HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

ROBERT LINDSAY HUGHES APPELLANT

AND

THE QUEEN RESPONDENT

Hughes v The Queen
[2017] HCA 20
14 June 2017
S226/2016

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

P R Boulten SC with K J Edwards for the appellant (instructed by Greg Walsh & Co)

L A Babb SC with K N Shead SC and B K Baker for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

G J C Silbert QC and N Rogers SC with B L Sonnet for the Director of Public Prosecutions (Vic), intervening (instructed by Solicitor for Public Prosecutions (Vic))

CATCHWORDS

Hughes v The Queen

Evidence – Admissibility – Tendency evidence – *Evidence Act* 1995 (NSW), s 97(1)(b) – Where appellant charged with 11 sexual offences against five female children aged under 16 years – Where prosecution permitted to adduce evidence of each complainant and other witnesses as tendency evidence – Where alleged tendencies identified as having sexual interest in underage girls and as using relationships to gain access to underage girls in order to engage in sexual activities with them – Whether tendency evidence required to display features of similarity with facts in issue in order to have "significant probative value" – Whether tendency evidence had "significant probative value".

Words and phrases – "modus operandi", "pattern of conduct", "probative value", "significant probative value", "tendency evidence", "underlying unity".

Evidence Act 1995 (NSW), s 97(1)(b).

1 KIEFEL CJ, BELL, KEANE AND EDELMAN JJ. Section 97(1)(b) of the *Evidence Act* 1995 (NSW) excludes evidence of the character, reputation or conduct of a person to prove that the person has or had a tendency to act in a particular way or to have a particular state of mind ("tendency evidence") unless the court thinks that the tendency evidence will have "significant probative value". The provision is enacted in the same terms in the uniform evidence legislation of the Commonwealth, Tasmania, Victoria, the Australian Capital Territory and the Northern Territory ("the Evidence Act")[1]. The issue in the appeal is the extent to which, if at all, evidence of conduct adduced to prove a tendency is required to display features of similarity with the facts in issue before it can be assessed as having "significant probative value".

2 The issue arises in the familiar context of the trial of counts charging an accused with sexual offences against several children at which the prosecution seeks to adduce the evidence of each complainant in support of its case on each count. The issue reduces in this case to the question of whether proof that a man of mature years has a sexual interest in female children aged under 16 years ("underage girls") and a tendency to act on that interest by engaging in sexual activity with underage girls opportunistically, notwithstanding the risk of detection, is capable of having significant probative value on his trial for a sexual offence involving an underage girl. The answer is that, in a case in which the complainant's evidence of the conduct the subject of the charge is in issue, proof of that tendency may have that capacity.

Procedural history

3 On 10 February 2014 the appellant was arraigned in the District Court of New South Wales (Zahra DCJ) on an indictment that charged him in 11 counts with sexual offences committed against five underage girls. Prior to the trial, the prosecution served the appellant with notice of its intention to adduce tendency evidence at the trial[2]. The evidence of each complainant and a number of other witnesses was to be adduced in the trial of each count to prove tendencies identified as "having a sexual interest in female children under 16 years of age" and using "his social and familial relationships … to obtain access to female children under 16 years of age so that he could engage in sexual activities with them". The notice particularised differing forms of sexual conduct with underage

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1 *Evidence Act* 1995 (Cth); *Evidence Act* 2001 (Tas); *Evidence Act* 2008 (Vic); *Evidence Act* 2011 (ACT); *Evidence (National Uniform Legislation) Act* (NT).

2 Evidence Act, s 97(1)(a).

girls. One particular of that conduct was its occurrence within the vicinity of another adult.

4 The complainants were aged between six and 15 years at the date of the offending. The acts charged in each count and the circumstances of their commission varied. They included digital penetration of the vagina of a girl aged 14 or 15 years; procuring a girl aged between six and eight years to masturbate him; indecently rubbing his erect penis against a nine year old girl; encouraging a 15 year old girl to touch his penis; and indecently exposing himself to girls aged nine and 12 or 13 years.

5 The prosecution also sought to adduce tendency evidence from additional witnesses. Three were women who described occasions when they had been at the appellant's home as young girls on which he had either touched them in a sexual way or exposed his penis in their presence. Another three were women who had worked with the appellant ("the workplace tendency witnesses"). They described occasions, when they were aged in their late teens or early twenties, when the appellant had inappropriately sexually touched them or exposed himself to them.

6 The appellant applied for severance of the counts relating to each complainant and an order for separate trials. The success of the application turned on the admissibility of the tendency evidence.

7 The admissibility of the tendency evidence was determined before the jury was empanelled by reference to the statements of the complainants and the tendency witnesses. A summary of the evidence given at the trial, which did not materially depart from the accounts contained in the statements, is set out later in these reasons. The trial judge rejected the appellant's challenge that the evidence lacked sufficient similarity to the charged conduct to have significant probative value. His Honour said that contention focused too narrowly on the need to prove a tendency to engage in sexual activity in a particular fashion. His Honour assessed the probative value of proof of the tendencies as particularised above to be significant in circumstances in which the fact in issue in each count was the occurrence of the sexual conduct charged.

8 His Honour held that the evidence of the workplace tendency witnesses was not admissible in support of counts one to 10. The evidence of these witnesses was found to have significant probative value with respect to proof of the offence charged in count 11. This offence occurred at the appellant's workplace and involved him exposing his penis to the complainant, who was aged 12 or 13 years. The jury was directed that the evidence of the workplace tendency witnesses was relevant to the determination of count 11. The Court of

Criminal Appeal held that the written and oral directions made clear that the evidence could not be used in consideration of counts 1 to 10[3]. The correctness of that conclusion is not an issue in the appeal.

9 On 7 April 2014, the jury returned verdicts of guilty on the first nine counts in the indictment. On 8 April 2014, the jury returned a verdict of guilty on the eleventh count. The jury was unable to agree on count 10 and was discharged without verdict. The appellant was sentenced to an aggregate sentence of 10 years and nine months' imprisonment, with a non-parole period of six years, to date from 7 April 2014.

The Court of Criminal Appeal

10 The appellant appealed against his convictions to the New South Wales Court of Criminal Appeal (Beazley P, Schmidt and Button JJ), contending that, having regard to the breadth of the tendency that it was adduced to prove, the tendency evidence did not possess significant probative value[4]. The appellant's argument drew support from the statement of the Court of Appeal of the Supreme Court of Victoria in *Velkoski v The Queen* that tendency evidence must possess "sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct"[5]. The Court of Criminal Appeal declined to follow *Velkoski* and held, consistently with a line of New South Wales authority[6], that there is no requirement that the conduct evidencing the tendency display features of similarity with the charged conduct. The evidence disclosed the appellant's sexual interest in underage girls and tendency to engage in sexual activity with them opportunistically as the occasion presented in social and familial settings and the work environment. The Court of Criminal Appeal concluded that the evidence had been rightly admitted because proof of the tendency made proof of the fact of the commission of the offence charged more likely to a significant extent[7].

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3 *Hughes v The Queen* [2015] NSWCCA 330 at [233].

4 *Hughes v The Queen* [2015] NSWCCA 330 at [149].

5 *Velkoski v The Queen* (2014) 45 VR 680 at 682 [3].

6 *R v Ford* (2009) 201 A Crim R 451; *R v PWD* (2010) 205 A Crim R 75; *Saoud v The Queen* (2014) 87 NSWLR 481.

7 *Hughes v The Queen* [2015] NSWCCA 330 at [188], [200].

11 On 2 September 2016, Gageler and Gordon JJ granted the appellant special leave to appeal on two grounds. The first ground contends error in the conclusion that the tendency evidence possessed "significant probative value". The second ground contends error in the rejection of the approach adopted in *Velkoski* to the assessment of that question. It raises consideration of the divergence between the Court of Appeal of the Supreme Court of Victoria and the Court of Criminal Appeal of New South Wales and the courts of Tasmania and the Australian Capital Territory with respect to the admission of tendency evidence under the Evidence Act[8]. The Director of Public Prosecutions for Victoria ("the Victorian Director") was given leave to intervene in support of the respondent with respect to the second ground of appeal.

12 For the reasons to be given, the Victorian Director's submission, that *Velkoski* evinces an unduly restrictive approach to the admission of tendency evidence, is accepted. The Court of Criminal Appeal's conclusion that the tendency evidence adduced at the appellant's trial had significant probative value in relation to proof of each count in the indictment was not attended by error and it follows that the appeal must be dismissed.

The scheme of the Evidence Act governing tendency evidence

13 Subject to the exclusionary rules in Pts 3.2 to 3.11 of the Evidence Act, evidence that is relevant in a proceeding is admissible in the proceeding[9]. Evidence is relevant if it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue[10]. Part 3.6 governs the admission of evidence of tendency and coincidence. At common law, this evidence is governed by rules concerning propensity and similar fact evidence. The intention of the Evidence Act to make substantial changes to the common law rules[11] is evident in the provision for the admission of tendency and coincidence evidence.

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8 *Tasmania v Martin (No 2)* (2011) 20 Tas R 445; *Tasmania v W (No 2)* (2012) 227 A Crim R 155; *Tasmania v H* [2015] TASSC 36; *R v Lam* [2014] ACTSC 49.

9 Evidence Act, s 56(1).

10 Evidence Act, s 55(1).

11 *Papakosmas v The Queen* (1999) 196 CLR 297 at 302 [10]; [1999] HCA 37; *IMM v The Queen* (2016) 257 CLR 300 at 311 [35] per French CJ, Kiefel, Bell and Keane J; [2016] HCA 14; *R v Ellis* (2003) 58 NSWLR 700 at 716-717 [78].

14 That provision in respect of tendency evidence is in s 97(1):

"Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value."

15 That provision in respect of coincidence evidence is in s 98(1):

"Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value."

16 The probative value of evidence is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue[12]. Tendency evidence will have significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent[13]. The trier of fact reasons from satisfaction that a

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12 Evidence Act, Dictionary. The definition appears in s 3(1) of the Tasmanian Act.

13 See *IMM v The Queen* (2016) 257 CLR 300 at 314 [46] per French CJ, Kiefel, Bell and Keane JJ.

person has a tendency to have a particular state of mind, or to act in a particular way, to the likelihood that the person had the particular state of mind, or acted in the particular way, on the occasion in issue. The capacity of tendency evidence to be influential to proof of an issue on the balance of probability in civil proceedings may differ from the capacity of the same evidence to prove an issue beyond reasonable doubt in criminal proceedings. The starting point in either case requires identifying the tendency and the fact or facts in issue which it is adduced to prove. The facts in issue in a criminal proceeding are those which establish the elements of the offence.

17 In criminal proceedings in which the prosecution seeks to adduce tendency evidence about the accused, s 101(2) of the Evidence Act imposes a further restriction on admissibility: the evidence cannot be used against the accused unless its probative value substantially outweighs any prejudicial effect that it may have on the accused. The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.

18 In a criminal proceeding, before tendency evidence may be adduced by the prosecution about the accused, the court must first ask whether the evidence has significant probative value and, if it does, the court must next ask whether that value substantially outweighs any prejudicial effect the evidence may have on the accused. The appeal is concerned with the answer to the first question.

Ground two – a requirement of similarity

19 It is convenient to address the second ground first. This ground contends that the Court of Criminal Appeal erred by holding that an "underlying unity" or "pattern of conduct" need not be established before tendency evidence is held to have significant probative value and by declining to follow *Velkoski*.

20 The appellant's argument acknowledges that s 97(1) does not refer to similarity, unlike s 98(1). Nonetheless, he submits that the inferential process of reasoning from proof of tendency inherently invokes consideration of the

similarity between the tendency and the fact or facts in issue: tendency evidence depends for its probative value on how persuasively it can be reasoned that the person will behave in a way that is consistent with the tendency. The legislative choice to condition the admission of tendency evidence on the evidence having significant probative value, and to preclude tendency reasoning if the evidence is not admissible under Pt 3.6 even if it is relevant for another purpose[14], is said to reflect long-standing scepticism of tendency reasoning and appreciation of the dangers of the unfair prejudice to which it may give rise[15]. The appellant refers to the interim report of the Australian Law Reform Commission ("the ALRC")[16] for the proposition 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.

21 At the time the ALRC published its reports in its landmark reference on the law of evidence, the preponderance of English and Australian authority was against the admission of evidence of propensity altogether[17]. The ALRC considered that the rules precluding the prosecution from adducing evidence of the bad character of the accused were supported by the results of psychological research[18]. The research was concerned with the value of evidence of general behavioural traits such as honesty. A person's general disposition was found to

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14 Evidence Act, s 95.

