HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

BETWEEN: **TL**
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

1. This submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

2. Did the NSW Court of Criminal ("CCA") err in concluding that the evidence relied upon by the Crown as tendency evidence has significant probative value.

Part III: Section 78B of the *Judiciary Act*

3. It is certified that this appeal does not raise a constitutional question. The respondent has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). No such notice is required.

Part IV: Statement of contested material facts

4. The respondent does not contest the facts set out in Part V (paras [6]-[10]) of the appellant's written submissions ("AS") except in one important respect: the description of the events of the evening of 20 April 2014 at AS [8] is incomplete and, in some respects, inaccurate. The events of that evening, when the fatal injuries were inflicted upon the victim, and additionally, the extreme nature of those injuries, are critical to a proper understanding of the factual matrix in which the issue of identity arose in this matter and therefore to an assessment of the probative value of the tendency evidence.

Evidence as to the injuries sustained by the victim

5. The victim, TM (aged 2 ½), was taken to Coffs Harbour Hospital at 8.25pm on 20 April 2014 (Easter Sunday). She was unconscious and her presentation was consistent with hypovolaemic blood loss.[1] The victim did not regain consciousness. Despite surgical intervention, TM died at 2.15am the following morning.

6. By the conclusion of the trial, it was not in issue that the victim's death was caused by blunt force trauma to her abdomen.[2] That trauma resulted in (externally) a large area of confluent mottled, recent bruising to the front of her abdomen and (internally) a 12-centimeter tear of the mesentery causing "*rapid and torrential hemorrhage into the abdominal cavity [that] would have had the effect of causing acute hypovolaemic shock due to blood loss.*"[3] The severity of the tear to the mesentery was such that the retroperitoneal blood vessels (the aorta and the inferior vena cava) were exposed.[4] TM also suffered extensive bruising to her small intestine, two lacerations to her liver, and bruising to her anus consistent with the forceful evacuation of faecal matter secondary to pressure from the abdominal injury.[5]

7. The type of very severe trauma seen in the victim is seldom seen in pediatric cases, even in motor vehicle trauma where large forces to the abdomen are observed.[6] The concurring opinion of the expert witnesses who gave evidence on the issue was that the child would have been "*immediately and severely incapacitated*" after the injuries were inflicted. She would not have appeared "*normal*" for any period of time after their infliction.[7]

The events of the evening of 20 April 2014

8. Immediately before her presentation at the hospital on the evening of 20 April 2014, the victim had been at the unit in Karuah Avenue, Coffs Harbour ("the unit")

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[1] *TL v R* [2020] NSWCCA 265 ("CCA Judgment") at [60]; (Core Appeal Book ("CAB") at 114); at [89] (CAB at 124).
[2] CCA judgment at [5] (CAB at 99).
[3] CCA judgment at [88] (CAB at 123-124).
[4] TT 684.1-14 (RFM at 75).
[5] TT 620.20-621.6 (RFM at 39-40); TT 675.40-676.3 (RFM at 66-67); TT 679.44-50 (RFM at 70); TT 681.31-50 (RFM at 72); TT 684.28-30 (RFM at 75).
[6] CCA judgment at [75] (CAB at 119-120); at [91] (CAB at 125).
[7] CCA judgment at [90]-[91] (CAB at 124-125); at [101] (CAB at 127); at [112] (CAB 130).

where she lived with her mother MW, and the appellant. MW had commenced a relationship with the appellant in November 2013. She and the victim moved into the unit with the appellant in February 2014. The appellant's then 14-year-old nephew, DM, stayed overnight at the unit from time to time.[8]

9. The appellant, MW, DM and the victim spent most of 20 April 2014 in the company of the appellant's family at his mother's house. They returned to the unit at approximately 5pm. Shortly thereafter, MW took the victim to visit her mother, LW. At approximately 6pm, MW and the victim returned to the unit. MW gave the victim dinner, which she ate at the table. The appellant and DM were also present. After dinner, the victim was put to bed in her bedroom.[9]

10. The appellant was interviewed by police on two occasions: 21 April 2014 and 1 May 2014. In each interview, he gave a detailed account of having put the victim to bed, together with MW. Nothing unusual was noted about the victim's condition. The appellant said that TM was talking to them, as well as to DM, to whom she said goodnight as she was taken into her bedroom.[10] In contrast, at trial, the appellant gave evidence that MW put the victim to bed. He said that MW was present alone in the bedroom with the victim for three to five minutes before calling him in to say goodnight, after which she was alone with the victim in the bedroom for a further one to two minutes (the appellant having returned to the lounge room where DM was watching TV).[11] The latter one to two minute period, which only arose if the appellant's evidence at trial was accepted, was the only opportunity MW had to be alone with the victim.

