HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

TL
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for publication on the internet

1 These submissions are in a form suitable for publication on the internet.

Part II: Concise statement of the issues on appeal

2 Whether tendency evidence can have significant probative value as required by s 97(1)(b) of the *Evidence Act 1995* (NSW) (**Evidence Act**) where it is adduced to prove the identity of the person who committed a known offence but where the tendency evidence lacks "close similarity" with the charged offence, or whether the requirement for "close similarity" only arises when the tendency evidence is the only or predominant evidence that goes to identity.

3 Whether the New South Wales Court of Criminal Appeal misapplied the principle articulated by this Court in *Hughes v The Queen* (2017) 263 CLR 338 (***Hughes***) at [39] by holding (at CCA [207]) that:

(a) "the requirement for close similarity should arise when the tendency evidence is the only or predominant evidence that goes to identity"; and

(b) "their Honours [in *Hughes*] allowed for exceptions" and that "[t]his case falls into that class of exceptions."

Part III: Notice under s 78B of the *Judiciary Act 1903* (Cth)

4 The appellant does not consider that any notice should be given under s 78B of the *Judiciary Act 1903* (Cth).

Parts IV: Citation of the judgment of the court below

5 The medium neutral citation for the reasons of the Court of Criminal Appeal of the Supreme Court of New South Wales (**CCA**) is *TL v R* [2020] NSWCCA 265.

Part V: Statement of the relevant facts

6 On 18 April 2017, the appellant was arraigned on an indictment charging that he "on 21 April 2014, at Coffs Harbour in the State of New South Wales, did murder [TM]". The trial before Latham J and a jury took place between 19 April 2017 and 19 May 2017. The jury returned a verdict of guilty of murder. On 5 June 2017, Latham J sentenced the appellant to a term of imprisonment, comprising a non-parole period of
10 27 years, expiring 30 April 2041, with a balance of term of 9 years, expiring 30 April 2050: *R v TL* [2017] NSWSC 715.

7 'TM' was the designated pseudonym for the deceased child who died on 21 April 2014 in Coffs Harbour Hospital. Immediately prior to her admission to hospital she had been residing with the appellant and her mother, who was identified as 'MW'. MW and the appellant were in a de facto relationship. On occasions, the appellant's then 14-year-old nephew, 'DM', stayed with the appellant and MW in their unit. DM was at the unit on the evening of 20 April 2014.

8 On 20 April 2014, MW had been out with TM and returned to their unit in the early evening. Shortly thereafter, MW and DM left the unit to go purchase dinner at a fast-
20 food outlet. On their return, the appellant reported that the child had vomited, and it was noted that she was limp. The appellant and DM then immediately took the child to the emergency department at Coffs Harbour Hospital. A series of procedures were carried out without success and TM was pronounced deceased in the early hours of 21 April 2014.

9 It was not in dispute by the conclusion of the trial that the cause of TM's death was blunt force trauma to her abdomen. The Crown relied on grievous bodily harm. The Crown case was that the injury that directly led to the death of TM had been caused by the appellant when he was solely in charge of her while the others were away getting the food. The injury could have been caused by either MW or DM. There is
30 no dispute, as the CCA recorded (at [215]), that "there were only three possible

suspects, the [appellant], MW and DM". The appellant when interviewed by the police immediately denied assaulting TM. He gave evidence in the trial and denied causing any blunt force trauma to TM.

10 The single issue at trial was ultimately whether the Crown had proved beyond reasonable doubt that the person who had inflicted the blunt force trauma to the abdomen of TM that caused her death was the appellant, and his intent at the time.

The tendency evidence and rulings

11 The Crown relied on an amended tendency notice dated 19 March 2017, seeking to adduce tendency evidence in accordance with s 97 of the Evidence Act. The evidence
10 the subject of the tendency notice was described by the trial judge in the summing up (CAB 41) as evidence suggesting "that the accused was responsible for placing the child in hot water on the morning of 10 April which resulted in burns to the sides of the child's feet and buttocks" and that "these burns were not accidentally sustained". The Crown's amended tendency notice in respect of this evidence stated that:

(a) The person whose "tendency" was the subject of the evidence sought to be adduced was the accused.

(b) The tendency sought to be proved was the accused's tendency to act in a particular way, namely to "deliberately inflict physical harm on the child" who is referred to as TM.

20 (c) The substance of the tendency evidence the Crown intended to adduce was contained in a folder of documents comprising transcripts of interview with lay witnesses, expert evidence, and photographs.