15 That scepticism, as Professor Tapper observes, appears to have been in decline in England and Wales before the enactment of s 101(1) of the *Criminal Justice Act* 2003 (UK), which allows the admission of evidence of the defendant's bad character where the evidence is relevant to an important matter in issue between the defendant and the prosecution: Tapper, *Cross and Tapper on Evidence*, 11th ed (2007) at 403-416; *Director of Public Prosecutions v P* [1991] 2 AC 447; *R v H* [1995] 2 AC 596; *R v Z* [2000] 2 AC 483; and see The Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Law Com No 273, (2001); New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character*, Report 103, (2008).

16 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985).

17 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 219 [400].

18 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 460 [810].

be of little value as a predictive tool, whereas a person's behaviour in similar situations might justify prediction[19].

22 The ALRC questioned the inflexible rejection of reasoning from propensity[20]. In cases in which it is established that the accused was responsible for other unusual acts, the ALRC pointed out, it is possible to reason to guilt via either propensity or the improbability of coincidence[21]. The analysis anticipated *Pfennig v The Queen*[22]. The focus of the analysis remained on the singularity of the propensity. Reflecting this thinking, in the draft Evidence Bill appended to its final report the ALRC conditioned the admission of tendency evidence on proof of substantial and relevant similarity[23].

23 The legislative history of Pt 3.6 of the Evidence Act as enacted is traced in Spigelman CJ's judgment in *R v Ellis*[24]. It suffices to observe that among the differences between the ALRC's draft and s 97, as enacted, is the omission of any requirement of similarity. The legislature's choice to reject the ALRC's recommendation in this respect is unexplained, but, as Spigelman CJ observed, it is a choice which makes the ALRC's reports less useful on this subject than on other subjects[25].

24 The Court of Appeal in *Velkoski* undertook a comprehensive review of the authorities touching on the admission of tendency evidence. Their Honours identified an approach in New South Wales in recent years that is less restrictive

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19 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 452 [797].

20 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 220 [400].

21 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 220 [401].

22 (1995) 182 CLR 461; [1995] HCA 7.

23 Australian Law Reform Commission, *Evidence*, Report No 38, (1987), Draft Evidence Bill, cl 87(b).

24 (2003) 58 NSWLR 700 at 714-715 [65]-[68].

25 (2003) 58 NSWLR 700 at 714-715 [65]; and see *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51 at 64 [51].

than the approach taken in Victoria, or by the Court of Criminal Appeal in earlier years[26]. The Court of Appeal concluded that the more recent New South Wales approach sets the threshold for the admission of tendency evidence too low[27]. The recent New South Wales approach was said to be exemplified by the decisions in *R v Ford*[28] and *R v PWD*[29]. *Ford* and *PWD* were each successful prosecution appeals against a ruling excluding tendency evidence on the trial of sexual offences.

R v Ford

25 In *Ford*, on an indictment charging the accused with sexual intercourse without consent, the prosecution sought to lead evidence of indecent assaults, committed by the accused against two other complainants, as evidence of the accused's tendency to sexually and indecently assault women who had fallen asleep at his home after drinking alcohol. The trial judge rejected the tender, holding that the differences in the nature of the sexual conduct on each occasion deprived the evidence of significant probative value[30].

26 Campbell JA, giving the leading judgment in the Court of Criminal Appeal, rejected the need for tendency evidence to prove a tendency to commit acts closely similar to the acts constituting the charged offence. His Honour observed that all "that a tendency need be, to fall within the chapeau to s 97(1), is 'a tendency to act in a particular way'"[31]. His Honour concluded: "[a]ll that is necessary is that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged"[32]. Evidence that on three occasions the accused had sexually assaulted an intoxicated woman

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26 *Velkoski v The Queen* (2014) 45 VR 680 at 713 [142].

27 *Velkoski v The Queen* (2014) 45 VR 680 at 717 [164].

28 *Velkoski v The Queen* (2014) 45 VR 680 at 716 [155], citing *R v Ford* (2009) 201 A Crim R 451.

29 *Velkoski v The Queen* (2014) 45 VR 680 at 713 [142], citing *R v PWD* (2010) 205 A Crim R 75.

30 *R v Ford* (2009) 201 A Crim R 451 at 456-458 [6]-[16], 461-465 [28]-[31].

31 *R v Ford* (2009) 201 A Crim R 451 at 466 [38].

32 *R v Ford* (2009) 201 A Crim R 451 at 485 [125].

who had fallen asleep at his home demonstrated a tendency to act in a particular way. Proof of that tendency was found to have significant probative value in the context of the issues in the trial[33].

R v PWD

27 In *PWD*, 10 counts charging the accused with sexual offences against four boys were joined in the same indictment. The complainants were boarders at a school of which the accused was the principal. The prosecution sought to adduce the evidence of each complainant and of two further witnesses on the trial of each count to prove the accused's tendency to be sexually interested in young male students and to use his position of authority to engage in sexual activity with them. The sexual conduct and the circumstances in which the conduct occurred varied. The trial judge considered these differences deprived the tendency evidence of significant probative value and ordered separate trials[34].

28 Allowing the appeal, the Court of Criminal Appeal followed *Ford* and held that the admissibility of tendency evidence does not depend upon the evidence exhibiting "striking similarities, or even closely similar behaviour"[35]. The tendency which the Court of Criminal Appeal identified the evidence to be capable of proving was the accused's sexual attraction to young male students and tendency to act on that attraction by engaging in various sexual acts with boarders who were vulnerable because they were homesick or otherwise unable to adjust to the normal pattern of school life[36]. Given that the occurrence of the offences was in issue, proof of the tendency had significant probative value, including by excluding that the accused's relationship with each student was an innocent one[37].

Velkoski v The Queen

29 The indictment in *Velkoski* charged the accused with 15 counts of committing an indecent act with a child under the age of 16 years and one count

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33 *R v Ford* (2009) 201 A Crim R 451 at 485 [126]-[127].

34 *R v PWD* (2010) 205 A Crim R 75 at 77-78 [2]-[6].

35 *R v PWD* (2010) 205 A Crim R 75 at 91 [79].

36 *R v PWD* (2010) 205 A Crim R 75 at 92 [87].

37 *R v PWD* (2010) 205 A Crim R 75 at 92 [88].

of attempting to commit that offence. The offences were alleged to have been committed against three complainants while each was attending the day-care centre run by the accused's wife. The indecent acts with which the accused was charged included: touching a child's penis; encouraging a child to take hold of the accused's penis; touching a child on the vagina; and touching a child on the bottom[38]. The tendency notice served by the prosecution identified the tendencies that it was sought to prove as "the accused had a sexual interest in young children attending the day-care centre run by his wife" and "the accused was willing to act on that sexual interest by engaging in sexual acts with the complainants"[39]. The defence did not object to the reception of the tendency evidence at the trial. On appeal against conviction, the defence resiled from that concession[40].

30 The Court of Appeal commenced its analysis in *Velkoski* by commenting on the stringency of the common law similar fact rule in its application to the prosecution of sexual offences[41]:

> "This high threshold meant that, in many cases, juries were left to consider the evidence concerning each alleged victim in isolation, without ever being made aware of the fact that allegations of a similar kind had been made by other complainants. Such cases often involved allegations that went back many years, and sometimes came down to a consideration of oath against oath. The result, in a great many cases, was a series of acquittals, whereas, had the evidence been made available, the outcome would almost certainly have been different."

31 The Court of Appeal correctly observed that the common law principles governing the admission of similar fact evidence have been abrogated and entirely replaced by Pt 3.6 of the Evidence Act[42]. Nonetheless, their Honours went on to hold that the common law concepts of "underlying unity", "pattern of conduct" and "modus operandi" continue to inform the assessment of whether

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38 *Velkoski v The Queen* (2014) 45 VR 680 at 682 [1], 683-685 [8]-[18].

39 *Velkoski v The Queen* (2014) 45 VR 680 at 685 [22].

40 *Velkoski v The Queen* (2014) 45 VR 680 at 686 [23]-[24].

41 *Velkoski v The Queen* (2014) 45 VR 680 at 687 [31].

42 *Velkoski v The Queen* (2014) 45 VR 680 at 692 [66], 717 [162]; see also *R v Ellis* (2003) 58 NSWLR 700 at 717 [83].

evidence is capable of supporting tendency reasoning[43]. The conclusion was linked to the view that the object of s 97(1)(b) is to protect against the risk of an unfair trial. Requiring significant probative value to be assessed by the criterion of similarity of operative features was said to protect against this risk[44]. Their Honours were critical of cases in which the prosecution adduces tendency evidence to establish "the offender's interest in particular victims and his willingness to act upon that interest" because such evidence discloses only "rank propensity". Their Honours said that once the jury is satisfied that the acts relied upon as tendency have been committed, any resort to proof of the offender's state of mind to support tendency reasoning is impermissible and highly prejudicial[45].

32 These statements, couched in the language of the common law, do not stand with the scheme of Pt 3.6. They are apt to overlook that s 97 applies to civil and criminal proceedings. In criminal proceedings, the risk that the admission of tendency evidence may work unfairness to the accused is addressed by s 101(2). Moreover, s 97(1) in terms provides for the admission of evidence of a person's tendency to have a particular state of mind. An adult's sexual interest in young children is a particular state of mind. On the trial of a sexual offence against a young child, proof of that particular state of mind may have the capacity to have significant probative value.

33 The Court of Appeal went on to state that[46]:

> "To remove any requirement of similarity or commonality of features does not ... give effect to what is inherent in the notion of 'significant probative value.' If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible."

34 This reasoning glosses the language of s 97(1)(b) of the Evidence Act; it does not explain its "inherent" meaning. The circumstance that the text of s 97(1)(b) does not include reference to similarity or to the concepts of "underlying unity", "pattern of conduct" or "modus operandi" is a clear indication that s 97(1)(b) is not to be applied as if it had been expressed in those terms. The

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43 *Velkoski v The Queen* (2014) 45 VR 680 at 692-693 [67], 698 [82].

44 *Velkoski v The Queen* (2014) 45 VR 680 at 717 [164].

45 *Velkoski v The Queen* (2014) 45 VR 680 at 720 [173(f)].

46 *Velkoski v The Queen* (2014) 45 VR 680 at 717-718 [164].

omission of these familiar common law concepts is eloquent of the intention that evidence which may be significantly probative for the purposes of s 97(1)(b) should not be limited to evidence exhibiting the features so described.

35 The Court of Appeal identified the following principle[47]:

> "[W]e have examined the principle which is applied in determining whether tendency evidence is admissible. The principle consistently applied in this court is that the evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct."

36 Applying this principle, the Court of Appeal held that it had been open to the prosecution to adduce tendency evidence in respect of the counts which had the common feature of the accused encouraging the complainant to touch his, the accused's, penis, or exposing his penis to the complainant[48]. The remaining counts, however, were held to have lacked any sufficiently similar feature to permit tendency reasoning[49]. The convictions were set aside and a new trial was ordered[50].

37 The *Velkoski* analysis proceeds upon the assumption that, regardless of the fact in issue, the probative value of tendency evidence lies in the degree of similarity of "operative features" of the acts that prove the tendency[51]. It is an analysis that treats tendency evidence as if it were confined to a tendency to perform a particular act. Depending upon the issues in the trial, however, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it. *Velkoski* is illustrative.

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47 *Velkoski v The Queen* (2014) 45 VR 680 at 682 [3].

48 *Velkoski v The Queen* (2014) 45 VR 680 at 721-722 [181].

49 *Velkoski v The Queen* (2014) 45 VR 680 at 722 [184].

50 Verdicts of acquittal were entered on two counts, which the Court of Appeal found were not supported by the evidence.

51 *Velkoski v The Queen* (2014) 45 VR 680 at 719 [171].

38 The expression of the accused's sexual interest in young children was not confined to soliciting them to touch his penis: he repeatedly touched one complainant's penis and he touched other complainants on their vaginas and bottoms. Confining the tendency evidence to counts charging an occasion on which he solicited one of the complainants to touch his penis did not give the tendency evidence its relative strength[52]. There was no reason to find that the accused was more likely to act on his sexual interest in young children by soliciting one of the complainants to touch his penis than he was to sexually molest the complainant at the day-care centre in another way. Given that the issue in each case was the occurrence of the offence, proof of the tendencies which the prosecution identified had significant probative value.

39 Commonly, evidence of a person's conduct adduced to prove a tendency to act in a particular way will bear similarity to the conduct in issue. Section 97(1) does not, however, condition the admission of tendency evidence on the court's assessment of operative features of similarity with the conduct in issue. The probative value of tendency evidence will vary depending upon the issue that it is adduced to prove. In 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. Different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence.