11. When interviewed on 21 April 2014, DM told police that he was present at the unit when the victim was put to bed by both the appellant and MW.[12] MW recalled

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[8] CCA judgment at [10] (CAB at 100).
[9] CCA judgment at [17]-[18] (CAB at 103); at [36]-[37] (CAB at 108); at [53] (CAB at 112).
[10] ERISP of Appellant 21 April 2014 Q/A 151-186 (RFM at 108-111); ERISP of the Appellant 1 May 2014 Q/A 185-209 (RFM at 157-159); Q/A 293-294 (RFM at 169); Q/A 316-317 (RFM at 171); Q/A 341 (RFM at 174). MW described TM's condition as the same as how she appeared in a video taken earlier that day (a reference to Trial Exhibit H): CCA judgment at [16] (CAB at 102-103).
[11] Evidence of the Appellant TT 728.8-729.14 (RFM at 227-228); TT 759.1-761.4 (RFM at 252-254).
[12] CCA Judgment at [36] (CAB at 108) referring to the first interview conducted with DM on 21 April 2014. Although in a further interview on 1 May 2014 and in evidence at trial, DM stated that he was not the unit when TM had dinner and was put to bed, as trial counsel for the Appellant noted in his closing address, it was the common position of the parties that DM's account in his first interview was a truthful account: TT 831.43-50.

putting the victim to bed on 20 April 2014 but could not recall if the appellant had helped her.[13]

12. It was not in dispute that immediately after the victim was put to bed, MW and the appellant went to the outside back patio area of the unit where they discussed dinner.[14] The area is immediately adjacent to the victim's bedroom window which was partially open.[15] DM remained on the lounge where he was watching TV. MW nominated the period spent outside discussing dinner as half an hour or less;[16] to police the appellant said it was about 10 to 15 minutes[17] but in evidence said it was just seven minutes.[18] Neither MW nor the appellant heard any sounds coming from the victim's bedroom during that period.[19] This brief period was the only opportunity that DM had to have inflicted the fatal injuries. He denied going into the victim's bedroom at any time that evening.

13. It was not in dispute that between approximately 7.33pm and 7.49pm, MW and DM were absent from the unit, having gone to buy dinner.[20] There was no dispute that the appellant was alone with the victim during that period. Nor was there any dispute that, when MW and DM arrived home, they saw the appellant coming out of the victim's bedroom into the hallway.[21] It was the Crown case that the injury that led to the victim's death was inflicted by the appellant during the period when she was in his sole charge.[22]

14. The appellant gave evidence (both when interviewed and at trial) that he went into the victim's bedroom twice whilst he was alone with her in the unit.[23] The first time he heard her cry, followed by the sound of her doorknob. When he went to check on her, she was standing at the door crying "*like she needed a spew*" and a

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[13] CCA judgment at [18] (CAB at 103).
[14] CCA judgment at [19]-[20] (CAB at 103); ERISP of Appellant 21 April 2014 Q/A 186-187 (RFM at 111).
[15] See Sketch Plan of the unit (Trial Exhibit B) (RFM at 9); Photograph: 60 - General view of child's bed (Part of Trial Exhibit A) (RFM at 15).
[16] CCA judgment at [20] (CAB at 103).
[17] ERISP of Appellant 21 April 2014 Q/A 186-187 (RFM at 111); ERISP of the Appellant 1 May 2014 Q/A 210 (RFM at 159).
[18] Evidence of the Appellant TT 729.10-730.8 (RFM at 228-229); TT 761.8-762.15 (RFM at 254-255).
[19] CCA judgment at [20] (CAB at 103); Evidence of Appellant TT 762.5-10 (RFM at 255).
[20] CCA judgment at [85] (CAB at 122-123); at [141] (CAB 136).
[21] CCA judgment at [21] (CAB at 104); at [142] (CAB at 136).
[22] CCA judgment at [6] (CAB at 99).
[23] CCA judgment at [116]; [120]-[121] (CAB at 130-132); at [132] (CAB at 134); at [142] (CAB at 136).

chunk of vomit or spit landed on his arm. He took her to the toilet where she made gagging noises but "*did not spew at all*", after which she said that she wanted to return to bed. The appellant gave evidence that when he checked on her a second time, the victim was making a "*weeping*" or "*panting*" noise. When asked why, in those circumstances, he closed the door to the victim's bedroom and returned to the lounge room, he said, "*I can't answer that*" and that he did not know why he did not pick her up and take her into the lounge room.[24] The appellant (and MW and DM) then ate dinner in the lounge room, before the appellant went into the victim's bedroom for a third time, this time bringing the victim out of her bedroom into the bathroom where she became "*floppy*". When MW saw the victim, she insisted they take her immediately to hospital.

