACP provisions in the Criminal Procedure Act and clarification of the Murray direction in *Ewen v R* [2015] NSWCCA 117.

historically often been difficult cases to prosecute. As counsel for the State of Victoria expressed it to the High Court during her oral argument in *Hughes*:

> *"child sexual assault cases make up essentially the bread and butter of most of the ... intermediate court trials, and invariably it is the occurrence of the act which is in issue. It is not identity. The child invariably knows the perpetrator and invariably it is put to the child that the child is lying in her or her evidence.*[5] *"*

5. Interestingly, it is my experience that applications to admit tendency evidence are now not only routinely made in child and adult sexual assault prosecutions but are also increasingly being considered and used by the Crown (and Police prosecutors) in the prosecution of other criminal offences. What was once an infrequently used evidentiary tool is now a standard part of the Crown's arsenal generally. Consequently, defence lawyers need to be well prepared.

Part 3.6 of the Evidence Act

6. Before discussing the decision in *Hughes*, it is useful to go back to the text of the *Evidence Act* itself (as was the approach of the majority in its decision). Part 3.6 of the Act deals with tendency and coincidence evidence and applies to criminal and civil proceedings. It sets out a series of rules that can be broadly described as prohibitions: 'the tendency rule' and 'the coincidence rule'. For the purposes of this paper, coincidence evidence will be left to one side.

7. In short – the 'tendency rule' is that tendency evidence is prima facie <u>not</u> admissible in criminal or civil proceedings, subject to section 97 and, in some criminal proceedings, section 101. The rationale behind this prohibition rests with the fundamental principle of a fair trial that underlies the common law approach to the admissibility of evidence more generally.

8. The concept of 'a fair trial' is an amorphous term that is so fundamental and all-encompassing as to be almost meaningless unless it is pinned to a practical procedural or evidentiary application. Tendency evidence is a particularly good example of such an application. As the High Court observed in *Phillips v The Queen* [2006] HCA 4, 158 A Crim R 431 at [79]:

[5] *Hughes v The Queen* [2017] HCATrans 016

"... [C]riminal trials in this country are ordinarily focused with high particularity on specified offences. They are not, as such, a trial of the accused's character or propensity towards criminal conduct. That is why, in order to permit the admission of evidence relevant to several different offences, the common law requires a high threshold to be passed. The evidence must possess particular probative qualities; a strong degree of probative force; a really material bearing on the issues to be decided. That threshold was not met in this case. It was therefore necessary that the allegations, formulated in the charges brought against the appellant, be separately considered by different juries, uncontaminated by knowledge of other complaints. ... No other outcome would be compatible with the fair trial of the appellant."

9. In short: evidence that the accused has a tendency is patently and fundamentally unfair to the accused, so more is needed in order to justify its admission. So what is the criterion for admissibility of tendency evidence? For criminal proceedings in which the Crown is adducing the tendency evidence there are three criteria across section 97 and 101:
    a. Firstly, the applicant must have provided **reasonable written notice** of the application to rely on tendency evidence (s.97(1)(a)); and,
    b. Secondly, the Court must be satisfied 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**" (s.97(1)(b)). (It is this criterion that was the focus in *Hughes*); and,
    c. Thirdly, the Court must find that **the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant** (s.101(2)).[6]

10. In addition to sections 97 and 101, Part 3.6 contains other provisions that guide the operation of the Part in the context of the Act as a whole and reiterate the particularly sensitive treatment that is to be given to evidence of tendency. Section 94 identifies when the tendency rule does not apply. This is during:
    a. bail or sentencing proceedings; or,
    b. if the character, reputation, conduct or tendency of a person is a fact in issue (meaning that it is an 'ultimate fact in issue')[7].

[6] Section 101(2) does not apply to civil proceedings, tendency or coincidence evidence adduced by the defence in criminal proceedings, or tendency or coincidence evidence adduced by the Crown in response to tendency or coincidence evidence adduced by the defence.

11. Section 95 provides that evidence in Part 3.6 that is not admissible to prove a particular matter cannot be used to prove that matter even if it is relevant and admissible for another purpose. This is the opposite approach to that taken with respect to hearsay evidence, which, pursuant to section 60, can be used as hearsay despite section 59 so long as it has been admitted for another purpose. As Bell J and Kiefel CJ noted during oral argument in *Hughes,* this distinction under the Act in what use can be made of hearsay and tendency evidence reinforces that the legislature recognized the specific risks associated with tendency evidence unless it has a particular probative value and the prejudicial effect can be assessed. [8]

12. If the evidence of tendency sought to be admitted goes only to questions of credibility, however, (i.e. that a witness, because of prior convictions for providing false statements to police or fraud, has a tendency to be dishonest), then the issue of the admissibility of that evidence relies upon Part 3.7 of the Act – Credibility.