40 In the trial of child sexual offences, it is common for the complainant's account to be challenged on the basis that it has been fabricated or that anodyne conduct has been misinterpreted. Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded. The particularity of the tendency and the capacity of its demonstration to be important to the rational assessment of whether the prosecution has discharged its onus of proof will depend upon a consideration of the circumstances of the case. The test posed by s 97(1)(b) is as stated in *Ford*[53]: "the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged". The only qualification to this is that it is not necessary that the

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52 cf *Velkoski v The Queen* (2014) 45 VR 680 at 719 [171].

53 (2009) 201 A Crim R 451 at 485 [125].

disputed evidence has this effect *by itself*. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charged. Of course, where there are multiple counts on an indictment, it is necessary to consider each count separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible.

41 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. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters. By seeing that there are two matters involved it is easier to appreciate the dangers in focusing on single labels such as "underlying unity", "pattern of conduct" or "modus operandi". In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged.

42 Unlike the common law which preceded s 97(1)(b), the statutory words do not permit a restrictive approach to whether probative value is significant. However, the open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means that it is inevitable that reasonable minds might reach different conclusions. This means that in marginal cases it might be difficult to know whether an appellate court might take a different view of the significance of the tendency evidence from a trial judge. This might result in the setting aside of any conviction and an order for a retrial. There may also be other risks for the prosecution. The admissibility of the tendency evidence is assessed based upon the evidence that witnesses are expected to give. In this case, the evidence given by the witnesses did not differ materially from their anticipated evidence. But in cases where the admissibility of tendency evidence is borderline, there may be risks if the actual evidence does not accord with the evidence as anticipated. Again, this could have consequences for any conviction. One intermediate appellate court has recently observed that the potential consequence of a new trial in cases where a conviction is overturned due to the wrongful admission of tendency evidence which was borderline should be a matter taken into account by the prosecution in assessing, perhaps conservatively, what tendency evidence it will rely upon[54]. In any event, the

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54 *DKA v The State of Western Australia* [2017] WASCA 44 at [69].

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[55].

Ground one

43 This ground challenges the conclusion that the tendency evidence adduced at the appellant's trial possessed significant probative value. At the outset it is to be noted that the prosecution did not seek to rely on the improbability of the complainants falsely making allegations of sexual impropriety against the appellant, so the appeal does not invite consideration of any overlap between tendency and coincidence reasoning[56].

The evidence

44 Counts one and two charged offences against JP of sexual intercourse without consent, knowing that JP was not consenting[57]. The offences were alleged to have occurred when JP was aged 14 or 15 years on occasions when the appellant and his wife were dinner guests at JP's home. The first count charged an occasion when the appellant entered JP's bedroom while she was asleep. JP was sharing a bed with the appellant's daughter. JP woke to find the appellant's hand inside her pyjama pants. He digitally penetrated her vagina. She pushed his hand away and he licked her cheek and left the room. The second count occurred a month or so later when the appellant again entered JP's bedroom. On this occasion JP was asleep on her own. She woke to find the appellant's hand inside her pyjama pants, he again digitally penetrated her vagina and he touched her clitoris for around 10 minutes. JP also said there were other occasions when the appellant entered her bedroom and touched her on the vagina.

45 The third, fourth, fifth and sixth counts charged indecent assaults on SH[58], which occurred on occasions when she was aged six, seven or eight years. The offences arose out of two incidents that occurred when SH was staying overnight at the appellant's home. On each occasion the appellant went into the bedroom where SH and the appellant's daughter were sleeping, wakened SH, and made her

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55 Evidence Act, s 55.

56 *Saoud v The Queen* (2014) 87 NSWLR 481 at 490-491 [38]-[44] per Basten JA.

57 *Crimes Act* 1900 (NSW), s 61D(1).

58 *Crimes Act* 1900 (NSW), s 61E(1).

masturbate him. On each occasion he ejaculated and rubbed semen over the mound of SH's vagina with his penis. SH gave evidence of similar incidents that had occurred on other occasions.

46 The seventh, eighth and ninth counts charged aggravated indecent assaults against AK[59], which took place when she was aged nine years. The seventh and eighth counts charged offences that occurred on an occasion when the appellant took AK and his daughter on an outing to the beach. The appellant suggested that the girls swim between his legs. On both occasions when AK did so, the appellant pinned her between his legs, exposing his penis to her. The ninth count charged an incident that occurred on an occasion when AK was staying overnight at the appellant's home. AK had an ear infection and she lay on the appellant's lap while he put drops in her ears. AK felt the appellant's erect penis rubbing against her cheek bone as he moved her head to position it in the light. When she swapped sides so that the appellant could put drops in her other ear, AK again felt his erect penis against her face. AK gave evidence of another occasion on which she had sat on the appellant's lap and felt his penis "digging into her buttock" as he moved her legs from side to side. She said that on other occasions the appellant had exposed his penis and testicles to her.

47 The tenth count charged the appellant with inciting EE to commit an act of indecency with him[60]. EE was 15 years old at the time. She had come to know the appellant when she was doing a work experience placement with his wife. The offence was alleged to have occurred on an occasion when the appellant had driven EE to her home. EE said that as they walked down the driveway at her home they had starting kissing and that she had moved her hand onto the appellant's erect penis over his clothing. EE gave evidence of another occasion in a park when she had sat leaning against the appellant and felt his erect penis against the small of her back. They had kissed and the appellant had touched her nipples and vulva through her clothing.

48 The eleventh count charged the appellant with committing an act of indecency towards SM when SM was 12 or 13 years old[61]. The appellant and SM were both appearing in a television series called *Hey Dad..!*. The appellant came out of his dressing room, stood in front of a mirror in SM's view and undid his belt, letting his pants and underpants drop to his ankles. He wiggled his hips

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59 *Crimes Act* 1900 (NSW), s 61E(1A).

60 *Crimes Act* 1900 (NSW), s 61E(2).

61 *Crimes Act* 1900 (NSW), s 61E(2).

back and forth exposing his penis as he looked at SM in the mirror. SM also gave evidence of occasions when she had sat on the appellant's lap while publicity photographs were taken. On these occasions SM said the appellant had put his hand underneath her and touched her on the chest, making her feel uncomfortable.

49 AA, a member of the appellant's extended family, gave evidence of an occasion when she was aged between 10 and 14 years when the appellant touched her on the breast and between her legs as she was swimming. AA also gave evidence of seeing the appellant in her bedroom touching his genitals while he stood naked in front of a mirror with the bedroom door open. On another occasion, AA said the appellant had touched her breasts shortly after his daughter left the room.

50 BB, another member of the appellant's extended family, gave evidence of an incident that occurred when she was 11 years old. She was at a birthday party at the appellant's home when he touched her breasts under her shirt and put his hand underneath the elastic of her jeans.

51 VOD stayed overnight with SH at the appellant's home on occasions when she was aged between seven and nine years. She gave evidence that the appellant had come into the bedroom which she was sharing with SH and walked around the room naked and that she had seen his genitals.

52 The workplace tendency witnesses all worked in the costume department of *Hey Dad..!*. LJ was about 24 years old at the time. She said that the appellant often slept in his dressing room during breaks and that she had to wake him. On occasions she would find him naked and uncovered. On other occasions LJ said that the appellant had made her feel uncomfortable by trying to grab her breast when hugging her and brushing past her, rubbing his genitals against her back or bottom.

53 CS was about 19 or 20 years old when she worked on *Hey Dad..!*. She said the appellant had made her feel uncomfortable by, when brushing past her, making contact with her bottom or breast with his genitals or hands. On one occasion, while in his dressing room, the appellant exposed his penis to CS.

54 VR was 18 years old when she worked on *Hey Dad..!*. On a couple of occasions the appellant had touched her near her breast. After the third occasion VR determined that the touching had not been accidental. She had to take clothes into the appellant's dressing room and sometimes she woke him from a nap. On one occasion the appellant was naked and she pulled up a sheet to cover

him. After the third occasion when she found the appellant lying naked on his bed, VR reported the matter to her supervisor.

The appellant's submissions

55 In this Court the appellant acknowledges that the evidence of JP was admissible as tendency evidence on the trial of the counts involving SH and vice versa because each involved the surreptitious sexual molestation of a child in bed notwithstanding that another child was close by. He is critical of the trial judge and the Court of Criminal Appeal for the failure to articulate how the remaining tendency evidence gained its significant probative force. He asks how satisfaction that he exposed his penis to a nine year old child swimming between his legs makes it more probable that he encouraged EE, a 15 year old girl, to put her hand over his penis as they kissed.

Conclusion

56 The focus of the appellant's submission on the dissimilarity in the acts and the circumstances in which they occurred ignores the tendency that they were adduced to prove. The particular stated in the tendency notice, that the conduct occurred in the vicinity of another adult, served to highlight the appellant's willingness to act on his sexual interest in underage girls despite the evident danger of detection. It would have been more accurate to particularise the conduct as occurring in the vicinity of another person, since on some occasions it was another child who was in the vicinity. In EE's case, there was no evidence that any person was in the vicinity. Nonetheless, the evidence in support of that count was that the appellant encouraged EE to stimulate his penis as they stood kissing in the driveway of her family home, in circumstances in which EE was fearful that they would be seen. The evidence as a whole was capable of proving that the appellant was a person with a tendency to engage in sexually predatory conduct with underage girls as and when an opportunity presented itself in order to obtain fleeting gratification, notwithstanding the high risk of detection.

57 An inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination are unusual as a matter of ordinary human experience. Often, evidence of such an inclination will include evidence of grooming of potential victims so as to reveal a "pattern of conduct" or a "modus operandi" which would qualify the evidence as admissible at common law. But significant probative value may be demonstrated in other ways. In this case the tendency evidence showed that the unusual interactions which the appellant was alleged to have pursued involved courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by. This level of disinhibited disregard of the risk of discovery by other

adults is even more unusual as a matter of ordinary human experience. The evidence might not be described as involving a pattern of conduct or modus operandi – for the reason that each alleged offence involved a high degree of opportunism; but to accept that that is so is not to accept that the evidence does no more than prove a disposition to commit crimes of the kind in question.

58 Given the complainants' ages, consent was not an issue in any of the counts. It was the defence case on each count that the complainant had fabricated her account. That the tendency evidence did more than prove a disposition to commit crimes of the kind in question, and was actually of significant value as proof of his guilt of the offences charged, can be illustrated by hypothesising separate trials in respect of each complainant with the only evidence against the appellant being the evidence of the complainant. In each such case, the jury would be presented with a prosecution case inviting it to conclude beyond reasonable doubt that the appellant had engaged in behaviour towards the complainant which involved predatory sexual activity pursued by taking opportunistic advantage of a social or family or work occasion in circumstances in which the appellant courted a real risk of discovery by other adults.

59 Considered in isolation, JP's evidence might have seemed inherently unlikely: the appellant, a family friend, at dinner in JP's home, absented himself from the party and came into her bedroom, and without making any attempt to ensure her silence, commenced to invasively sexually assault her while his daughter lay sleeping in the same bed. The jury might well be disinclined to accept JP's evidence as satisfying it, beyond a reasonable doubt, that the appellant had, in fact, engaged in conduct which was so much at odds with the jury's experience of the probabilities of ordinary human behaviour. Proof of the appellant's tendency to engage in sexual activity with underage girls opportunistically, notwithstanding the evident risk, was capable of removing a doubt which the brazenness of the appellant's conduct might otherwise have raised.

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

61 As explained above, there are two matters which must be considered. The first matter, involving the extent to which the evidence supports a tendency, does not require that the evidence be considered "by itself". In the words of s 97(1),

the evidence of either "conduct" or "a tendency" can be used to determine the tendency relied upon by "having regard to other evidence adduced or to be adduced". In other words, evidence of a tendency might be weak by itself but its probative value can be assessed together with other evidence.

62 This point can be illustrated by reference to an example given by the appellant in oral submissions, which was that there was a "world of difference" between the evidence concerning EE (count 10), who was 15 years old and whom the appellant encouraged to commit indecent acts in a park and in a driveway, and the evidence concerning SH (counts 3 to 6), which involved intrusive acts "in a darkened bedroom, in her bed, when she was only six, seven or eight". One problem with this comparison is that it ignores the fact that in relation to, for example, count 4, involving SH, the evidence of EE needed to be considered together with the evidence involving (i) counts 1 to 3 and counts 5 to 11, (ii) uncharged acts relating to the complainants SH, JP, AK and SM, and (iii) uncharged acts relating to the tendency witnesses VOD, AA and BB. Indeed, one of the appellant's concessions on this appeal was that the tendency evidence from counts 1 to 2 (JP) and 3 to 6 (SH) was cross-admissible. This evidence, which was conceded to be admissible, reinforced the other tendency evidence. When considered together, all the tendency evidence provided strong support to show the appellant's tendency to engage opportunistically in sexual activity with underage girls despite a high risk of detection.