15. The appellant denied having caused the fatal injuries. When asked if anyone had an opportunity to harm the victim, he nominated MW, DM and himself.[25]

16. MW and DM each denied hurting the victim.[26] There was no evidence that either MW or DM entered the victim's bedroom after they returned to the unit having bought dinner and the appellant did not recall either having done so.[27] MW gave evidence that she did not go and check on the victim because the appellant told her that she was okay.[28] DM denied having gone into the victim's bedroom.[29]

17. Forensic pathologist Dr Cala opined that the injuries were occasioned some time *after* the victim was put to bed. On the assumption that the victim conversed with MW and the appellant as she was put to bed and said "*Good night*" to DM, Dr Cala opined that she was not, at that point, suffering from the injuries he observed at autopsy.[30]

18. Dr Cala gave evidence that, if she had sustained the injuries he observed, it was "*highly unlikely*" that the victim would have been capable of getting out of bed, walking to the bedroom door, playing with the doorknob and standing at the door

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[24] CCA judgment at [143] (CAB at 137).
[25] CCA judgment at [133]-[134] (CAB at 134).
[26] CCA judgment at [32] (CAB at 107).
[27] CCA judgment at [140] (CAB at 136); ERISP of the Appellant 1 May 2014 Q/A 500 (RFM at 191).
[28] CCA judgment at [22] (CAB at 104).
[29] CCA judgment at [44] (CAB at 110).
[30] TT 686.24-687.23 (RFM at 77-78).

while the appellant came and answered it.[31] The significance of that evidence lay in the appellant's account of the victim's condition (standing, fiddling with the door knob and talking to him) when he first went into her bedroom after MW and DM had left the house. If that account were accepted, it necessarily followed that the fatal injuries had not yet been inflicted and they could only have been inflicted by the appellant who, it was not disputed, was the only person to have contact with the victim after MW and DM left to buy dinner.

The tendency evidence

19. Pursuant to an amended notice dated 19 March 2017, the Crown sought to lead as tendency evidence, evidence that was capable of establishing that on 10 April 2014 (ten days before the charged offence) the appellant had deliberately immersed the victim in hot water causing first degree burns to her buttocks and feet and a third degree (or full thickness) burn to the outer aspect of her right foot.[32] The evidence was relied upon as establishing a tendency of the appellant to deliberately inflict physical harm on the victim.[33]

20. There was no dispute that the victim sustained the said burns while in the care of the appellant.[34] The burns to both of the victim's feet blistered, as did an area near the crease of her right thigh.[35] The wounds required daily dressing and it was estimated that they could take eight weeks to heal. At the time of her death, the burns continued to cause the victim pain and discomfort.[36]

21. Photographs of the burns taken by MW on 10 April 2014 show what Dr Christine Norrie, forensic physician, described as "*doughnut sparing*" on the victim's bottom and a "*stocking distribution*" on both feet. The distribution of injuries as well as the absence of apparent burns to the soles of the victim's feet and the absence of splash marks (which are typically seen as a child splashes as they try to get out of the hot water) led Dr Norrie to conclude that the victim had been sat

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[31] TT 687.25-29 (RFM at 78).
[32] CCA judgment at [156]-[159] (CAB at 140-141).
[33] Tendency Notice as amended 19 March 2017 (RFM at 5).
[34] CCA judgment at [156] (CAB at 140).
[35] CCA judgment at [12] (CAB at 100-101); at [31] (CAB at 107).
[36] CCA judgment at [15] (CAB at 102); at [56] (CAB at 113). The state of the burns to the victim's right foot as at 21 April 2014 is depicted in Photographs 20-23 taken on that date (Part of Trial Exhibit A) (RFM at 11-14).

in the bath with her knees bent and that hot water rose and burned around that part of the victim's skin that was pressed against the surface of the bath. That position is also consistent with the burns to the victim's labia majora and the sparing of the skin fold in the victim's groin. Dr Norrie gave evidence that, at 60 degrees centigrade, it can take a child up to five seconds to suffer full thickness burns. She concluded that the pattern of injuries suffered by the victim indicated "*forced immersion*" and "*non-accidental burning*".[37]

22. On 1 May 2017, the Crown made a further application to adduce evidence of statements made by the victim to trusted relatives in relation to three (other) occasions on which the appellant had deliberately caused her physical harm. Each of these statements were made within weeks of the charged offence. The evidence was sought to be relied upon as evidence of the same tendency and/or evidence as to the relationship that existed between the appellant and the victim,

23. *First*, a text message sent by MW to the appellant on 10 April 2014, the same day as the burns were inflicted upon the victim, which read, "*TM just came in telling me you hurt her neck again*".[38]

24. *Second*, evidence that some weeks before Easter 2014, in the course of playing ring-a-ring-a-rosy, the victim said to her grandmother, *"That's it grandma you have been naughty. I am going to ring TL and he will punch you in the face like he does to me*" and then pretended to punch herself.[39]

25. *Third*, evidence that in late March 2014, TM's aunt noticed a bruise to the victim's right forearm. When she asked the victim about it, the victim replied, *"TL did it, TL hurt me"*.[40]

26. Evidence of each of the four incidents was admitted as tendency evidence. The jury were directed that before they could use that evidence as tendency evidence, they must be satisfied beyond reasonable doubt that the victim's statements to