12 On 19 April 2017, the trial judge ruled on the admission of the evidence subject to the Crown's tendency notice: *R v TL* [2017] NSWSC 426 (CAB 5). In admitting the tendency evidence, Latham J:

(a) described the tendency evidence subject to the notice as evidence of "the infliction of burns to the feet and buttocks" of TM from hot water which occurred when the appellant was giving the child a bath (at [24]); and

(b) identified the "principal issue at trial" as "whether the injuries consistent with blunt force trauma to the abdomen were inflicted by the accused and with the requisite intent, namely, to cause at least serious bodily harm to the deceased" (at [20]).

13 On 1 May 2017, the trial judge made a further ruling on the admission of tendency evidence (CAB 14-16). The further tendency evidence was identified in the Crown's hearsay notice but was not the subject of a separate tendency notice. Despite the absence of a separate tendency notice, the trial judge did not insist on compliance with s 97(1)(a) of the Evidence Act for the further pieces of tendency evidence. In the trial judge's summing up, her Honour identified the three further pieces of tendency evidence as follows (CAB 40-41):

(a) In late March 2014, "Ms Sipple noticed a bruise on TM's arm, and on asking the child, "What happened to your arm", TM said, "TL did it, TL hurt me"."

The CCA (at [50] and [234]) summarised this evidence by reference to parts of the transcript. In giving this evidence, Ms Sipple needed to have her memory refreshed. The trial judge gave the Crown leave to do so by reference to Ms Sipple's statement to Police (T515.48). Upon referring to her statement, Ms Sipple agreed with the proposition that "you said to TM, 'TM, what happened to your arm?' and TM said, 'TL did it. TL hurt me'" (T516.34-35). Following this, Ms Sipple gave evidence that she asked TM, "[w]hen did he hurt you?" but TM did not answer her question and "she went off and played". When asked again by the Crown, Ms Sipple agreed that "she wouldn't talk to you about it" (T516.38-46).

(b) "TM complained to her mother on 10 April 2014 that the accused had hurt her neck again, and that comes from exhibit K, the text message."

The CCA (at [13] and [232]) also summarised this evidence by reference to parts of the transcript recording MW's examination in chief (at T312-313). Relevantly, at 7.25 am on the morning of 10 April 2014, MW said in a text message to the appellant, "TM just came in telling me you hurt her neck again." When asked by the Crown, "[w]hat was it that TM told you?", MW said "I can't remember her telling me that, so I'm not sure" (T312.45-46)".

Further, when asked whether "TM said anything to you on any occasion before 10 April 2014 about being hurt by TL?", MW responded "No, there was one time that she did say to me, "TL no hurt her" (T313.10-15).

(c) "TM disclosed to Lee-ann [W] in the weeks prior to Easter that the accused had previously punched her in the face when she was naughty."

An extract of parts of the transcript of this evidence appears in the CCA's reasons at [52]. The context around this evidence reveals that TM made the statement to Ms W (her grandmother) when "we were playing ring-a-ring-a-rosy" (T524), and that after TM said, "I'll punch you like TL punches me", she then "pretended to punch herself" before going "back to playing".

14 In ruling to admit the further tendency evidence, Latham J said (CAB 15-16): "the origin of the bruising is sought to be explained by the Crown as consistent with the tendency already alleged against the accused to behave towards the child in an inappropriately physical and violent fashion. In those circumstances, it seems to me that the probative value of this evidence is not insignificant." Her Honour's description of the purpose of the tendency evidence in the ruling differed from what the Crown alleged in the amended tendency notice and what her Honour ultimately said in summing up – that the purpose of the evidence "was to support a finding that the accused" had a tendency to deliberately inflict physical harm on the child (CAB 41).

15 As the CCA observed (at [235]), "[t]hese three pieces of evidence, together with the evidence of the incident in the bath, comprised the tendency evidence relied upon by the Crown in the trial."

Part VI: The appellant's argument on the ground of appeal

16 In the present case, where the principal issue at trial was whether the Crown had proved beyond reasonable doubt the identity of the offender, none of the tendency evidence which the Crown adduced had significant probative value for the purposes s 97(1)(b) of the Evidence Act. The trial judge erred in admitting the tendency evidence. The CCA erred in dismissing the appellant's challenge to the trial judge's rulings on the basis that the statement of principle in *Hughes* (at [39]), concerning the

need for "close similarity" where tendency evidence is adduced to prove identity, did not apply in this case. The CCA (at [207]) incorrectly held that "the requirement for close similarity should only arise when the tendency evidence is the only or predominant evidence that goes to identity", and that "a class of exceptions" exist where there is evidence that only limited persons had the opportunity to commit the offence.