63 The probative value of the evidence of each complainant and of AA, BB and VOD lay in proof of the tendency to act on the sexual attraction to underage girls, notwithstanding the evident risks. The fact that the appellant expressed his sexual interest in underage girls in a variety of ways did not deprive proof of the tendency of its significant probative value.

64 The assessment of the significant probative value of the proposed evidence does not conclude by assessing its strength in establishing a tendency. The second matter to consider is that the probative value of the evidence will also depend on the extent to which the tendency makes more likely the elements of the offence charged. This will necessarily involve a comparison between the tendency and the facts in issue. 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. In contrast, a tendency expressed at a level of particularity will be more likely to be significant. The Court of Criminal Appeal did not err in finding that the tendency evidence of each of the complainants and AA, BB and VOD met the condition imposed by s 97(1)(b) in relation to each count in the indictment.

65 It will be recalled that the evidence of the workplace tendency witnesses was confined to proof of the offence charged in count 11. Relevantly, the trial judge assessed that the evidence of the workplace tendency witnesses was capable of establishing the appellant's tendency to expose his genitalia to females. His Honour considered that the workplace tendency witnesses' evidence had significant probative value to the determination of whether the appellant had acted as SM alleged by exposing his genitals to her. In circumstances in which SM's evidence was said to have been fabricated, this conclusion did not involve error. As earlier noted, the Court of Criminal Appeal's conclusions (i) that the probative value of the tendency evidence was not substantially outweighed by any prejudicial effect it may have on the appellant, and (ii) that the directions concerning the confined use to be made of the workplace tendency witnesses' evidence were sufficient, are not the subject of the appeal in this Court.

Orders

66 For these reasons there should be the following order.

Appeal dismissed.

67 GAGELER J. One of the exclusionary rules set out in the Uniform Evidence legislation[62] is labelled the "tendency rule". The tendency rule is that "[e]vidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency … to act in a particular way, or to have a particular state of mind unless … the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value"[63]. The probative value of evidence is "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue"[64].

68 The effect of the tendency rule is to make evidence inadmissible to prove a tendency as a step in proving or disproving the existence of another fact, being a fact that is in issue, unless the court evaluates the extent to which the evidence could rationally affect the assessment of the probability of the existence of the fact in issue as "significant". Consideration of how high the bar of "significance" should be set in undertaking that evaluation usefully begins with a simple question. Why does the tendency rule exist?

69 The scheme of the Uniform Evidence legislation is that no evidence is admissible at all in a civil or criminal proceeding unless it is evidence that could (if accepted) rationally affect the assessment of the probability of the existence of a fact in issue[65]. Tendency evidence adduced about a defendant by the prosecution in a criminal proceeding is subject to the special rule that it cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect on the defendant[66]. On top of all that, a court has discretion to refuse to admit evidence the probative value of which is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party, or be misleading or confusing, or cause or result in undue waste of time[67]. And on top of all that again, a court in a criminal proceeding has an overriding duty to refuse to admit evidence adduced by the

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62 See *Evidence Act* 1995 (Cth), *Evidence Act* 1995 (NSW) and cognate legislation in other States and Territories.

63 Section 97(1).

64 Dictionary, Pt 1, definition of "probative value". (The definition appears in s 3(1) of the *Evidence Act* 2001 (Tas).)

65 Sections 55 and 56.

66 Section 101.

67 Section 135.

prosecution if its probative value is outweighed by the danger of unfair prejudice to the defendant[68]. Given all of those other potential barriers to its admissibility and use, why is there added this particular barrier to the admissibility of evidence that has the potential rationally to affect the assessment of the probability of the existence of a fact in issue by contributing to proof that a person has or had a tendency to act in a particular way or to have a particular state of mind?

70 To answer that question, it is necessary to be clear about the problem to which the tendency rule is directed. The problem arises from the cognitive process necessarily involved in using tendency evidence to assess the probability of the existence of a fact in issue. The cognitive process is that mapped out in the statement of the tendency rule itself. Tendency evidence – be it of character or reputation or of conduct other than an occasion in issue in a proceeding – is evidence that is used to prove to the tribunal of fact that a person has or had a tendency to act in a particular way or to have a particular state of mind. The tendency so proved to the tribunal of fact is then used by the tribunal of fact to predict or (to adopt terminology which describes the process of reasoning employed more accurately) to "postdict"[69] the action or state of mind of the person on the occasion or occasions in issue in the proceeding. Applied to evidence of past conduct, tendency reasoning is no more sophisticated than: he did it before; he has a propensity to do this sort of thing; the likelihood is that he did it again on the occasion in issue.

71 Tendency reasoning, as courts have long recognised, is not deductive logic. It is a form of inferential or inductive reasoning. What it involves is "admeasuring the probability or improbability of the fact ... in issue ... given the fact or facts sought to be adduced in evidence"[70]. In the admeasurement of that probability or improbability, as courts have again long recognised, there inheres a very real risk of attaching "too much importance" to the tendency evidence – of giving tendency evidence "too much weight"[71]. The common law traditionally took an extremely conservative approach to managing that risk, at least in criminal proceedings.

72 The problem that inheres in tendency reasoning has come to be exposed by social science research and explained in social science literature in more

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68 Section 137.

69 Saks and Spellman, *The Psychological Foundations of Evidence Law*, (2016) at 151.

70 *Martin v Osborne* (1936) 55 CLR 367 at 385; [1936] HCA 23, quoted in *Hoch v The Queen* (1988) 165 CLR 292 at 294; [1988] HCA 50.

71 *Perry v The Queen* (1982) 150 CLR 580 at 585-586; [1982] HCA 75.

precise terms. The problem is one of cognitive bias, amounting to an inclination observable on the part of most persons to overvalue dispositional or personality-based explanations for another person's conduct and to undervalue situational explanations for that conduct. The bias is towards overestimating the probability of another person acting consistently with a tendency that the person is thought to have – of treating the person as more consistent than he or she actually is[72].

73 That problem of cognitive bias in tendency reasoning is separate from any added danger which might arise from the potential for a tribunal of fact to make some improper use of tendency evidence. The potential for a tribunal of fact to make improper use of tendency evidence is readily accommodated within an evaluation of the prejudicial effect of the evidence[73]. Cognitive bias can perhaps be thought of as a form of prejudice, but it really is a problem of a different sort from the problem of a tribunal of fact making improper use of evidence. The problem is of a different sort because it inheres in the process of reasoning involved in the tribunal of fact making entirely proper use of evidence.

74 To recognise that the tendency rule is directed to the problem of cognitive bias is consistent with its legislative history. The legislative history is recounted in detail in the reasons for judgment of Nettle J. Enough for present purposes is to emphasise the most salient aspects.

75 The interim report of the Australian Law Reform Commission, which preceded the enactment of the Uniform Evidence legislation, drew attention to the considerable body of psychological research which had come to bear on the topic of tendency reasoning by 1985. That research, the Commission pointed out, indicated not only that "the concept of character in the narrow sense of general disposition has little value as a predictive tool of human behaviour" but also that "there is a real danger that evidence from which a character inference can be drawn will be given disproportionate weight by the fact-finder, compared with the weight scientific studies suggest it should have"[74].

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72 Saks and Spellman, *The Psychological Foundations of Evidence Law*, (2016) at 157-158.

73 *HML v The Queen* (2008) 235 CLR 334 at 354 [12]; [2008] HCA 16.

74 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 452 [797], 453 [799].

76 The Commission stated[75]:

> "Psychological studies indicate that, in the absence of detailed information on an individual's history and personality, the chances of accurate prediction are very low unless the individual is in similar situations – it is the behaviour in a similar situation rather than an inferred character trait which justifies prediction."

77 The Commission concluded[76]:

> "The research confirms the need to maintain strict controls on evidence of character or conduct and for such evidence to be admitted only in exceptional circumstances. It demonstrates, however, that the emphasis of the law should be changed. For the sake of accurate fact-finding, fairness and the saving of time and cost, the law should maximise the probative value of the evidence it receives by generally limiting it to evidence of conduct occurring in circumstances similar to those in question. Only for special policy reasons should other evidence of character or conduct be received."

78 In its interim report, the Commission proposed a multilayered solution to the problem to which the psychological research had pointed. There should be a general statutory rule to the effect that evidence of specific conduct or a specific state of mind should not be admissible to prove that a person had a tendency to act in a particular way or to have a particular state of mind. There should be an exception from that rule in a civil or criminal proceeding only where the court was satisfied that it was reasonably open to find that the person did some other particular act or had some other particular state of mind and that the act or state of mind and the circumstances in which it was done or existed were substantially and relevantly similar to the act or state of mind and circumstances in issue in the proceeding. Even then, tendency evidence about a defendant should not be adduced by the prosecution in a criminal proceeding unless that evidence overcame the additional hurdles of being relevant to a fact in issue that was substantially in dispute in the proceeding and of having "substantial probative value"[77]. The matters to which the court was to have regard in determining whether the evidence had substantial probative value should include: the nature

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75 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 452 [797].

76 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 456 [800].

77 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 2 at 47.

and extent of the similarity; the extent to which the act or state of mind to which the evidence related was unusual; in the case of evidence of a state of mind, the extent to which the state of mind was unusual or occurred infrequently; and, in the case of evidence of an act, the likelihood that the defendant would have repeated the act, the number of times on which similar acts had been done, and the period that had elapsed between the time when the act was done and the time when the defendant was alleged to have done the act that the evidence was adduced to prove[78]. The Commission repeated that proposal in its final report[79].

79 The Australian Law Reform Commission's proposal was not taken up in the Uniform Evidence legislation. What emerged in place of the proposal in the legislation as originally enacted in 1995 was a single statutory rule applicable in civil and criminal proceedings alike. The rule was couched in terms that evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, was not admissible to prove that the person had a tendency to act in a particular way, or to have a particular state of mind, if the court thought that the evidence would not have significant probative value[80]. To that was added the prohibition on use against a defendant in a criminal proceeding of tendency evidence adduced about the defendant by the prosecution unless the probative value of the evidence substantially outweighs any prejudicial effect on the defendant[81].

80 Exactly why the Australian Law Reform Commission's proposal was departed from does not appear from publicly available sources. The legislative choice that was made cannot be explained as a preference to adhere to the approach of the common law: the structure and language of the statutory rule differed markedly from the common law rule as it came to be definitively stated in Australia almost contemporaneously with the enactment of the Uniform Evidence legislation[82]. Against the background of the Commission's careful identification of the underlying problem with tendency evidence and the implicit rejection of the Commission's proposed solution, however, two aspects of the legislative choice that was made come into sharp relief.

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78 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 2 at 47.

79 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at 101 [176(a)].

80 Section 97.

81 Section 101(2).

82 See *Pfennig v The Queen* (1995) 182 CLR 461; [1995] HCA 7.

81 First, the legislative choice was for tendency evidence to be admissible only if adjudged by a court to meet a threshold of probative value set above the minimum requirement for any evidence to be admissible, being simply that the evidence be capable of bearing on the assessment of the probability of the existence of a fact in issue. The higher threshold set for evidence used for tendency reasoning was that it be capable of bearing on the assessment of the probability of the existence of a fact in issue to a "significant" extent. The threshold of significant probative value, as was soon pointed out in the case law, is lower than that of "substantial" probative value; but, to meet the threshold of significant probative value, evidence must still be "important" or "of consequence" to the assessment of the probability of the existence of a fact in issue[83].

82 Second, the legislative choice was that a court was not to be constrained or legislatively guided as to the considerations which might be taken into account in forming the judgment that tendency evidence met that threshold. In particular, tendency evidence capable of meeting the threshold was not to be limited to evidence of an act or state of mind occurring in circumstances substantially and relevantly similar to the act or state of mind and circumstances in issue.

83 The legislative history does not conclude with the enactment of the Uniform Evidence legislation in 1995. In 2005, the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission jointly conducted a review of the Uniform Evidence legislation. In the course of that review, they revisited the psychological research to which the Australian Law Reform Commission had referred in 1985. They observed in their joint report that a review of the psychological literature since 1985 and of psychological teaching current in 2005 confirmed and in some cases strengthened the Australian Law Reform Commission's previous analysis[84]. Tendency evidence, as the Commissions then put it by way of summary, "poses problems for the fact-finding process because the probative value of such evidence tends to be overestimated and the evidence can be highly prejudicial"[85]. Their joint report contains no suggestion that they saw the suite of statutory rules which had then been in operation for ten years as other than an appropriately tailored legislative response to those problems.

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83 *Lockyer* (1996) 89 A Crim R 457 at 459.

84 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report, (2005) at 83 [3.19].