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[37] CCA judgment at [105]-[109] (CAB at 128-129); Photographs taken by MW on 10 April 2014 (Trial Exhibit G) (RFM at 16-18).
[38] CCA judgment at [13] (CAB at 101); at [232] (CAB at 166); AFM 7-8.
[39] CCA judgment at [52] (CAB at 112); at [233] (CAB at 166); AFM 9-10.
[40] CCA judgment at [50] (CAB at 111); at [234] (CAB at 166-167); AFM 4-5.

others about the appellant hurting her were truthful and reliable and that the scalding burns were not consistent with accidental exposure to hot water.[41] The tendency evidence was admitted against the appellant on the basis that if the jury were satisfied beyond reasonable doubt that he had deliberately inflicted injuries on the child in the weeks preceding her death, it rendered more likely the fact that he (and not MW or DM) caused the fatal injuries sustained by the victim.[42]

Part V: Argument

10 Introduction

27. The issue raised on appeal is confined to the question of whether the tendency evidence had significant probative value for the purpose of s 97 of the *Evidence Act 1995* (NSW). For the reasons outlined below, the CCA did not err in finding that it did.

The fact in issue

28. The fact in issue was whether the appellant was the person who had inflicted the blunt force trauma to the abdomen of the victim that caused her death, and (if he was that person), whether he intended to inflict grievous bodily harm to her.[43]
20 The circumstances in which those facts in issue arose were characterised by two important considerations. *First*, the "pool" of potential perpetrators was confined to, at most, three persons: the appellant, MW and DM. *Second*, the opportunity of each of those three persons to inflict the fatal injuries was markedly different.

29. The respective opportunities of the appellant, MW and DM to have inflicted the fatal injuries is set out above in Part IV. Given its importance to the factual matrix in which the probative value of the tendency evidence was to be assessed, it is convenient to restate it briefly. The appellant was the only person to have spent time alone in the unit with the victim during the period when the injuries
30 were inflicted. He was alone with the victim for approximately 16 minutes while

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[41] CCA judgment at [174] (CAB at 144); at [287] (CAB at 179). As the CCA noted, such a direction was not necessary because the representations were not an indispensable intermediate link in the chain of reasoning: *R v Bauer* [2018] HCA 40; 266 CLR 56 at [86]. It was a significantly more onerous direction than that sought by the appellant: CCA judgment at [288]-[289] (CAB 179-180).
[42] CCA judgment at [154] (CAB at 140).
[43] CCA judgment at [8] (CAB at 99).

MW and DM were buying dinner, after which he was seen coming from her bedroom. In contrast, the only "opportunity" for either MW or DM to have committed the offence arose during very brief periods, when the other occupants were at home and present in areas immediately adjacent to the victim's bedroom and where no one reported hearing any noise from the victim at the time of such opportunity.

30. DM's opportunity to inflict the blow/s causing death was limited to the period when MW and the appellant were on the back patio area discussing dinner. The patio is immediately adjacent to the victim's bedroom window, which was open. MW and the appellant each gave evidence that when they left the lounge room to go to the patio, and on their return, DM was in the lounge room watching TV.

31. MW's opportunity to inflict the blow/s causing death was limited to a one-to-two-minute period when the victim was put to bed. That opportunity only arose if the appellant's evidence at trial regarding who put the victim to bed was accepted. If it were found that she was put to bed by both MW and the appellant, it followed that MW did not have any opportunity.

32. In recognition of the above, it was the Crown case that the circumstantial evidence (including evidence of the events of the evening considered in light of the medical evidence) was overwhelming, and excluded the reasonable possibility that either MW or DM inflicted the fatal injuries. The trial judge directed the jury that it would be open to them to find that the Crown had established beyond reasonable doubt that the appellant inflicted the fatal injuries to the victim on the basis of the circumstantial evidence alone, without having regard to the tendency evidence, a position also endorsed by the CCA.[44]

33. The cogency of the other circumstantial evidence notwithstanding, the appellant's defence was predicated on a denial of responsibility and an assertion that MW and DM had opportunity to commit the offence. It therefore remained for the Crown to establish that it was not reasonably possible that MW or DM inflicted the fatal injuries.

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[44] SU 24.2 (CAB at 40); CCA judgment at [295] (CAB at 181-182).

34. The purpose for which of the tendency evidence was adduced was threefold (cf AS [26]). *First*, as proof that, at the time of the charged offence, the appellant had a tendency to inflict physical harm to the child, which supported the conclusion that it was him (and not MW or DM) who inflicted the fatal injuries to the same child. *Second*, as demonstrating the nature of the relationship that existed between the appellant and the victim at the time of her death, in circumstances where the appellant relied on evidence of his "good" relationship with the victim. *Third*, to rebut the possibility that the injuries to TM were occasioned accidentally. In each of these respects, the evidence had the capacity to support proof of the facts in issue.