17 As this Court (per curiam) said in *R v Bauer* (2018) 266 CLR 56 (***Bauer***) at [61], "[t]he question of whether tendency evidence is of significant probative value is one to which there can only ever be one correct answer". And, on appeal, "it is for the court itself to determine whether evidence is of significant probative value, as opposed to deciding whether it was open to the trial judge to conclude that it was" (*Bauer* at [61]). In doing so, "the open-textured, evaluative task remains one for the court to undertake by application of the same well-known principles of logic and human experience as are used in an assessment of whether evidence is relevant" (*Hughes* at [42]). In *Hughes*, the majority (at [41]) stated that:

> The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters. 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.

18 In summary, for the following substantive reasons (which are developed in greater detail in the submissions hereunder), the tendency evidence in this case did not have "significant probative value" for the purposes of s 97(1)(b) of the Evidence Act:

(a) In criminal cases where proof of the identity of the offender is the central issue, "close similarity" between the asserted tendency and the charged offence is necessary to give the tendency evidence significant probative value. The principled reason for this is that, to have significant probative value, the asserted tendency must be able to specifically identify the accused from other potential perpetrators of the charged offence. For tendency evidence logically to do so in an identity case, the evidence requires "close similarity" with the charged offence or at least some other logically significant feature which "strongly supports" (*Hughes* at [41]) proof of the fact in issue – namely, the identification of the offender from the pool of potential perpetrators.

(b) Where the alleged tendency (as pleaded in the tendency notice given under s 97(1)(a) of the Evidence Act) is formulated in board and generalised terms, as it was in this case, proof of the asserted tendency cannot be significantly probative in identifying the offender for a known offence. This is because the probative value of tendency evidence adduced to prove identity depends on its ability to identify the accused from other potential perpetrators of the charged offence. An alleged tendency formulated in generalised terms (such as a "tendency to inflict deliberate physical harm" on the victim), even if proven, cannot identify the accused from other potential perpetrators where it could not be reasoned that the accused was the only person in the pool of potential perpetrators to have such a tendency. This inability to specifically identify the offender against the pool of potential perpetrators is what denies tendency evidence adduced to prove a generalised tendency significant probative value in an identity case such as the present, and which thereby fails on the second step of the two-part assessment articulated in *Hughes* at [41].

(c) The tendency evidence in this case comprised evidence of a single act (the burns from the bath) and three pieces of evidence of hearsay statements about acts (the bruise and punch). On the proper application of the holding in *IMM v The Queen* (2016) 259 CLR 300 (***IMM***), the evidence of statements abouts acts, taken at their highest, did not give the tendency evidence in this case significant probative value for the purposes of the two-part assessment articulated in *Hughes* at [41]. Moreover, the statements about acts taken at their highest disclosed no "close similarity" with the charged offence. In the circumstances, the evidence of statements about acts did not strongly support proof of the asserted tendency and did not strongly support the identification of the appellant as the offender.

(d) On the correct application of these principles, the reasoning in *Hughes* (at [39]) applies in this case without exception. Therefore, the tendency evidence adduced by the Crown does not have significant probative value once it is accepted that the injuries suffered "were different in nature and degree" (CCA [195]) from the tendency alleged, and where the asserted tendency was not necessarily unique to the appellant only and therefore could not identify him specifically as the offender.

Identity cases and the need for close similarity

19 In *Hughes* (at [39]), the majority (Kiefel CJ, Bell, Keane and Edelman JJ) observed that s 97(1) of the Evidence Act does not "condition the admission of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue." However, the majority reasoned that "[i]n criminal proceedings where it is adduced to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence."

20 This statement of principle applies by reference to the conceptual dichotomy acknowledged by the CCA (at [196]) concerning the "difference between proof of the commission of an offence and proof of the identity of the person who committed a proven offence when considering the admission of similar fact evidence at common law and evidence of tendency and coincidence under the Act." The majority's statement in *Hughes* (at [39]) concerning the requirement for "close similarity" in identity cases also reflects longstanding authority and the logical function of tendency evidence where it is adduced to prove the identity of an offender for a known offence.

21 Despite what Campbell J in *R v Green (No 9)* [2021] NSWSC 1318 (***Green***) at [31] described as the "strong statement from the High Court [in] (*Hughes* at [39])" about the requirement for "close similarity" in identity cases, intermediate appellate courts as well as lower courts have diverged in their approach to the assessment of probative value in such cases under s 97(1)(b), and to the application of the principle in *Hughes* at [39] more generally.[1] Rulings such as *Green* illustrate that divergence of principle has accelerated since the CCA's decision in this case.