85 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report, (2005) at 366 [11.5].

84 Characterising the tendency rule as "a preliminary admissibility screen which operates in both civil and criminal proceedings", and noting that "in criminal proceedings, there are other requirements that must be satisfied"[86], the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission in their joint report in 2005 recommended no change to the formulation of the threshold for the admissibility of tendency evidence in terms of significant probative value. They rejected submissions that the threshold should be removed in civil proceedings[87]. They also rejected submissions that the threshold should be raised in criminal proceedings by replacing "significant" with "substantial"[88]. The only change they recommended to the rule was a drafting change – to remove a double negative from the text as originally enacted[89]. The Uniform Evidence legislation was subsequently amended to reflect that recommendation[90]. The result is the tendency rule in its current form.

85 Plainly enough, the tendency rule is not an attempt entirely to remove the risk of overestimation of the probative value of tendency evidence to which attention was drawn in 1985 and again in 2005. The risk is inherent in any tendency reasoning, and the rule admits of the possibility of evidence being admitted to prove or disprove the existence of a fact in issue through a process of tendency reasoning.

86 The tendency rule is, rather, best explained as confining the availability of tendency reasoning to evidence adjudged capable through the application of tendency reasoning of affecting the assessment of the probability of the existence

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86 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report, (2005) at 379 [11.48].

87 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report, (2005) at 375 [11.36].

88 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report, (2005) at 379 [11.51].

89 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report, (2005) at 378 Recommendation 11-3.

90 Eg, *Evidence Amendment Act* 2008 (Cth), Sched 1, item 42; *Evidence Amendment Act* 2007 (NSW), Sched 1 [38].

of a fact in issue to an extent significant enough to justify the risk of cognitive error which tendency reasoning entails. The statutory standard of "significant", and its non-statutory but helpful synonyms "important" and "of consequence", are best understood and applied purposively in that light.

87 For a court to think that tendency evidence has significant probative value, it must be satisfied that using the evidence for tendency reasoning makes the existence of a fact in issue significantly more probable or improbable. If the question is just how much more probable or improbable, the answer is enough to justify the ever-present risk that the objective probability will be subjectively overestimated. Putting the same point more colloquially, the court must be comfortable that the evidence is of sufficient weight to justify the risk of the evidence unwittingly being given too much weight.

88 The significance to be adjudged through the application of that standard is between the tendency evidence and the probability of the existence of a fact in issue. The connection between the two, however, lies in the particular tendency that is alleged. That is to say, whilst the focus is on the connection between the tendency evidence and the probability of the existence of the fact in issue, the particular tendency is the lens through which the focus occurs.

89 To return to the explanation already given of the essential nature of tendency reasoning, the degree to which tendency evidence is capable of rationally affecting the assessment of the probability of the existence of the fact in issue is a function of two considerations.

90 The first consideration is the extent to which the evidence (alone or with other evidence adduced or to be adduced by the party seeking to adduce the evidence) is capable of rationally affecting the assessment of the probability of the person having or having had a tendency to act in a particular way or to have or have had a particular state of mind. Unless the evidence as a whole is capable of establishing to the requisite standard of proof that the person has or has had the alleged tendency, tendency reasoning can go no further.

91 Sometimes a tendency will be capable of being established to the requisite standard by evidence of how a person acted on one other occasion or on a small number of unrelated other occasions. More commonly, what will need to be shown to establish a tendency is a pattern of behaviour: the person having acted in a particular way, or in a manner which demonstrates the person to have a particular state of mind, in repeated circumstances in which common factors have been present.

92 Courts of criminal appeal have properly pointed out that a tendency to act in a particular way or to have a particular state of mind can be established by

evidence of past conduct without that evidence needing to disclose a "striking pattern of similarity between the incidents"[91]. That is not, however, to detract from the importance of factors indicative of some sort of pattern to inferring tendency from conduct and to assessing the strength of such tendency as might be found. In the language of Basten JA in *Saoud v The Queen*[92], for evidence of conduct to establish that a person had a tendency to act in a particular way or to have a particular state of mind "will almost inevitably require degrees of similarity, although the nature of the similarities will depend very much on the circumstances of the case".

93 The second consideration is the extent to which the tendency established by the evidence is (alone or with other evidence adduced or to be adduced by the party seeking to adduce the evidence) capable of rationally affecting the assessment of the probability of the person having acted in a particular way or having had the state of mind alleged on an occasion in issue in the proceeding. Important at this stage of the analysis will be the specificity of the tendency and how precisely that tendency correlates to the act or state of mind that the person having the tendency is alleged to have had on the occasion in issue. That is because, other considerations being equal, the greater is the specificity of the tendency and the greater is the correlation between the tendency and the act or state of mind in issue, the greater will be the predictive or "postdictive" value of the tendency in that the greater will be the likelihood that the person acted or thought in conformity with the tendency on the occasion in issue.

94 Making and illustrating that point, Leeming JA said in *El-Haddad v The Queen*[93]:

> "[T]he specificity of the tendency directly informs the strength of the inferential mode of reasoning. It is easy to see why. It is, for example, one thing to say that a man has a tendency to steal cars; that says something, but not very much, as to whether he stole a particular car the subject of a charge. It is quite another to say that a man has a tendency to steal black European sports cars and then set them on fire, if the fact in issue is whether that man stole and burnt a black Porsche."

95 Of course, the significance of tendency reasoning is not always as limited as that simple illustration might suggest. The Victorian Director of Public Prosecutions, intervening in the present appeal, draws attention to the circumstance that tendency reasoning assumes added significance in a typical

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91 *R v Ford* (2009) 201 A Crim R 451 at 485 [125].

92 (2014) 87 NSWLR 481 at 491 [44].

93 (2015) 88 NSWLR 93 at 113 [72].

case of historic sexual assault. Typically, the defendant was an adult and the complainant was a child at the time of the sexual assault charged. The complainant gives evidence that the sexual assault occurred in a setting in which there were no witnesses to the assault. The defendant was known to the complainant. There is no issue about identity. The defendant denies any wrong-doing. Whether the defendant committed the sexual assault charged comes down to whether the complainant or the defendant is to be believed.

96 The Victorian Director of Public Prosecutions points out that evidence of the defendant having committed other sexual assaults, contributing to proof that the defendant had a tendency to commit sexual assault, informs the assessment of the probability of the defendant having committed the sexual assault charged, not only by increasing the likelihood that the defendant acted in accordance with that tendency on the occasion to which the charge relates, but also by making more plausible the testimony of the complainant that the defendant did so act on that occasion and less plausible the testimony of the defendant that he did not. Enhancing the plausibility of the complainant's testimony enhances the significance of the tendency evidence to proof of the prosecution case[94].

97 The Victorian Director of Public Prosecutions nevertheless stops short of suggesting that the typical case of historic sexual assault is a special category in which tendency evidence of the defendant having committed other sexual assaults must have significant probative value on the basis that it makes the testimony of the complainant more plausible. For tendency evidence to have the effect of enhancing the plausibility of the complainant's testimony, it must be evidence to which tendency reasoning is applied to make the complainant's version of events more probable. Risk of cognitive error inheres in that method of reasoning, and what still needs to be evaluated in the application of the tendency rule is the extent to which the tendency evidence makes the complainant's version of events objectively more probable.

98 Test that last point by hypothesising a case in which the defendant admits to a dozen prior sexual assaults but adamantly denies the assault with which he is charged in spite of testimony from the complainant that he did it. The probative value of the prior sexual assaults still lies in the tendency they reveal and in the extent to which the defendant can be inferred to have acted in accordance with that tendency on the occasion in question.

99 A pertinent illustration of appropriate practical outworking of the requisite analysis is provided by the reasoning of Hoeben CJ at CL in *Sokolowskyj v The*

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94 See *Stubley v Western Australia* (2011) 242 CLR 374 at 416-417 [143]; [2011] HCA 7.

Queen[95]. In a trial of a man for an offence of indecently assaulting an eight-year-old girl known to the defendant in a toilet at a shopping centre, the prosecution relied on the facts surrounding three previous convictions for indecent exposure to young women to establish that the defendant "had a tendency at the relevant time to have sexual urges and to act on them in public in circumstances where there was a reasonable likelihood of detection". Holding that the extent to which the evidence relied on to found that tendency could rationally affect the assessment of the probability of the existence of the fact in issue was not capable of being adjudged to be significant, his Honour identified the central flaw in the prosecution case as one of reliance on "generalised sexual activity" insufficiently related to the elements of the offence charged[96].

100 Another pertinent illustration is provided by the reasoning of Maxwell P, Nettle and Beach JJA in *Rapson v The Queen*[97]. Following a trial of a teacher for having committed sexual offences against eight male pupils in his care at a secondary boarding school over a 15-year period, the prosecution on appeal conceded that the evidence of two of the pupils concerning charges of penile-anal rape involving domination and violence was not cross-admissible on the charges concerning the other six pupils, all of which involved non-violent and non-penetrative fondling. Their Honours accepted the prosecution concession, noting distinct differences in the gravity of the misconduct and in the qualitative character of the surrounding circumstances.

101 More problematic is the reasoning in *PNJ v Director of Public Prosecutions*[98]. The Victorian Court of Appeal there took the view that a tendency cannot be inferred by reference to circumstances within which conduct occurred which were beyond the control of the person in question. The Court of Appeal acted on that view to disregard the circumstance that the evidence sought to be adduced for the purpose of tendency reasoning in that case was of sexual offences against children which occurred at the same location during the period in which the defendant was employed in a supervisory role in a youth detention centre. The correctness of the result in that case has since been doubted[99], and I agree with the submission of the Victorian Director of Public Prosecutions that the approach was too blinkered.

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95 (2014) 239 A Crim R 528.

96 (2014) 239 A Crim R 528 at 537-538 [40]-[44].

97 (2014) 45 VR 103.

98 (2010) 27 VR 146.

99 *RHB v The Queen* [2011] VSCA 295 at [17].

102 To multiply illustrations beyond this point might distract from principled analysis rather than illuminate it. The Victorian Director of Public Prosecutions submits that the tendency rule has in practice been applied more restrictively in Victoria since the decision of the Victorian Court of Appeal in *Velkoski v The Queen*[100] than the tendency rule has been applied in New South Wales. The ultimate aim of the present analysis being to consider how the tendency rule is best to be applied, little is gained from attempting to evaluate a submission cast in such relative terms. Even less would be gained from attempting to engage with the comment made by the Victorian Court of Appeal in *Velkoski* that the approach taken to tendency evidence by the New South Wales Court of Criminal Appeal up until the time when *Velkoski* was decided went too far in lowering the threshold to admissibility[101].

103 There is nevertheless some utility in addressing two specific statements in *Velkoski*. One is the statement that for tendency evidence to be admissible "evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct"[102]. The other is the statement, singled out for adverse comment by the New South Wales Court of Criminal Appeal in the decision under appeal, that "to determine whether the features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal 'underlying unity', a 'pattern of conduct', 'modus operandi', or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely"[103].

104 The statements, in my opinion, are unobjectionable. The first captures, perhaps as well as any single verbal formulation could, the purposive approach to the application of the tendency rule which I consider to be appropriate. The second fairly describes the normal process of tendency reasoning where a particular tendency is sought to be proved from evidence of other conduct. It does not lay down an exhaustive test for determining when tendency evidence is admissible. Applied too rigidly, it might impede rather than assist the requisite analysis by conflating the capacity of the evidence to establish a particular tendency on the part of a person with the capacity of the particular tendency to

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100 (2014) 45 VR 680.

101 *Velkoski v The Queen* (2014) 45 VR 680 at 717 [164].

102 *Velkoski v The Queen* (2014) 45 VR 680 at 682 [3].

103 *Velkoski v The Queen* (2014) 45 VR 680 at 719 [171], quoted in *Hughes v The Queen* [2015] NSWCCA 330 at [187].

contribute to the probability of the person acting or thinking in the manner alleged on the occasion in issue.

105 Making the evaluative judgment required of a court in the implementation of the tendency rule is facilitated by the procedural requirement that a party must ordinarily give notice of an intention to seek to adduce tendency evidence[104]. The utility of the tendency notice goes beyond providing procedural fairness to other parties. The tendency 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. The importance of explicitly identifying in the notice the particular tendency that is asserted, as Howie AJ put it in *Bryant v The Queen*[105], "should be obvious: how else is the court going to be able to make a rational decision about the probative value of the evidence". By 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.

106 The tendency notice given by the prosecution in the trial of the appellant on 11 counts of sexual misconduct against five female children under 16 years of age (JP, SH, AK, EE and SM) over a seven-year period relevantly gave notice of the prosecution's intention to seek to make cross-admissible, as tendency evidence relevant to proof of each charge of misconduct against each complainant, evidence of each of the other four complainants concerning the misconduct against them.