35. The tendency evidence was not adduced to prove the identity of the offender for a known offence in the sense contemplated in the passages of *Bryant v R* (2011) 205 A Crim R 531, *O'Keefe v R* [2009] NSWCCA 121 or *Ilievski v R; Nolan v R* [2018] NSWCCA 164 extracted at AS [23]-[24] and [27]. That is, where the identity of the perpetrator was at large. Here, the tendency evidence was relied upon to support the conclusion that as between three individuals with markedly unequal opportunity to commit the offence, the appellant was the person responsible for deliberately inflicting the fatal injuries to the child in the circumstances. The tendency evidence did not bear the inferential burden of establishing the aforementioned conclusion alone, but rather in connection the other evidence adduced by the Crown.

<u>The CCA did not depart from *Hughes v The Queen*</u>

36. The circumstances in which the question of identity may arise in a criminal trial are many and varied, as is the evidence by which the identity of an offender may be proved. The capacity of tendency evidence to contribute to proof of the identity of an offender for a known offence depends not only on the tendency evidence itself but on the facts and circumstances of the case and the extent to which other evidence adduced by the tendering party contributes to proof of the offender's identity. The latter two matters, in combination, define the inferential burden that the tendency evidence is left to bear.

37. To elide all cases in which the identity of the perpetrator is in issue fails to recognise that the assessment of whether tendency evidence has significant

probative value depends upon the context in which the question of identity arises.[45] There is a significant difference between, on the one hand, a prosecution of an accused where the identity of the perpetrator is at large and, on the other hand a case such as this, where the class of possible perpetrators is limited to a small number of people. Different again is a case where there is direct evidence from a complainant or eyewitness identifying the accused as the person responsible for the offence and where the tendency evidence is relied upon to support the challenged identification.[46] Group identification cases involving the alleged commission of multiple offences by multiple accused are likewise unique as personnel may alter between the offences.[47] Relevant to the appellant's argument in this Court, the degree of similarity required for tendency evidence to have significant probative value differs according to the context in which the question of identity arises.

38. The majority in *Hughes v The Queen* [2017] HCA 20; (2017) 263 CLR 338 did not lay down a prescriptive test for the admissibility of tendency evidence in all cases where it was sought to be used to prove identity.[48] Such a test would be inconsistent with the observation that there should be no "gloss" on the language of s 97(1)(b) of the *Evidence Act 1995* (NSW), and that the legislature had "consciously omitted" reference to similarity or to the concepts of "underlying unity", "pattern of conduct" or "modus operandi".[49]

39. The requirement for close similarity will arise when the tendency evidence is *the only or predominant* evidence that goes to identity.[50] In such cases, the pool of possible perpetrators will be undefined and the absence of other evidence to prove the identity of the offender leaves the inferential burden to be borne by the tendency evidence alone - to be capable of rationally affecting the assessment of the probability of the fact in issue to a significant extent, the evidence must be capable of identifying the actor from the undefined masses. In such examples,

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[45] CCA judgment [307] (CAB at 184). As the South Australian Court of Criminal Appeal noted in *R v Bromley* [2018] SASCFC 41 at [491] *"the term "identification cases" may itself subsume cases of varying types such as to impact on the degree of similarity required"*.
[46] *R v W (John)* [1998] 2 Cr App Rep 289.
[47] *Ilievski v R; Nolan v R* [2018] NSWCCA 164; *R v Brown & Ors* [1997] Crim LR 502.
[48] CCA judgment at [207] (CAB at 155).
[49] *Hughes v The Queen* at [34].
[50] *Hughes v The Queen* at [39]. CCA judgment at [207] (CAB at 155).

for the tendency evidence to have significant probative value, it will usually demonstrate close similarity to the charged act. The CCA did not suggest that the requirement for close similarity should *only* arise in those circumstances (cf AS [2]).

40. It does not follow that close similarity is required in every case where tendency evidence is relied on in combination with other evidence to support proof of the identity of an offender for a known offence. Because the probative value of tendency evidence falls to be assessed in light of the fact in issue to which it is directed and the totality of the evidence led by the party seeking to adduce it, the degree of similarity required between the tendency evidence and the conduct in issue will depend on the factual and evidential context of a particular case.

41. In light of the infinite variety of circumstances in which the question of admissibility of tendency evidence to prove or contribute to proof of the identity of an offender for a known offence may arise, it is neither necessary nor desirable to attempt to lay down a universal rule. The question in each case will be, in the first instance, is the tendency evidence relevant and, if it is, does the evidence have significant probative value.