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[1] See, for example, *R v Warwick (No.2)* [2017] NSWSC 1225; *Ilievski v R; Nolan v R* [2018] NSWCCA 164; *R v Bromley* [2018] SASCFC 41; *Davey v Miller* (2018) 330 FLR 367; *Brown v Tasmania* (2019) 31 Tas R 288; *Brendan Davies v R* [2019] VSCA 66; *Edward Dempsey (a pseudonym) [1] v The Queen* [2019] VSCA 224; *R v Hammond* [2019] VSC 135; *R v Johnson (No 2)* [2019] NSWSC 144; *R v Ralston* [2019] ACTSC 120; *The Queen v Dixon-Hargraves* [2019] NTSC 29; *The State of Western Australia v Edwards* [2019] WASC 87; *R v Kaddour* [2019] NSWDC 243; *R v Cresnar* [2019] NSWDC 625; *Vagg v R* [2020] NSWCCA 134; *Rollond v The Queen* (2020) 137 SASR 519; *Brodie Larsen (a pseudonym) v The Queen* [2020] VSCA 335; *DPP v Dixon & Ors (Ruling No 1)* [2020] VSC 743; *R v WBN* (2020) 286 A Crim R 323; *R v Al Batat & Ors (No 12)* [2020] NSWSC 1129; *The Queen v Cusack* [2020] NTSC 55; *The Queen v Faustmann* [2020] NTSC 8; *R v UD; R v TF* [2020] ACTSC 45; *R v Green (No 9)* [2021] NSWSC 1318; *The Queen v Lewis* [2021] NTSC 40; *Director of Public Prosecutions v Smith (Ruling No. 2)* [2021] VCC 1545; *R v Coskun* [2022] NSWSC 149.

22 Notwithstanding the divergence that has emerged, the following authorities reflect the correct and principled approach based on the reasoning in *Hughes* at [39], and explain the underlying logic as to why "close similarity" is required in identity cases.

23 In *Bryant v R* (2011) 205 A Crim R 531, Howie J observed (at [79]) that:

> I am not sure that the matters listed in 1 to 7 above would be sufficiently unusual to give rise to coincidence evidence of sufficient probative value to justify its admission under s 98. They do not give rise to a particularly unique manner of committing an armed robbery on premises that are obviously prone to such an offence and they do not take into account the break and enter offences. Nor I am sure that taken together they are significantly probative that the accused had a tendency to act in a particular way, apart from being a thief. **Tendency evidence itself will rarely have sufficient probative value to *identify* a person as a particular offender**. A good example of the difference between coincidence and tendency evidence in its capacity to identify a particular person as the offender in the commission of a particular offence is *O'Keefe v R* [2009] NSWCCA 121. (Emphasis added.)

24 In *O'Keefe v R* [2009] NSWCCA 121 (***O'Keefe***), Howie J (McColl JA and Grove J agreeing) said the following (at [55], [59]):

> [55] Ultimately it was a circumstantial case against the applicant in relation to the counts against JG, subject to what the jury might make of the admissions allegedly made by the applicant. That is a matter to which I shall return shortly. **But the jury would have to be satisfied that there was no reasonable possibility that it was some person other than the applicant who attacked JG**. Unless the Judge determined what other evidence there was, if any, that the prosecution could rely upon to identify the appellant as the attacker of JG and the probative value of that evidence, it was no answer to the prejudice arising from the admission of the evidence that the tendency evidence was not itself sufficient to give rise to a conviction on counts 7 to 11. If the other evidence had little probative value by itself, then the likelihood was that the prejudicial aspect of the tendency evidence would still outweigh the combined probative value of the tendency evidence and the other evidence in the prosecution case.
>
> [59] The Crown points out, rightly, that the admissibility of tendency evidence cannot be considered in a vacuum. The decision whether to admit the evidence must be considered in light of the other evidence relied upon by the Crown to prove that the accused was the person who attacked JG. **If the tendency identified stood alone in *identifying* the appellant as the offender in the JG offences, it would have to be sufficiently peculiar or singular to amount to what has been described as a "hallmark" or "signature" of the appellant such that it would offend common sense to exclude it**. (Emphasis added.)