107 The tendency notice stated in relation to the appellant:

> "The tendency sought to be proved is his tendency to act in a particular way, and to have a particular state of mind, namely:
>
> (i) To having a sexual interest in female children under 16 years of age;
>
> (ii) To use his social and familial relationships with the families to obtain access to female children under 16 years of age so that he could engage in sexual activities with them;
>
> (iii) To use his daughter's relationship with female children to obtain access to them so that he could engage in sexual activities with them;

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104 Section 97(1)(a) and (2).

105 (2011) 205 A Crim R 531 at 540 [50].

(iv) To use his working relationship with females to utilise an opportunity to engage in sexual activities;

(v) To engage in sexual conduct with females aged under 16 years of age by either

a. touching in an inappropriate sexual way but maintaining the contact was inadvertent or accidental;

b. by exposing his naked penis / genitalia;

c. by making the child come into contact with his penis / genitalia;

d. touching the child's vaginal area

e. by carrying out sexual acts upon the complainants when they were within the vicinity of another adult."

108 Elaborate as the description of the tendency asserted in the notice seems at first sight to be, counsel for the appellant fairly points out that the tendency asserted boils down to a tendency to have a sexual interest in female children less than 16 years of age and to engage in sexual activities with them by using his social, familial or working relationships to obtain access to them. The Court of Criminal Appeal acknowledged only slightly more specificity in the tendency asserted when characterising it in light of the tendency evidence sought to be adduced by the prosecution as a tendency to have a sexual interest in female children less than 16 years of age and to engage in sexual activities "opportunistically, as and when young female persons were in [his] company". Accepting it to be capable of establishing that tendency, the Court of Criminal Appeal concluded that the tendency evidence of all complainants was correctly assessed by the trial judge to have significant probative value[106].

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

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106 *Hughes v The Queen* [2015] NSWCCA 330 at [197]-[200].

risk that any subjective estimation of the likelihood will be greater than is objectively warranted.

110 The phrase "unless … the court thinks" in the formulation of the tendency rule admits of the potential for judicial understanding of the probative value of evidence of particular tendencies to be informed by social science data and enhanced by judicial education. Judicial evaluations of the probative value of categories of tendency evidence may change as new data comes to light and as informed consensus about best practice is built and adjusted in light of improved understanding. No party or intervener in the present appeal sought to direct attention to data or scholarly work bearing on actual probabilities.

111 In the meantime, I think it better to take a conservative approach. On the material currently available, I am unable to be satisfied that either a tendency to be sexually interested in female children, or a tendency to engage in sexual activities with female children opportunistically, bears on the probability that a man who had such a tendency engaged in a particular sexual activity with a particular female child on a particular occasion to an extent that can properly be evaluated as significant. In my opinion, it was not open to the Court of Criminal Appeal to conclude on the basis of its capacity to establish such a tendency that the evidence of all of the complainants met the tendency rule so as to be cross-admissible.

112 Drilling down to what more specific tendency might be revealed on closer examination of the evidence of each complainant, the appellant accepts that there were sufficient similarities between the evidence of JP and SH to permit the finding of a more particular tendency so as to render the evidence of each as to the assault or assaults against her cross-admissible on the charges of assault against the other. The evidence of JP, SH and AK, if accepted, was sufficient to establish that the appellant had engaged in a pattern of conduct which involved exposing his penis to and sexually touching girls where other persons were in close proximity and where he was therefore at risk of detection. Although not fitting neatly the same pattern of conduct on the part of the appellant, because it did not occur in a familial setting, I think it open to conclude that the evidence of SM was cross-admissible on essentially the same basis. The evidence of SM was of the appellant touching her and exposing his penis to her in a work setting where he was again at risk of detection. The overall pattern of conduct revealed by the evidence of JP, SH, AK and SM is indicative of a tendency on the part of the appellant to initiate fleeting physical sexual contact with young females in circumstances in which he was at risk of detection.

113 The evidence of EE, in my opinion, was materially different. The circumstances in which the conduct constituting the offence against EE arose were arranged with the complainant and involved an element of planning. In my view, the appellant's interactions with EE cannot be characterised as indicative of

a tendency to initiate fleeting physical sexual contact in circumstances in which he was at risk of detection.

114 I do not think that the evidence of EE (whether considered alone or with other evidence adduced by the prosecution) is of conduct capable of proving a tendency of sufficient specificity to have the effect of increasing the probability of the appellant having engaged in the conduct alleged against JP, SH, AK or SM to an extent that can be described as significant. The evidence of EE, in my opinion, was not open to be admitted as tendency evidence on any of the charges of sexual assault against JP, SH, AK or SM.

115 The New South Wales Director of Public Prosecutions accepts that it follows from a conclusion that the evidence of any complainant was not cross-admissible against any other complainant that an error of law occurred in the conduct of the trial on all charges. He accepts that the consequence is that all of the convictions recorded must be quashed and a new trial must be ordered. He does not argue that any of the convictions can be upheld on the basis that no substantial miscarriage of justice actually occurred by reason of the wrongful admission of the evidence.

116 In the result, I would make the orders sought by the appellant, allowing the appeal, setting aside the orders made by the Court of Criminal Appeal, quashing the convictions of the appellant on counts 1 to 9 and 11, and ordering a new trial on those counts.

117 NETTLE J. In February 2014, the appellant stood trial in the District Court of New South Wales on 11 counts of sexual misconduct against five female complainants under 16 years of age. Over objection, the Crown was permitted to adduce as tendency evidence pursuant to s 97 of the *Evidence Act* 1995 (NSW):

(a) in relation to each count:

(i) evidence of the charged acts committed against each other complainant;

(ii) evidence of uncharged acts committed against each other complainant;

(iii) evidence of uncharged acts committed against three non-complainants; and

(b) in relation to Count 11, in addition to the above, evidence of uncharged acts committed against three further non-complainants.

118 The appellant was convicted by a jury of 12 of all counts except Count 10.

119 The question for decision in this appeal is whether any and what part of that evidence was admissible against the appellant as tendency evidence under s 97 of the *Evidence Act*. As will be explained in what follows, some of the evidence was not admissible as tendency evidence in support of some of the counts because it did not have significant probative value in relation to the facts in issue on those counts.

Evidence adduced against the appellant[107]

120 Counts 1 and 2 related to complainant "JP"; Counts 3, 4, 5 and 6 to complainant "SH"; Counts 7, 8 and 9 to complainant "AK"; Count 10 to complainant "EE"; and Count 11 to complainant "SM".

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107 It was accepted that the summaries appearing at *R v Hughes* unreported, District Court of New South Wales, 14 February 2014 at 9-37 per Zahra DCJ and *Hughes v The Queen* [2015] NSWCCA 330 at [126]-[132] sufficiently state the evidence adduced at trial (except in one respect in relation to complainant EE which is corrected below).

Evidence given by complainants of charged offences and uncharged acts admitted as tendency evidence in relation to all counts

(i) Complainant JP

121 Counts 1 and 2 charged offences of sexual intercourse with JP between January 1984 and April 1985 without the consent of JP and knowing that JP was not consenting[108]. At the time of the alleged offending, JP was 14 or 15 years of age. The appellant was a friend of JP's parents and the two families socialised from time to time. JP gave evidence that the acts comprising Count 1 occurred at JP's family home during one such occasion. She said that the appellant entered her bedroom, where she and the appellant's daughter were sleeping, put his hand inside her pyjama pants causing her to wake, touched her vagina and inserted his finger into her vagina. She said that she pushed his hand away and that he then licked her cheek and left the room.

122 JP's evidence as to Count 2 was that, a month or so later, the appellant again entered her room while she was in bed, put his hand inside her pants and rubbed her clitoris and vagina. She said that she held his wrist, trying to push his hand away.

123 JP stated that the appellant had entered her room and touched her vagina on other occasions, and that he would touch or brush past her in ways that made her uncomfortable.

(ii) Complainant SH

124 Counts 3, 4, 5 and 6 charged offences of indecent assault against SH between March 1985 and May 1986[109]. At the time of the alleged offending, SH was between six and eight years old. SH lived with her family close to the appellant's home. She was a friend of the appellant's daughter and regularly visited and slept over at the appellant's home. SH gave evidence that the acts comprising Counts 3, 4, 5 and 6 occurred in the course of two separate incidents at the appellant's home when the appellant came into the bedroom in which SH and the appellant's daughter were sleeping and instructed SH to roll over in bed. He put her hand on his penis and made her masturbate him until he ejaculated. He then wiped the semen on her exposed vagina with his penis.

125 SH gave evidence that the appellant had done the same thing on other occasions, stating that it had occurred at least five times.

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108 Contrary to s 61D(1) of the *Crimes Act* 1900 (NSW) (as in force at the time of the alleged offending).

109 Contrary to s 61E(1) of the *Crimes Act*.

(iii) Complainant AK

126 Counts 7, 8 and 9 charged offences of aggravated indecent assault of AK between December 1986 and February 1987, while AK was under the authority of the appellant[110]. At the time of the alleged offending, AK was nine years old. AK was a school friend of the appellant's daughter and occasionally stayed over at the appellant's home. AK gave evidence that the acts comprising Counts 7 and 8 occurred during an outing to Manly Beach when the appellant encouraged his daughter and AK, who were wearing goggles, to swim between his legs. AK said that on the two occasions she did so, she saw the appellant's penis protruding from the side of his swimming togs and that he briefly pinned her between his legs as she passed between them. Her evidence of the acts comprising Count 9 was that, on another occasion when she stayed over at the appellant's home, it was necessary for the appellant to apply medicated ear drops to her ear. In order for that to occur, AK lay with her head on the appellant's lap. When she did so, she felt his erect penis through his trousers rubbing against her face.

127 AK also gave evidence of other occasions when the appellant instructed her to sit on his lap while he had an erection and of further occasions when he exposed his penis to her. On one of the latter occasions, AK walked into the lounge room and the appellant was sitting on the sofa dressed in a sarong that was pulled up to his thighs so that she could see his groin, penis and testicles. After moving his legs open and shut, he pulled the sarong down a little and AK and the appellant's daughter sat on the sofa with him. Another such occasion occurred when the appellant, again wearing a sarong, came into the bedroom in which AK and the appellant's daughter were sleeping. He sat on his daughter's bed with his legs apart so that AK, who was sleeping on a mattress on the floor, could see his penis as he conversed with her about the day's events.

(iv) Complainant EE

128 Count 10 charged an offence of inciting EE to commit an act of indecency with the appellant between September and December 1988[111]. At the time of the alleged offending, EE was 15 years of age. The appellant was a friend of EE's uncle and EE had undertaken work experience with the appellant's wife. After the work experience finished, EE met the appellant several times. EE gave evidence that the acts comprising Count 10 occurred when the appellant drove her home after they had visited a harbour-side park. They walked together down the driveway of EE's parents' home and began kissing. During the kiss, the appellant pressed his erect penis into EE's hip and she moved her hand onto his penis outside his clothing. He said "that's it". EE said that the appellant told her

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110 Contrary to s 61E(1A) of the *Crimes Act*.

111 Contrary to s 61E(2) of the *Crimes Act*.

that she should not bother having sex with boys because they would not look after her, that she should have sex with a real man because she would have a much better time and that he could show her things that boys did not know.

129 EE also gave evidence of uncharged acts, including that, on another occasion, she met the appellant after school and they went together into bushland adjacent to sports fields. They sat together on a rock and she leaned her back against him with his legs either side of her and his arms around her. He kissed her on the back of the neck. She turned and kissed him. At one point during the kissing, the appellant touched her vulva through her clothing. When the appellant later returned EE to her parents' home, he said to her that he thought they had taken things about as far as they could go and that he wanted her to find a place for them to have sex because he was "too old to be doing it in the bush".

(v) Complainant SM

130 Count 11 charged an offence of committing an act of indecency towards SM between April and August 1990, when SM was 12 or 13 years old[112]. SM had worked with the appellant on a television series called *Hey Dad..!* from the time she was eight years old. She gave evidence that the acts comprising Count 11 occurred when the appellant came out of his dressing room on the *Hey Dad..!* set and stood in front of a mirror in view of SM. She said that he made eye contact with her, undid his belt, allowing his trousers to drop to the floor, and pulled down his underpants, thus exposing his penis in the mirror. He wiggled his hips back and forth looking at her in the mirror and then at his penis.

131 SM also gave evidence of uncharged acts, including of occasions when she was required to sit on the appellant's lap for publicity photographs and he would pick her up with his hands on her chest and put his hand underneath her, sometimes moving it so as to touch her vagina.