42. Recognition that the assessment of whether tendency evidence has significant probative value depends on the context in which the issue of identity arises does not constitute departure from *Hughes v The Queen*. To the contrary, the majority observed that the particularity of the tendency and its capacity to be important to the rational assessment of whether the prosecution has discharged its onus of proof will depend on a consideration of the circumstances of the case. Applying an important qualification to the test posed by s 97(1)(b) as stated in *Ford*[51], the majority held that the question was whether the disputed evidence "*together with other evidence*" makes significantly more likely any facts making up the elements on the offence charged.[52]

[51] (2009) 201 A Crim R 451 at 485 [125].
[52] *Hughes v The Queen* at [40].

43. To describe the present case as falling into a "*class of exceptions*"[53] was simply to recognise that it was an unusual case where there was other evidence that confined the class of persons who could be the perpetrator to only three people who themselves had markedly unequal opportunity. In those unique circumstances, it was not necessary for the evidence to bear particular hallmarks that could identify the perpetrator by distinguishing them from an undefined class of persons.

The tendency evidence has significant probative value

44. The assessment of whether tendency evidence has significant probative value involves consideration of two interrelated but separate matters: *first*, the extent to which the evidence supports the tendency and *second*, the extent to which the tendency makes it more likely that it was the appellant who inflicted the fatal injuries (and not MW or DM) and that he did so deliberately.[54]

45. The appellant does not dispute that the evidence of the burns inflicted on the victim on 10 April 2014, taken at its highest, strongly supports proof of the tendency to deliberately inflict physical harm to her (AS [36]). He contends however that the remaining three pieces of tendency evidence, which he characterises as "*statements about acts*" do not. That contention rests on an assertion that the circumstances surrounding the statements disclose nothing about the appellant's state of mind which could provide a cogent and logical basis to infer that he *deliberately* hurt TM on previous occasions (AS [46]). That assertion should not be accepted.

46. Characterisation of that evidence as "*statements about acts*" ought not obscure a proper assessment of the probative value of that evidence, which requires that the possible use to which the evidence might be put be taken at its highest and the assumption that the jury will accept the evidence.[55] The evidence comprises representations by the victim about the appellant's violent behaviour towards her in the weeks leading up to her death. One statement was accompanied by the physical reenactment of a punch. Another statement was referable to a bruise

[53] CCA judgment at [207] (CAB at 155).
[54] *Hughes v The Queen* at [41].
[55] *IMM v The Queen* [2016] HCA 14; (2016) 257 CLR 300 at [44].

observed on the victim's arm. The absence of a detailed description of the circumstances in which the appellant committed each of the three acts is relevant to the assessment of the probative value of the evidence, but it is not determinative (cf AS [46]).

47. Each of the three statements relied upon as tendency evidence was made by the deceased to a trusted family member. The deceased's statement to her aunt, *"TL did it, TL hurt me"* where "it" is the bruise observed by the witness, taken in combination, is supportive of the deliberate infliction of physical harm by the appellant upon the victim. In relation to the statement to her grandmother, the deceased's reenactment of the punch confirmed her verbal description. A punch is, by its nature, a deliberate act. The deceased's statement to her mother that the appellant "*hurt her neck again*" is also consistent with a deliberate act of hostility by the appellant resulting in physical harm to the victim. More importantly, it was a statement made by the victim on the same morning as the appellant is alleged to have forcibly immersed her in scalding water. The intimate temporal connection between those events (in the order of minutes, not hours) is a matter which further supports the conclusion that the physical harm occasioned by the appellant to the deceased's neck was inflicted deliberately.

48. The probative value of each of the three statements and the question of whether the acts described were inflicted deliberately is not to be assessed in a vacuum.[56] Tendency evidence, as a species of circumstantial evidence, must be viewed holistically with all the evidence in the tendering party's case. When one examines the acts described by the victim together with one another, and with the evidence that is capable of establishing that, within the same confined period, the appellant forcibly immersed her in hot water causing first and third degree burns to her buttocks and feet, the deliberateness of the physical harm inflicted by the appellant to the deceased on each occasion becomes manifest. It follows that the tendency evidence strongly supports proof of the asserted tendency.

49. Turning to the second of the two interrelated but separate matters referred to by the majority in *Hughes v The Queen*, proof of the appellant's tendency to

[56] *IMM v The Queen* at [45]; *Hughes v The Queen* at [56]; [61]-[62].

deliberately inflict physical harm on the deceased was capable of removing any doubt that the appellant, and not MW or DM, was responsible for deliberately inflicting the fatal injuries to her. As noted above, the tendency evidence alone did not bear the inferential burden of identifying the appellant beyond reasonable doubt as the person responsible. The probative value of the tendency evidence lay in its capacity to separate the appellant from the only other two persons who it might be said had opportunity to commit the offence and in doing so support the conclusion that he (the person with far greater opportunity) was the person responsible.