25 The case of *Sutton v The Queen* (1984) 152 CLR 528 (***Sutton***) supports this principled approach for requiring close similarity in identity cases. In *Sutton*, Gibbs CJ (at 535)

referred with approval to the proposition that, where propensity evidence is used to identify the offender, "[t]he similarity must after all be capable of *identifying the actor* in the other incidents with the accused. This is best achieved by showing a *shared and significant deviation from the common norm for criminal acts of that type*" (emphasis added), or that the evidence demonstrates something more than the "stock in trade" of persons who commit a particular kind of offence. Although these statements pre-date s 97(1)(b) of the Evidence Act, the applicable logic underpinning the principle remains forceful and aligns with the second part of the two-step assessment endorsed in *Hughes* (at [41]) – that tendency evidence is likely to have "a high degree of probative value where … (ii) the tendency strongly supports the proof of a fact that makes up the offence charged." Where the fact in issue is the identity of the offender for a known offence then the tendency evidence must be significantly probative in its capacity to *identify* "the actor in the other incidents with the accused" (*Sutton* at 535) by logically differentiating to a significant extent the accused from other possible perpetrators of the relevant offence.

26 In this context, the requirement for close similarity arises because the specific function of the tendency evidence was only to identify the offender. Logically, this can only be achieved to a significant or high degree of probability through close similarity between the tendency and the charged offence. Only in this way can the logic of tendency reasoning operate to "rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent" (*Hughes* at [16]; *IMM* at [46]). Expressed another way, the principled reason for requiring "close similarity" in identity cases is because it provides the "logically significant connection" (*Hughes* at [158] per Nettle J) between the asserted tendency and the charged offence which "strongly supports" proof of the relevant fact in issue – namely, the *identification* of the specific offender from other possible perpetrators.

27 This understanding of why close similarity is required in identity cases is reflected in Bathurst CJ's reasoning in *Ilievski v The Queen; Nolan v The Queen* [2018] NSWCCA 164. In finding the tendency evidence in that case inadmissible, Bathurst CJ said the following at [104] and [106] – [107]:

> [104] It is important to bear in mind that the evidence is not relied upon as coincidence evidence. The fact that the three accused committed an armed robbery in **circumstances which might be said to be common to armed robberies,** such as

> using dangerous weapons, threatening staff, wearing disguises, using a high-performance luxury motor vehicle and dumping it after the robbery, whether in a carpark as in the robbery in 2003 or as alleged in the present case, in a public street, does not establish a tendency to commit armed robberies to the standard required by s 97(1)(b).
>
> …
>
> [106] … As the majority pointed out in *Hughes* at [39], the probative value of tendency evidence which is used to prove the identity of an offender for a known offence will "almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence". The fact that the three accused on one prior occasion committed an armed robbery together in somewhat similar circumstances to the robbery for which the applicants were charged does not give rise to a tendency having significant probative value **where the similar features could be said to be common to many bank robberies**.
>
> [107] As Nettle J stated in *Hughes* at [154], to "make evidence of previous offending or misconduct significantly probative of a subsequent offence there needs to be something more about the nature of the offences or the circumstances of the offending in each case … which rationally affects to some significant degree the assessment of the probability that the accused committed the offence". I do not think that the fact that the three accused had committed the robbery in 2003 together is an additional fact which gave the evidence significant probative value as tendency evidence. **The difficulty is highlighted by the fact that, as the applicants pointed out, a tendency notice was issued against Mr Kwu stating that he had tendency to commit armed robberies with persons other than the applicants**.
>
> (Emphasis added.)

28 These observations highlight why the conceptual distinction between cases concerning proof of the commission of an offence and cases concerning proof of the identity of the person who committed a known offence is important when it comes to the assessment of "significant probative value" under s 97(1)(b) of the Evidence Act. And why in the latter category of cases the principle in *Hughes* (at [39]) applies without exception to require "close similarity" between the tendency and the charged offence in order for the evidence to have significant probative value. In particular, the requirement for close similarity (or a cognate formulation) reflects the logical need for the tendency evidence to be significantly probative in *identifying* a specific offender for a particular offence based on tendency reasoning. A high degree of similarity is especially important where, as in many identity cases, the tendencies of other potential perpetrators is unknown, or where the existence of the asserted

tendency is equally plausible amongst other potential perpetrators (perhaps because of the generalised nature of the alleged tendency).

29 Applied to this case, the above analysis of principle establishes the CCA's error in rejecting the requirement for close similarity and instead creating "a class of exceptions" in which this case is said to fall (at CCA [207]). Understood against the authorities outlined above, the CCA lacked a principled basis for holding that this case fell within a "a class of exceptions" simply because there was other circumstantial evidence which established that only three persons had the opportunity to commit the offence.