Evidence of uncharged acts against non-complainants ("BB", "AA" and "VOD") admitted as tendency evidence in relation to all counts

132 BB, who was a member of the appellant's extended family, gave evidence of uncharged acts, including of an occasion when she was 11 years old and attended her grandparents' birthday party at the appellant's home. BB said that the appellant touched her breasts under her shirt and put his hand underneath the elastic of her jeans.

133 AA, who was also a member of the appellant's extended family, gave evidence of uncharged acts, including that, when she was between 10 and 14 years of age, the appellant touched her breasts and between her legs while

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112 Contrary to s 61E(2) of the *Crimes Act*.

swimming in the pool at her home. She stated that, following the touching in the pool, she saw the appellant, who had asked to get changed in her bedroom, standing naked in front of a mirror touching his genitals with the bedroom door open[113]. AA further deposed that, on occasions when she had visited the appellant's home, the appellant had touched her breasts on the outside of her clothing while the appellant's daughter was out of the room and that the appellant had tried to touch her (AA's) breasts and take off her shirt while giving her a back massage.

134 VOD, who had lived near to the appellant, gave evidence that, when she was seven to nine years old, on occasions when she and SH slept over at the appellant's house, the appellant would walk around the house, including in the bedroom where the girls were sleeping, without any clothes on. VOD said that she saw the appellant's genitals.

Evidence of uncharged acts committed against non-complainants ("LJ", "CS" and "VR") admitted as tendency evidence in relation to Count 11

135 LJ, CS and VR each worked with the appellant on the set of *Hey Dad..!* and each gave evidence of uncharged acts admitted as tendency evidence in relation to Count 11 only.

136 LJ started work as a costume designer on the *Hey Dad..!* set when she was about 24 years of age. She said that it was part of her responsibilities to wake the appellant when he was napping in his dressing room and that the appellant requested that she enter the room to ensure he was awake. She recalled that, although he had initially slept clothed, and then naked under a sheet, the appellant began occasionally to sleep naked and uncovered. As a result, LJ said that, when the appellant was naked, she would only call to him and leave the door open, and that he would cover himself. She also deposed that, on occasions, the appellant grabbed her breasts, and brushed past her in a way that caused his genitals to rub against her back or bottom.

137 CS worked in the wardrobe department when she was between 19 and 20 years old. She said that the appellant would brush past her and make contact with her bottom or breasts with his genitals or hands, and that, on one occasion, he exposed his penis to her by dropping his pants in the dressing area of the set.

138 VR worked as a wardrobe assistant when she was 18 years old. She said that, on occasion, the appellant had put his hand under her armpit near her breast and that, when she was called upon to wake him after he had been napping in his dressing room, she would see him naked.

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113 *Hughes* unreported, District Court of New South Wales, 14 February 2014 at 31 per Zahra DCJ. Cf *Hughes* [2015] NSWCCA 330 at [128].

Admission of the tendency evidence

139 The Crown sought to adduce the evidence described above (hereinafter, "the tendency evidence") to prove a tendency on the part of the appellant to act in a particular way and to have a particular state of mind. The Crown particularised that alleged tendency in the following terms:

> "(i) To [have] a sexual interest in female children under 16 years of age;
>
> (ii) To use his social and familial relationships with the families to obtain access to female children under 16 years of age so that he could engage in sexual activities with them;
>
> (iii) To use his daughter's relationship with female children to obtain access to them so that he could engage in sexual activities with them;
>
> (iv) To use his working relationship with females to utilise an opportunity to engage in sexual activities;
>
> (v) To engage in sexual conduct with females aged under 16 years of age by either
>
> a. touching in an inappropriate sexual way but maintaining the contact was inadvertent or accidental;
>
> b. by exposing his naked penis / genitalia;
>
> c. by making the child come into contact with his penis / genitalia;
>
> d. touching the child's vaginal area
>
> e. by carrying out sexual acts upon the complainants when they were within the vicinity of another adult."

140 The appellant sought a pre-trial ruling from the trial judge as to the admissibility of the tendency evidence. The trial judge held that[114]:

> "The fact that alleged sexual acts are not identical does not deplete the evidence of its probative value. ... The tendency which is established

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114 *Hughes* unreported, District Court of New South Wales, 14 February 2014 at 53-54 per Zahra DCJ.

> here is a wider and more detailed pattern of behaviour or modus operandi in the accused's behaviour. In my view, that whilst there are differences in the complainant's [sic] accounts as to the nature of the acts undertaken and the circumstances in which they occur, the evidence is capable of establishing a sexual interest by the accused in young female children. In my view, the probative value of the evidence is significant.
>
> ...
>
> It is not the Crown case that the accused had a tendency to orchestrate or arrange the circumstances or created the environment in which the sexual activities occurred. In my view, the evidence establishes a tendency to take advantage of situations which arose where the accused came into contact with young female children. ...
>
> [T]he pattern of behaviour relied upon by the Crown is manifest, if not striking and requires little further analysis."

141 In closing address, the Crown prosecutor put to the jury that the tendency evidence proved "that the accused has a tendency to have a sexual interest in females under 16 years of age and that he acted upon that sexual interest". The written "Tendency Direction" given and read to the jury by the trial judge in the course of summing up also provides some insight into the purpose for which the evidence was adduced and, therefore, the basis on which it was admitted. The direction was as follows:

> "The Crown case is that the evidence of the sexual conduct of the accused given by the complainants (both the acts the subject of a count on the indictment and other alleged acts of sexual conduct) and the evidence of the tendency witnesses is relevant to proving the accused's guilt in respect to individual counts on the indictment because the evidence of the complainants and the tendency witnesses establishes a pattern of behaviour that reveals that the accused has a tendency to act in a particular way or to have a particular state of mind.
>
> The Crown argues that the evidence establishes that the accused had a particular state of mind, that is;
>
> - That the accused was a person who had a sexual interest in female children under 16 years of age;
>
> In this regard, the Crown argues that you will find from the evidence led in the trial in relation to each of the complainants and the tendency witnesses, [VOD], [AA] and [BB], that the accused had the tendency to act with a particular state of mind beyond reasonable doubt, that is the accused had a sexual interest in female children under 16 years of age. The Crown argues that having found beyond reasonable doubt the

accused's sexual interest in female children under the age of 16 years, you can use that finding to prove the allegations in each of the counts on the indictment beyond reasonable doubt.

The Crown argues also that the evidence of the complainants and tendency witnesses [VOD], [AA] and [BB] establishes that the accused has a tendency to act in the following particular ways:

- That the accused took advantage of his social and familial relationships with the families to obtain access to female children under 16 years of age so that he could engage in sexual activities with them;

- That the accused took advantage of his daughter's relationship with female children to obtain access to them so that he could engage in sexual activities with them;

- That the accused engaged in sexual conduct with females aged under 16 years of age by:

    a. touching in an inappropriate sexual way but maintaining the contact was inadvertent or accidental;

    b. by exposing his naked penis / genitalia;

    c. by making the child come into contact with his penis / genitalia;

    d. touching the child's vaginal area;

    e. by carrying out sexual acts upon the complainants when they were within the vicinity of another person.

In relation to Count Eleven on the indictment, the Crown argues that the evidence of the tendency witnesses [LJ], [CS] and [VR] establishes that the accused has a tendency to act in the following particular way:

- That the accused took advantage of his working relationship with females to utilise an opportunity to engage in sexual activities;

- That the accused engaged in touching in an inappropriate sexual way but maintaining the contact was inadvertent or accidental;

- That the accused exposed his naked penis / genitalia.

The necessary findings before the evidence can be used as establishing tendency:

The evidence of the accused having the tendency to act with a particular state of mind or the evidence of the tendency to act in a particular way can only be used by you, in the way the Crown asks you to use it, if you make two findings beyond reasonable doubt.

The first finding:

> The first finding is that you are satisfied beyond reasonable doubt that one or more of the acts relied upon by the Crown to prove the particular tendency to act with the particular state of mind, or the tendency to act in a particular way occurred. Before you can apply tendency reasoning to the counts on the indictment you must first be satisfied that the Crown has established beyond reasonable doubt that the accused did in fact commit the acts which the Crown alleges demonstrate the relevant tendency to act with the particular state of mind or the tendency to act in a particular way.
>
> In making that finding you do not consider each of the acts in isolation, but consider all the evidence and ask yourself whether you are satisfied that a particular act or acts relied upon actually took place.
>
> ...

The second finding:

> You ask yourself whether, from the act or acts that you have found proved, you can conclude beyond reasonable doubt that the accused had the tendency to act with the particular state of mind or the tendency to act in a particular way that the Crown alleges.
>
> If you cannot draw that conclusion beyond reasonable doubt, then again you must put aside any suggestion that the accused had the particular tendency alleged.

So, if having found one or more of the acts attributed to the accused to have been proved beyond reasonable doubt and you can, from the proved act or acts, conclude beyond reasonable doubt that the accused had the tendency to act in the particular way or have the particular state of mind that the Crown alleges, you may use the fact of that particular tendency or state of mind in considering whether the accused committed one or more of the offences charged on the indictment. That is, if you were satisfied that the accused did have the particular tendency argued by the Crown

> then that may lend support to the evidence of the complainants who are the subject of specific charges on the indictment.
>
> ...
>
> The evidence must not be used in any other way. It would be completely wrong to reason that, because the accused has committed one offence or has been guilty of one piece of misconduct, he is therefore generally a person of bad character and for that reason must have committed the offences. That is not the purpose of the evidence".

142 When later summarising the evidence led by the Crown, the trial judge referred back to the written directions several times and reminded the jury that, before they could take into account the acts alleged as tendency evidence, they needed to be satisfied of those acts beyond reasonable doubt. Some elaboration of the directions was offered in the context of BB's evidence, as follows:

> "Now again ladies and gentlemen I remind you of the use that the Crown invites you to make of her evidence. The Crown argues that her evidence establishes that the accused had a tendency to act with a particular state of mind, that is that he had a sexual interest in females under the age of 16 and acted in a particular way. Here the Crown relies on her evidence of the accused touching her as she described in evidence."

The reasoning of the Court of Criminal Appeal

143 Following his conviction on Counts 1 to 9 and 11, the appellant appealed to the New South Wales Court of Criminal Appeal on a large number of grounds, including, in effect, that the trial judge had erred in admitting the tendency evidence under s 97 of the *Evidence Act* and, further or alternatively, that the trial judge had erred in failing to exclude the tendency evidence under s 101 in relation to all or some counts, because:

(a) the alleged tendency of having a sexual interest in female children under 16 years of age was so broad as to encompass the entirety of the evidence in relation to each complainant and, of itself, insufficient to have significant probative value[115];

(b) not every tendency alleged was relevant to all counts. In particular, the alleged tendency of the appellant to take advantage of his social and familial relationships to obtain access to female children under 16 years of age for the purpose of engaging in sexual activities with them applied only to Counts 1 to 9 and was not of

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115 *Hughes* [2015] NSWCCA 330 at [149].

significant probative value in relation to Count 10 or 11; and, conversely, the alleged tendency of utilising working relationships with females to create an opportunity to engage in sexual activities applied only to Count 11 and did not have significant probative value in relation to Counts 1 to 10[116]; and

(c) some of the sexual conduct relied upon as tendency evidence in relation to all counts alleged acts that were different in nature from the charged offences and therefore not significantly probative of the facts in issue. In particular[117]:

(i) the evidence of inappropriate touching in the course of working relationships which was given by LJ, CS and VR had no significant probative value in relation to any count other than Count 11;

(ii) the evidence of SH and AK that the appellant made them come into contact with his penis did not have significant probative value in relation to Count 10 or 11;

(iii) the evidence of JP, SH and AA that the appellant touched their vaginal areas did not have significant probative value in relation to Count 7, 8, 9, 10 or 11;

(iv) the evidence of JP, SH and AK of the appellant committing sexual offences against them when they were in the vicinity of another person did not have significant probative value in relation to Count 11.

144 The appellant also contended that the trial judge failed to analyse the tendency evidence to determine whether each witness's evidence had significant probative value and, if so, in relation to which counts[118], and that the trial judge's directions were inadequate in failing to identify, count by count, the aspects of

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116 *Hughes* [2015] NSWCCA 330 at [150]. In this Court, the appellant's submissions accepted that the tendency of taking advantage of social and familial relationships, and of utilising working relationships, to engage in sexual activities might also have been relevant to Count 10.

117 *Hughes* [2015] NSWCCA 330 at [151]-[153].

118 *Hughes* [2015] NSWCCA 330 at [154].

each witness's evidence that were capable of having significant probative value in establishing the alleged tendency in relation to that count[119].