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50. The tendency relied upon by the Crown (to deliberately inflict physical harm on TM) was not a *generalised and broadly formulated tendency"* (cf AS [31]), but as framed, was capable of separating the appellant in a "*logically significant way*" from the other two other possible suspects - MW and DM (cf AS [31]). The appellant's assessment of particularity and similarity is unduly confined to consideration of the nature and degree of the injuries suffered (AS [18(d)]; [53]). In relation to human behaviour, it is artificial to expect that the same or very similar behaviour will be repeated on every occasion even where it is with or toward the same complainant.[57] The nature and degree of the injuries suffered,
20 while a relevant factor, was not determinative of the probative value of the evidence.[58]

51. Furthermore, the charged offence and the incidents the subject of the tendency evidence shared several similarities. Each involved the same victim in the same house in the same family and occurred close in time - within weeks of one another. Each event involved a deliberate physical assault committed by the appellant upon the victim when they were alone. Both the bath scalding incident and the charged offence involved a deliberate act of cruelty.[59]

30 52. Most significantly, there was close similarity between the charged act and the tendency evidence, in that the appellant had previously harmed the same

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[57] *IMM v The Queen* at [178].
[58] CCA judgment at [195] (CAB at 152).
[59] CCA judgment at [208]-[209] (CAB at 155-156).

person.[60] Where a person, in this case the appellant, repeatedly acts in a similar way towards another person it illuminates the nature of the particular relationship that exists between them.

53. The process of reasoning that applies to acts committed on a single complainant is different to that which applies where an accused is charged in connection with acts perpetrated against a multiplicity of complainants.[61] Analogous to the reasoning described in *The Queen v Bauer* at [62], the high probative value of the tendency evidence in this case rests on the logic that where a person has a state of mind of hostility or animus toward another person (in this case a very young child), and has at a point in time closely proximate to the act under consideration, acted on that hostility by deliberately inflicting physical harm on that child, the person is more likely to continue to give effect to that hostility by again deliberately inflicting harm on that child. The same process of reasoning applies irrespective of whether the case concerns the deliberate infliction of physical harm or sexual offending.[62]

54. The logical significance of the deliberate infliction of physical harm on the same child is well illustrated by the example given by Nettle J in *Hughes v The Queen* at [155]:

> "So, for example, if the previous offence were one which involved the intentional infliction of bodily harm upon the victim, the fact of the previous offence might, as a matter of common sense and experience, rationally suggest a degree of animosity on the part of the accused towards the victim that significantly affects the assessment of the probability that the accused committed a subsequent offence involving the intentional infliction of bodily injury upon the victim." (Citations committed)

55. The admissibility of tendency evidence is not predicated on an ability to quantify, in a mathematical sense, the extent to which the existence of a tendency to act in a particular way makes it more likely that the holder of such a tendency will act in accordance with it (cf AS [36]). That said, in any given case, the strength of the tendency may be discerned from the nature of the tendency

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[60] CCA judgment at [215] (CAB at 158).
[61] *The Queen v Bauer* [2018] HCA 40; (2018) 266 CLR 56.
[62] *Wilson v The Queen* (1970) 123 CLR 334 at 337; 339 per Barwick CJ and 344 per Menzies J (with whom McTiernan and Walsh JJ agreed).

asserted, the number of acts that comprise it and the period over which they are repeated. In the present case, proof that the appellant had, over a period of weeks before the charged offence, deliberately inflicted physical harm to TM on four occasions was capable of rendering it more likely, to a significant extent, that he, and not MW or DM, inflicted the fatal blows to the same child.

56. Further, it does not follow that an absence of evidence of such a tendency on the part of MW or DM reduces the probative value of the tendency of the appellant to the point where it cannot have the significance required by s 97(1)(b) (cf AS [30]; [49]). The capacity of the tendency evidence to separate the appellant from MW or DM does not depend upon whether the Crown has disproved the existence of a similar tendency on their part (cf AS [18(b)]; [49]). To hold otherwise would be to equate the absence of evidence with positive proof that MW and DM had the tendency.

57. If there were evidence that MW or DM did have a similar tendency, that may diminish the probative value of the tendency evidence. However, if, for the sake of argument, evidence that MW or DM had a similar tendency had been admitted at trial, evidence that demonstrated the appellant also had the tendency may nonetheless have had significant probative value to show that the existence of the tendency was not a matter that discriminated between them.

58. In any event, the evidence adduced at trial demonstrated that neither MW nor DM had a tendency to deliberately inflict physical harm to TM (cf AS [36]; [38]). The kind and caring relationship of both MW and DM with the victim was a central pillar of the Crown's circumstantial case.[63] A number of witnesses gave unchallenged evidence that MW was observed to have a good relationship with the deceased. She was the person the deceased went to for comfort in the days prior to her death, as she continued to experience pain and discomfort from the burns to her bottom and feet. The evidence established that MW was an attentive and caring mother who regularly sought medical attention for the victim and was concerned for her welfare.[64]

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[63] SU at 21.6-22.1 (CAB at 37-38).
[64] CCA judgment at [51] (CAB at 111-112).