10 30 The evidence of opportunity could not, and did not, logically give the tendency evidence a high degree of probative value by "strongly support[ing] the proof of a fact that makes up the offence charged" – relevantly, the identity of the offender. Rather, the circumstantial evidence going to opportunity only established the pool of potential perpetrators (three people in this case). Without more, the evidence relevant only to opportunity did not give the tendency evidence significant probative value. This is because once the opportunity evidence established the pool of potential perpetrators it exhausted its identification function. It was then logically incapable of specifically identifying the accused as the offender from the other two persons in the pool. In that context, the probative value of the tendency evidence would need to be
20 derived from its ability as tendency evidence to separate (and therefore identify) the accused from the other two persons who had the opportunity. By lacking close similarity, the tendency evidence in this case could not do so to a logically significant degree as required by s 97(1)(b) of the Evidence Act.

Generality of the asserted tendency

31 According to the Crown's amended tendency notice, the burns evidence was adduced to prove that the accused had a tendency to act in a particular way, namely to "deliberately inflict physical harm on the child". This generalised and broadly formulated tendency combined with the lack of close similarity between the asserted tendency and the charged offence in this case further denied the tendency evidence
30 significant probative value. A generalised tendency formulated in this way was not capable, as tendency evidence, of separating in a logically significant way (and,

therefore, specifically *identifying*) the accused as the particular offender from the other two persons established by the circumstantial evidence as having the opportunity to commit the offence.

32 In *Hughes* (at [105]), Gageler J emphasised the importance of particularity in the tendency notice and observed that the notice "provides the court, at the critical time of assessing the admissibility of tendency evidence, with a statement of the particular tendency which the party seeking to adduce the tendency evidence seeks to prove by it." His Honour added that "[b]y identifying the particular tendency that the evidence is asserted to prove, the notice allows the court to evaluate the strength of the connection between the evidence and the tendency and the strength of the connection between the tendency and the fact in issue."

33 Moreover, a deficient notice can disable the court from performing the assessment of probative value as well as the evaluation of probative value against any prejudice which the accused may suffer as required by s 101 of the Evidence Act (see *El-Haddad v The Queen* (2015) 88 NSWLR 93 at [56] per Leeming JA, McCallum and RA Hulme JJ agreeing).

34 Similarly, Nettle J in *Hughes* (at [154]) said that the assessment of significant probative value for a particular count charged "is not an exercise that may properly be undertaken by an analysis expressed in broad generalities. It requires precise particularisation of each tendency alleged and logical analysis of why the alleged tendency, if proved, would have significant probative value in relation to a fact in issue in respect of the count under consideration." As noted above, the fact in issue here was identity. And the assessment of probative value turns on whether the tendency evidence strongly supports proof of the tendency asserted in the tendency notice, and whether the tendency is significantly probative in identifying the accused as against the two other persons who had the opportunity to commit the offence.

35 The ultimate difficulty for the respondent which emerges from this course of reasoning is illustrated by Gageler J's statement in *Hughes* (at [109]) where his Honour said:

> [109] A grown man does not normally have a sexual interest in female children less than 16 years of age. A tendency to have such a sexual interest and to engage in

> sexual activities with female children less than 16 years of age, opportunistically or at all, is so abnormal as to allow it to be said that a man shown to have such a tendency is a man who is more likely than other men to have engaged in a particular sexual activity with a particular female child on a particular occasion. **Yet the problem is this: how much more likely is not easy to tell, in part because common experience provides no sure guide, and the abhorrence any normal person naturally feels for such a tendency highlights the risk that any subjective estimation of the likelihood will be greater than is objectively warranted**. (Emphasis added.)

10 36 Although these observations appeared in a context where identity was not in issue, the reasoning concerning the assessment of the probative value of tendency evidence applies equally in this case. This is because, even if the burns evidence strongly supports proof of the asserted tendency (to deliberately inflict physical harm on the child), proof of that generalised tendency does not say "how much more likely" that the accused was the person who committed the offence in question so as to significantly inculpate him in particular as against two other persons who also had the opportunity and who might also have had such a general tendency.

37 In short, the difficulty for the Crown here is that (once the principled reason for requiring close similarity in identity cases is appreciated) the tendency asserted in the
20 amended tendency notice does not have significant probative value because it cannot satisfy the second part of the analysis required by *Hughes* at [41]. Proof of such a tendency on the part of the accused is not significantly probative in identifying him as against two other persons who could also have had the same tendency, and where the asserted tendency establishes no "shared and significant deviation from the common norm for criminal acts of that type" (*Sutton* at 535).