Trial

13. The appellant was arraigned in the District Court of New South Wales on an indictment that charged him, in 11 counts, with sexual offences committed against five female children under the age of 16 years. The complainants were aged between six and 15 years at the time of the offences. The sexual acts particularized in each count and the circumstances of their commission varied although there were similarities across aspects of the charged behaviours:
    a. They were opportunistic and committed in situations where there was a risk of detection;
    b. They all involved sexual touching; and,
    c. A number of the offences (6) involved touching while the complainants were in bed at night.

14. The Crown gave notice that it would seek to adduce evidence from each complainant and from other women as "tendency evidence". The uncharged tendency evidence came from two sources: women who, as children, were subjected to indecent touching from the appellant when in his care or at his

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[7] Examples are where a parolee is seeking to establish that he or she is not 'dangerous', in defamation proceedings where the defence of justification is pleaded (i.e. the story printed about a celebrity describing them as being vain and obsessed with their appearance is true because of their penchant for obtaining plastic surgery).
[8] *Hughes v The Queen* [2017] HCATrans 016 per Kiefel CJ and Bell J at p 42

home (the child tendency witnesses); and women, who as adults employed to work in the costume department on the set of 'Hey Dad', asserted that they had been indecently touched or were subjected to indecent behaviour by the appellant (the workplace tendency witnesses). (Again, these are set out in the attached table in their respective categories.)

15. A detailed explanation of the tendency notice prepared by the Crown pursuant to section 97(1)(a) can be found in the judgment of Nettle J in *Hughes*. For the purposes of this paper, it is sufficient to summarise the tendencies of the appellant that the Crown sought to prove as including:
    a. The appellant having a sexual interest in female children under the age of 16 years; and,
    b. The appellant using his relationships to obtain access to female children in order to engage in sexual activities with them.

16. The appellant, applying for an order for separate trials, challenged the admissibility of the tendency evidence on the basis that it lacked sufficient similarity to the charged conduct 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. Specifically, he found that the tendency evidence:
    a. Was still of significant probative value despite the fact that the alleged sexual acts were not identical because they were still capable of establishing that the appellant had a sexual interest in young female children; and,
    b. Established that the accused had a tendency to orchestrate or arrange the circumstances in which the sexual activities occurred, and that he would take advantage of situations that arose where he came into contact with young female children.

17. His Honour ruled that the evidence in counts 1-10 was admissible as tendency evidence in the case of each count therein, as was the evidence from the child tendency witnesses. The evidence of the workplace tendency witnesses was admissible only with respect to Count 11, which itself was not admissible in the cases for counts 1-10.

18. The jury returned verdicts of guilty counts 1-9 and 11. It was unable to reach a verdict with respect to count 10 and was discharged. The appellant was

sentenced to an overall sentence of imprisonment of 10 years and 9 months, with a non-parole period of 6 years.

Court of Criminal Appeal

19. The appellant appealed to the NSW Court of Criminal Appeal against conviction and sentence. A number of grounds were agitated with respect to the conviction appeal, only some of which concern tendency evidence, the degree of similarity and the meaning of significant probative value. The appellant's argument on those questions was simply that the tendency evidence did not possess 'significant probative value' and relied on the Victorian CCA 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".[9]

20. Beazley P, Schmidt and Button JJ declined to follow *Velkoski* and instead held that, consistently with the line of NSW authority[10], there is no requirement that the purported evidence of tendency display similar features to the charged conduct. They noted that the language of the VSCA in *Velkoski* was reminiscent of the common law relating to similar fact evidence and failed to recognize that Part 3.6 and section 97 make no reference to the need for a 'pattern of conduct' or 'underlying unity' etc and there was no basis for the reliance on those terms to the extent urged by the appellant.

21. Instead, the NSW CCA found that the evidence must demonstrate that the accused had a tendency to act or think in a particular way, following which the question the Court must focus upon is whether or not that evidence has 'significant probative value'. The NSW CCA noted, however, that the nature and extent of any similarity is still relevant to that question – but is not determinative.

22. They went on to conclude that the evidence of tendency had been rightly admitted by Zahra DCJ. Specifically, they found that notwithstanding that the various acts were different in some respects, there was still some similarity: the conduct was sexual in nature, directed towards young females and

[9] *Velkoski v The Queen* [2014] VSCA 121 at [3].
[10] 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.

occurred on occasions that afforded the appellant the opportunity to act opportunistically. Accordingly, the evidence was of significant probative value and satisfied the condition of admissibility pursuant to section 97(1)(b).