59. DM expressed a genuine affection for the deceased. Notably, the most cogent evidence that excluded the possibility that DM had a tendency to harm the victim came from the appellant himself. In unguarded, intercepted conversations he told family members, *"I know within my heart DM wouldn't do this*" and, again referring to DM said, "*I know he fucking wouldn't do it... I raised the kid from when he was fucking young. I know what he is capable of"*.[65] The only person in the pool of potential perpetrators to have a tendency to inflict harm on the victim was the appellant (cf AS [18(b)]; [18(d)]).

60. The tendency evidence was, as the CCA recognised, capable of separating the appellant from the only other potential perpetrators. In circumstances where the appellant's defence rested on a denial of responsibility and the suggestion that the Crown had not excluded the reasonable possibility that either MW or DM caused the fatal injuries to the deceased, the tendency evidence had the capacity to be "*important*" or "*of consequence"*[66] in the jury's assessment of whether the appellant (and not MW or DM) was the person responsible for committing the offence.

61. The CCA correctly held that the tendency evidence had significant probative value.

<u>The proviso</u>

62. If this Court concludes that the tendency evidence in whole or in part did not have significant probative value and should not have been admitted, the respondent submits that in the circumstances of the present case, the proviso to s 6(1) *Criminal Appeal Act 1912 (NSW)* can and should be applied.

63. In most cases which turn on issues of contested credibility, the wrongful admission of tendency evidence will preclude the application of the proviso because reliance cannot be placed on the verdict to overcome the natural limitations of the record. [67]

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[65] TT 575.16-576.24 (RFM at 19-20). It should also be noted that the appellant also said that DM was not left alone with the victim that evening *"the only one left alone was me":* TT 575.47 (RFM at 19)
[66] *Hughes v The Queen* at [81] citing *Lockyer* (1996) 89 A Crim R 457 at 459; *IMM v The Queen* at [46].
[67] *Hughes v The Queen* at [209]; *McPhillamy v The Queen* [2018] HCA 52; (2018) 92 ALJR 1045.

64. Given the strength of the Crown's circumstantial case and the directions given to the jury,[68] the jury may well have been satisfied beyond reasonable doubt that the appellant was the person responsible for inflicting the fatal injuries to the victim without having regard to the tendency evidence. However, the respondent accepts that because of the risk that the jury did use the tendency evidence to reason to guilt, the better approach is to eschew any reliance on the verdict returned by the jury.

10 65. The conclusion that the appellant's guilt was established beyond reasonable doubt as a necessary (albeit not necessarily sufficient)[69] condition of the application of the proviso can be reached without needing to rely on the jury's verdict as the determinant of whether the evidence of the appellant on crucial issues should be rejected, because greater weight should be accorded to the evidence of other witnesses. In the extraordinary circumstances of the present case, but for his denial of responsibility, it is not necessary to reject the appellant's evidence before a conclusion may be reached that his guilt is established beyond reasonable doubt.

20 66. The uncontroverted medical evidence was that after the infliction of the injury, the victim would have been "*immediately and severely*" incapacitated. It is highly unlikely that she would have been capable of getting out of bed, walking to the bedroom door, playing with the doorknob and standing at the door while the appellant came and answered it, had the fatal blow/s already been inflicted.[70] The appellant's admission (from which he at no stage resiled) that he found the victim in that state when he first entered her bedroom is only consistent with the conclusion that she had not at that time received the fatal blunt force trauma to her abdomen. It followed inevitably that the appellant (who was the only person to enter the victim's bedroom after that time), must have inflicted the fatal
30 injuries.

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[68] SU 24 (CAB at 40).
[69] *Weiss v The Queen* (2005) 224 CLR 300 at [44]; *Hofer v The Queen* (2021) 95 ALJR 937 at [54].
[70] See above at RS [18].

67. Evidence as to the extremely limited opportunity of either MW or DM to have committed the offence, and the circumstances attending their opportunity, serves only to further reinforce that conclusion. The suggestion that either entered the victim's bedroom, undetected by the other occupants of the small unit and inflicted the fatal injuries to the victim without drawing the attention of those other persons is so fanciful as to be incapable of raising a reasonable doubt as to the appellant's guilt.

68. A consideration of the whole of the evidence inevitably leads to the conclusion that the appellant's denial of responsibility was so glaringly improbable that it could not give rise to a reasonable doubt as to his guilt.

69. This Court, being satisfied that no substantial miscarriage of justice has actually occurred, would dismiss the appeal.

Part VII: Time estimate

70. It is estimated that oral argument will take 2 hours.

Dated 29 June 2022

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY

BETWEEN: **TL**

Appellant

and

THE QUEEN

Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

Constitutional provisions

1. There are no constitutional provisions that are relevant to this appeal.

Statutes

2. *Evidence Act 1995* (NSW), s 97, as currently in force.
3. *Criminal Appeal Act 1912* (NSW), s 6(1) as currently in force.

Statutory instruments

4. There are no statutory instruments that are relevant to this appeal.