38 Although the prosecution in this case suggested that the existence of the asserted tendency on the part of the accused made his guilty more likely, the Crown never sought to neutralise or disprove the existence of the same tendency on the part of the other two persons in the pool. In these circumstances, the generalised tendency
30 alleged in this case, combined with the principled reasons for requiring close similarity between the tendency and the charged offence, deprived the tendency evidence of significant probative value.

39 The asserted tendency in this case ultimately attracts the criticism made by the majority in *Hughes* at [64], that "[a] tendency expressed at a high level of generality

might mean that all the tendency evidence provides significant support for that tendency. But it will also mean that the tendency cannot establish anything more than relevance." (See also *R v Nassif* [2004] NSWCCA 433 at [51]; *O'Keefe* at [60].)

40 Distilling these propositions into the present case, the tendency evidence did not have significant probative value because the asserted tendency was so general that it could not, as a matter of common experience or logic, exclude to a high degree of probability either of the two other persons who also had the opportunity to commit the offence.

Tendency evidence of a single act and evidence of statements about acts

41 The three pieces of evidence comprising statements about acts (outlined above at paragraph [13]) were not covered by the Crown's amended tendency notice. However, the effect of the Crown's case in closing and the trial judge's ruling and summing up was that the Crown was permitted to deploy that evidence against the appellant for the same tendency purpose as articulated in the amended tendency notice concerning the evidence of the burns.

42 In assessing the probative value of the tendency evidence of the statements about acts, the CCA (at [276]) reasoned in conclusion that:

> [276] …the combination of this evidence and the fact that there were only three persons who could have committed the offence gives to this evidence significant probative value. This is because it is capable of separating the applicant from the other two persons and identifies him as the perpetrator of the crime. The impugned evidence taken at its highest does indicate a tendency to act violently towards TM and if accepted by the jury, was capable of identifying the applicant as the person responsible for TM's death.

43 The correct application of the principle in *IMM* (at [40]) along with the assessment of the tendency evidence required by the reasoning in *Hughes* (at [39] – [41]) reveals that the evidence of statements about acts lacked significant probative value.

44 In *IMM* at [40], the majority said that:

> The assessment of "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue" requires that the possible use to which the evidence might be put, which is to say how it might be used, be taken at its highest. The definition must be read in the context of the

> provision to which it is applied. For the purposes of s 97(1)(b), the enquiry is whether the probative value of the evidence may be regarded as "significant".

45 This Court affirmed the above statement in *Bauer* at [69]. In the present context, it is also significant that the majority in *IMM* acknowledged (at [50]) that to proceed on the basis that "the jury will accept the evidence taken at its highest, does not distort a finding as to the real probative value of the evidence." And that, "[t]he circumstances surrounding the evidence may indicate that its highest level is not very high at all". This statement has considerable force when applied to the evidence of statements about acts adduced for the tendency purpose relied on by the Crown in this case, particularly for the two-part assessment described in *Hughes* (at [41]).

46 As to the first step in the assessment of probative value, the application of the reasoning in *IMM* (at [40]) does not mean that, at its highest, the evidence of statements about acts strongly supports proof of the asserted tendency to deliberately inflict physical harm on the child. The circumstances surrounding the statements (set out above) disclosed nothing about the appellant's state of mind which could provide a cogent and logical basis to infer that the accused *deliberately* hurt the child on previous occasions. Taking the evidence at its highest in this context does not mean accepting that the evidence will prove whatever the Crown says it will prove, or whatever is asserted in a tendency notice. The real probative value of the three hearsay statements about acts ultimately deployed as tendency evidence does not rise to the level of significant probative value because the evidence fails at the first step of the assessment which requires it to strongly support proof of the asserted tendency.

47 Indeed, the above submission draws support from the Crown's closing address in this case where it was conceded that, "[w]hether she [the child] was talking about a full-on punch or something else, we don't know, but she clearly made reference to the accused hurting her in relation to that evidence" (T810.43-45). The accepted ambiguity of the child's representation means that it could not strongly support any inference of deliberateness. In the circumstances, the real probative value of this evidence could not establish the asserted tendency which, although stated in a generalised way in the notice, at least required the evidence to strongly support deliberate infliction of physical harm by the accused.