High Court

23. The issues identified in the Notice of Appeal were expressed in the form of the following questions by the appellant:
    a. How similar should tendency evidence be to the charged act before it can be found to have significant probative value pursuant to s.97 of the Act?
    b. Can tendency evidence be said to have significant probative value if it is dissimilar to and occurred in dissimilar circumstances to the charged acts?
    c. In such circumstances is it necessary to establish an underlying unity, a pattern of conduct or a modus operandi in order to find that tendency evidence has significant probative value?
    d. Is evidence of a tendency to "act on sexual attraction to girls under the age of sixteen" in an opportunistic fashion sufficiently specific to reach the threshold of significant probative value for s.97?
    e. If tendency evidence can be said to prove no more than a disposition to commit the offences in question, can that evidence have significant probative value?

24. These questions were taken from the written submissions of counsel for the appellant which can be found on the High Court website (at least as at the time of writing). The appellants argument with respect to these questions was that the NSW CCA:
    a. Set the standard of admissibility for tendency evidence too low by removing any requirement of specificity or similarity;
    b. Gave insufficient weight to the statutory requirement that the evidence not only be relevant but be of "significant probative value"; and,
    c. Gave little or no guidance as to exactly how potential tendency evidence gathers its probative force where it is constituted by evidence of dissimilar acts carried out in dissimilar circumstances.

25. Unsurprisingly, the Crown's position was that the NSW CCA decision was correct. It is noted that the Victorian DPP intervened in the proceedings given that one specific issue to be determined by the Court was the conflict between *Velkoski* (the Victorian CCA) and *Hughes* (the NSW CCA).

26. Despite the list of questions outlined by the appellant (and set out above at 23), the majority (Kiefel CJ, Bell, Keane and Edeman JJ) neatly articulated in the second paragraph of their judgment that the issue to be determined could be synthesized to 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.

27. The short answer to this question was 'yes'. The tendency evidence was imbued with significant probative value not because the sexual acts as between the complainants and tendency witnesses were identical or sufficiently similar, but because:

> "*the unusual interactions which the appellant was alleged to have pursued involved courted a substantial risk of discovery by friends, family members, workmates or even casual passers-by*."

28. 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. 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 given that the fact in issue was whether or not the conduct 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."*

29. The majority found that the test in section 97(1)(b) as to significant probative value was as set out in the NSW CCA line of authority (not *Velkoski*), specifically *Ford*:

"*the disputed evidence (alone or in combination with other evidence) should make more likely, to a significant extent, the facts that make up the elements of the offence charged."*[11]

30. With respect to *Velkoski*, the majority found that the analysis of the Victorian Court of Criminal Appeal proceeded 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 that 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 similar in the acts which evidence it*."[12]

31. The majority found that, nonetheless, similarity between the conduct evidencing the tendency and the offence *may be* determinative of 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. They gave two examples:
    a. Where the fact in issue is identity, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence; and
    b. Where the issue is whether or not offences of child sexual abuse occurred at all (i.e it will be asserted that the complaint is fabricated, false or mistaken), the similarity of the conduct evidencing the tendency and the offence/s may not be a consideration.

32. Helpfully, the majority outlined a two-step process for determining whether or not the proposed tendency evidence has 'significant probative value' and meets the criteria in section 97(1)(b):
    a. Firstly: To what extent does the evidence support the tendency? and,
    b. Secondly: To what extent does the tendency make more likely the facts making up the charge (i.e. the facts in issue)?

33. There are six key, overarching propositions to take away from the majority decision:
    a. That the probative value of tendency evidence will vary depending upon the issue that it is adduced to prove;

[11] *R v Ford* [2009] NSWCCA 306
[12] Note 2 per Kiefel CJ, Bell, Keane and Edelman JJ

b. The degree of particularity of the tendency, and its capacity to affect the rational assessment of facts in issue, will depend upon a consideration of the particular circumstances of the case;
c. The admissibility of tendency evidence does not depend on the assessment of any operative features of similarity with the conduct in issue;
d. Although there are dangers in focusing on labels such as 'underlying unity', 'pattern of conduct' or 'modus operandi', nonetheless conduct of the kind embraced by those labels may have significant probative value;
e. However, significant probative value may be demonstrated in other ways; and,
f. Tendency evidence is likely to possess a high degree of probative value where the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and the tendency strongly supports the proof of a fact in issue that makes up the offence charged.

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31 July 2017