48 As to the second step of the assessment, even if the highest use of the evidence of the statements about acts relating to bruising and a punch could support the asserted tendency, for the same reasons as submitted above in relation to the burns, that evidence does not have significant probative value. This is because the evidence of statements about acts did not strongly support the proof of the relevant fact in issue being the identity of the accused as the offender. For this purpose, the evidence of statements about acts had even less probative value than the burns evidence because of its lack of precision in nominating any particular conduct or state of mind which could identify the accused as the offender by making it highly probable that he was the one who committed the offence out of the pool of three persons who had the opportunity to do so.

49 For these reasons, the real probative value of the hearsay statements about acts was "not very high at all" and did not reach the level of significant probative value for the purposes of s 97(1)(b). Contrary to the CCA's reasoning (at [276]), the evidence of the statements about acts was not "capable of separating the applicant from the other two persons" – or at least not to the logically significant degree required by s 97(1)(b). In circumstances where a tendency to "deliberately inflict physical harm" could be seen as common to this type of offence, and where the evidence did not disprove the existence of such a tendency on the part of the other two persons, the evidence of the statements about acts did not strongly support the fact in issue (being identity) by making it much more probable that the accused and not the other two persons committed the offence. To satisfy this second step, the evidence needed close similarity.

The tendency evidence did not have significant probative value

50 Against the matters set out above, this Court should find that the tendency evidence adduced in this case did not have significant probative value, and that the CCA erred in finding otherwise. In addition, this Court should hold that the CCA erred in principle by stating that this case fell within a "class of exceptions" because the requirement for "close similarity" articulated by the majority in *Hughes* (at [39]) did not apply as "the requirement for close similarity should arise when the tendency evidence is the only or predominant evidence that goes to identity" (CCA [207]).

51 In view of the principles set out above, the CCA was wrong to hold that:

(a) the tendency evidence of burns had significant probative value because, having regard to the circumstantial evidence concerning opportunity, "it identified the applicant as the offender as against the mother of the child and a 14 year old boy" (CCA [215]); and

(b) in relation to the evidence of bruises and punching, that that evidence "is capable of separating the applicant from the other two persons and identifies him as the perpetrator of the crime" (CCA [276]).

52 The flaw in this reasoning is exposed by Gageler J's statement in *Hughes* at [109] (quoted above) where his Honour noted that the problem with trying to prove a particular offence with a generalised tendency is that "how much more likely is not easy to tell, in part because common experience provides no sure guide". Although that statement appeared in a different context, the underlying logic is powerful and applicable in this case. This is especially so where the Crown relied on (and the CCA accepted) only the circumstantial evidence of opportunity as the factor which gave the tendency evidence significant probative value. Other than the evidence of opportunity, which could only establish the pool of potential perpetrators but not specifically identify anyone in that pool, the tendency evidence was the only evidence directed purely to identifying the accused as the perpetrator.

53 In circumstances where the CCA accepted (at [195]) that "the injuries suffered were different in nature and degree" to the charged offence, the tendency evidence lacked significant probative value because it could not strongly support a finding that the accused committed the offence on the basis that there was a logically significant factor in the asserted tendency which separated him from the two other persons with opportunity.

54 Therefore, in identity cases generally, and this case in particular, the tendency evidence needed to exhibit "close similarity" before it could have significant probative value for the specific purpose of identifying the offender out of a pool of people who had the opportunity to commit the offence. The requirement for close similarity reflects the principled approach to tendency evidence in cases where it is adduced to prove the identity of the offender for a known offence. That principle

should be preferred in recognition that "the dangers of tendency reasoning are greater in cases in which the tendency does not share features of similarity with the conduct in issue" (*Hughes* at [20], referring to a submission made by the appellant in that case).

55 On the correct application of the principle in *Hughes* (at [39]) to this case involving proof of the identity of the offender, the tendency evidence adduced by the Crown lacked closed similarity and did not have significant probative value. The admission of that evidence was in error and the trial miscarried.

Part VII: Orders sought

10 56 The orders sought by the appellant are:

(a) The appeal be allowed.

(b) Order 3 of the New South Wales Court of Criminal Appeal made on 19 October 2020 be set aside and, in place thereof, it be ordered that:

(i) The appeal against conviction be allowed.

(ii) The appellant be retried.

Part VIII: Time required for oral argument

57 The appellant estimates 2.5 hours are required for presentation of oral argument.

Dated: 1 June 2022

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

TL
Appellant

and

THE QUEEN
Respondent

10 **ANNEXURE TO THE SUBMISSIONS OF THE APPELLANT**

List of statutes and statutory instruments referred to in the submissions

1 *Evidence Act 1995* (NSW), s 97 (current compilation).