145 The Court of Criminal Appeal (Beazley P, Schmidt and Button JJ) rejected those contentions. Their Honours held[120] that the trial judge was correct in his understanding of the tendency evidence and in his assessment of it as having significant probative value. They reasoned[121] that, although there was "no doubt that the tendency evidence ... was admitted on a basis that allowed dissimilar circumstances and dissimilar acts to be used in respect of different counts", the fact of dissimilarity was not, of itself, determinative. In relation to the circumstances of the offences, it was said that[122]:

> "what was common to them all was that they represented occasions on which young females were present and the [appellant] used those occasions for the purpose of engaging in sexual activities with them".

146 In relation to the various acts alleged, the Court held[123]:

> "notwithstanding the dissimilarities, the conduct alleged was sexual in nature, directed towards young females, on occasions that presented themselves to the [appellant]. Underlying the similarity was that the conduct was, in effect, referable to the circumstances as they presented to the [appellant]. In short, the conduct occurred opportunistically, as and when young female persons were in the [appellant's] company."

147 It followed, their Honours concluded[124], that all of the evidence adduced as tendency evidence was correctly assessed as having significant probative value in relation to each count.

148 The Court also held that the trial judge had not erred in failing to exclude any of the tendency evidence under s 101 of the *Evidence Act*. The appellant's contentions had included[125] that the trial judge had treated his rejection of the

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119 *Hughes* [2015] NSWCCA 330 at [229].

120 *Hughes* [2015] NSWCCA 330 at [200].

121 *Hughes* [2015] NSWCCA 330 at [196].

122 *Hughes* [2015] NSWCCA 330 at [198].

123 *Hughes* [2015] NSWCCA 330 at [199].

124 *Hughes* [2015] NSWCCA 330 at [200].

125 *Hughes* [2015] NSWCCA 330 at [209].

possibility of concoction as determinative of the question of unfair prejudice. The Court rejected[126] that contention because the appellant's case accepted that the pre-trial publicity and the risk of concoction was integral to the assessment of the probative value of the tendency evidence, and the trial judge's conclusion that there was no real risk of contamination was well based.

149 The Court concluded[127] that there was equally no deficiency in the trial judge's directions as to the use which could be made of the tendency evidence. Their Honours stated that there were two essential tendencies, "being that the [appellant] had a sexual interest in female children under the age of 16" and that he acted on that interest, albeit in various ways. The trial judge's directions to that effect were appropriate because "although it was accepted that there were some dissimilarities in the tendency evidence ... dissimilarity is not determinative".

The appellant's contentions

150 Before this Court, the appellant contended, as he did below, that not all of the tendencies alleged by the Crown, as particularised in the tendency notice and set out in the trial judge's directions to the jury[128], applied to every count. Those submissions are outlined above[129]. Counsel for the appellant further submitted that there were significant dissimilarities between the conduct charged by some counts; that the complainants varied greatly in age from six to almost 16 years of age; and that the context and circumstances varied greatly between the counts. It was also said that the alleged tendencies were expressed with such generality as to obscure the manner in which each alleged tendency was said to arise. The appellant submitted that the trial judge and the Court of Criminal Appeal failed to, or could not, identify any particular feature of the conduct alleged by the tendency evidence that supported an inferential process of reasoning which made it more likely that the appellant would have acted as alleged. The only common feature identified was that of opportunism. There was an absence of any common or unifying modus operandi or systematic approach.

151 It was contended that the Court of Criminal Appeal erred in principle in supposing[130] that it was sufficient to identify contexts in which the offending

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126 *Hughes* [2015] NSWCCA 330 at [212], [215].

127 *Hughes* [2015] NSWCCA 330 at [230].

128 See [139], [141] above.

129 See [143] above.

130 *Hughes* [2015] NSWCCA 330 at [197].

occurred that were "different, but not significantly disassociated". In the result, the tendency evidence that was admitted in relation to all counts was evidence of a tendency no more specific than to have a sexual interest in, and engage in sexual conduct with, female children under 16 years of age in a wide variety of circumstances in which the appellant found himself. Counsel for the appellant accepted that the tendency evidence was capable of establishing that the appellant had a sexual interest in female children under 16 years of age, but argued that a tendency put at such a level of generality did not rise to the threshold of "significant probative value" for the purposes of s 97. It was a tendency, it was said, that went little if at all beyond a mere disposition to commit offences of the kind charged, and the suggestion that the appellant acted opportunistically added nothing of significance by way of refinement.

"Significant probative value" in relation to tendency evidence

152 Section 97 of the *Evidence Act* provides that evidence adduced for the purpose of proving that an accused had a tendency to act in a particular way or to have a particular state of mind is inadmissible unless:

> "the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value."

153 The "probative value" of evidence means the extent to which the evidence can rationally affect the assessment of the probability of the existence of a fact in issue or, put differently, the degree of its relevance[131]. Because each count on a multiple count indictment must be considered separately and decided separately by reference only to so much of the evidence adduced as is relevant to that count[132], the question of whether tendency evidence could have significant probative value in relation to a particular count needs to be decided individually for each count by reference to the facts in issue for that count[133]. It is not an

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131 *Evidence Act*, ss 3, 55, Dictionary Pt 1 definition of "probative value". See *Lockyer* (1996) 89 A Crim R 457 at 459.

132 See generally *KRM v The Queen* (2001) 206 CLR 221 at 234 [36] per McHugh J, 257 [106], 260 [118] per Kirby J, 263-264 [132]-[133] per Hayne J; [2001] HCA 11; *MFA v The Queen* (2002) 213 CLR 606 at 617 [34] per Gleeson CJ, Hayne and Callinan JJ; [2002] HCA 53; *R v Markuleski* (2001) 52 NSWLR 82 at 92-93 [31]-[34] per Spigelman CJ (Carruthers AJ agreeing at 149 [344]), 125-126 [212]-[214] per Wood CJ at CL, 136 [271] per Grove J.

133 See *Phillips v The Queen* (2006) 225 CLR 303 at 317-318 [44]-[47]; [2006] HCA 4; *Lockyer* (1996) 89 A Crim R 457 at 459; *Lock* (1997) 91 A Crim R 356 at 362; *SKA v The Queen* [2012] NSWCCA 205 at [295] per Adams J (Hislop J agreeing at [323]).

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[134].

154 Evidence that an accused has committed an offence is not, of itself, significantly probative of the accused having committed another offence[135]. Without more, it establishes only that the accused is the kind of person who has committed an offence[136]. 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, or about the victim of each offence, which rationally affects to some significant degree the assessment of the probability that the accused committed the offence, or that the complainant is telling the truth as to the commission of the offence[137].

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134 *HML v The Queen* (2008) 235 CLR 334 at 350-352 [4]-[5], 354 [11] per Gleeson CJ; [2008] HCA 16; *IMM v The Queen* (2016) 257 CLR 300 at 314 [46] per French CJ, Kiefel, Bell and Keane JJ; [2016] HCA 14; *R v Nassif* [2004] NSWCCA 433 at [51], [54] per Simpson J (Adams J and Davidson AJ agreeing at [71], [72]); *El-Haddad v The Queen* (2015) 88 NSWLR 93 at 113 [72] per Leeming JA (McCallum J and R A Hulme J agreeing at 124 [129], [130]); *Vojneski v The Queen* [2016] ACTCA 57 at [57] per Murrell CJ and Refshauge J, [150]-[153] per Wigney J.

135 See *Jacara Pty Ltd v Auto-Bake Pty Ltd* [1999] FCA 417 at [10]; *GBF v The Queen* [2010] VSCA 135 at [26]-[27]. See also *BBH v The Queen* (2012) 245 CLR 499 at 525 [70]-[71] per Hayne J (Gummow J agreeing at 522 [61]); [2012] HCA 9.

136 *CGL v Director of Public Prosecutions* (2010) 24 VR 486 at 495 [30]-[31], 497 [38]; *CEG v The Queen* [2012] VSCA 55 at [14]; *Reeves v The Queen* (2013) 41 VR 275 at 292 [66] per Maxwell ACJ (Coghlan JA agreeing at 301 [101]). See also *Thompson and Wran v The Queen* (1968) 117 CLR 313 at 316 per Barwick CJ and Menzies J (McTiernan J agreeing at 319); [1968] HCA 21; *Markby v The Queen* (1978) 140 CLR 108 at 116 per Gibbs ACJ (Stephen J, Jacobs J and Aickin J agreeing at 118-119); [1978] HCA 29; *Pfennig v The Queen* (1995) 182 CLR 461 at 483 per Mason CJ, Deane and Dawson JJ, 525 per McHugh J; [1995] HCA 7.

137 See *R v Fletcher* (2005) 156 A Crim R 308 at 319-320 [49]-[50] per Simpson J (McClellan CJ at CL agreeing at 310 [1]), 339-341 [157]-[166] per Rothman J; *RHB v The Queen* [2011] VSCA 295 at [17] per Nettle JA (Harper JA agreeing at [29]); *Saoud v The Queen* (2014) 87 NSWLR 481 at 487 [28] per Basten JA

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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[138]. If the previous offence were a sexual offence against one complainant, the fact of a previous offence might, as a matter of common sense and experience, rationally suggest a sexual attraction on the part of the accused to the complainant that significantly affects the assessment of the probability that the accused committed a subsequent sexual offence against or with that complainant[139]. If the previous offence involved aspects of offending which were unusual or distinctive for that kind of offence, and a subsequent offence involves similar features of offending, the fact of the previous offence might, as a matter of common sense and experience, rationally be seen significantly to increase the probability that the two offences were committed by the same offender and, therefore, significantly to affect the assessment of the probability that the accused committed the subsequent offence[140]. Equally, where a previous offence was

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(Fullerton J and R A Hulme J agreeing at 494 [63], [64]); *Vojneski* [2016] ACTCA 57 at [49], [54] per Murrell CJ and Refshauge J.

138 See for example *Middendorp v The Queen* (2012) 35 VR 193 at 201 [20]-[22] per Redlich JA (Mandie JA and Whelan AJA agreeing at 205-206 [40], [41]); *Vojneski* [2016] ACTCA 57 at [85] per Murrell CJ and Refshauge J, [157]-[162] per Wigney J.

139 See for example *Rolfe v The Queen* (2007) 173 A Crim R 168 at 188 [64] per Giles JA (James J and Harrison J agreeing at 207 [143], [144]); *GBF* [2010] VSCA 135 at [26]; *MR v The Queen* [2011] VSCA 39 at [13]-[14] per Hansen JA (Buchanan JA and Harper JA agreeing at [16], [17]); *PCR v The Queen* (2013) 279 FLR 257 at 262 [37] per Buchanan JA (Priest JA agreeing at 265 [61]), 265 [57]-[59] per Neave JA; *Gentry v Director of Public Prosecutions (Vic)* (2014) 244 A Crim R 106 at 113 [29], 115-116 [38]-[39] per Redlich JA (Tate JA and Priest JA agreeing at 118 [49], [50]); *Aung Thu v The Queen* [2017] VSCA 28 at [34]. See also *R v Ball* [1911] AC 47 at 71 per Lord Loreburn LC (the other Law Lords agreeing at 71-72); *Gipp v The Queen* (1998) 194 CLR 106 at 111-113 [9]-[11] per Gaudron J; [1998] HCA 21.

140 See for example *R v Dupas (No 2)* (2005) 12 VR 601 at 606-609 [12]-[19] per Warren CJ, 622-624 [66]-[71], 625 [75]-[76] per Nettle JA (Harper JA agreeing at 638 [114]); *Smith* (1915) 11 Cr App R 229. See also *AE v The Queen* [2008] NSWCCA 52 at [42], [45]; *CGL* (2010) 24 VR 486 at 495-496 [31]-[33], 496-497 [37]-[38]; *PNJ v Director of Public Prosecutions* (2010) 27 VR 146 at 151-152

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committed by an accused in circumstances which are unusual or distinctive for that kind of offence, and the subsequent offence is committed in similar circumstances, the circumstances in which the previous offence was committed might, as a matter of common sense and experience, be seen significantly to increase the probability that the accused committed the subsequent offence[141]. As was observed in *Hoch v The Queen*[142], in a different but related context, the probative force of similar fact evidence lay in similarities of offending, unusual features, some underlying unity, or a system or pattern that, as a matter of common sense and experience, increased the objective improbability of some event having occurred other than as alleged. The same logic applies to the question of the admissibility of tendency evidence under s 97[143]. To repeat, therefore, the mere fact that an accused has committed a previous offence, although relevant, is not, without more, significantly probative of the accused having committed another offence.

Assessing the probative value of the tendency evidence

156 In this case, the tendency evidence was admitted on the basis that, when viewed in light of all of the Crown's evidence cumulatively, it could be seen to establish a tendency on the part of the appellant to have a sexual interest in female children under the age of 16 and to act on that tendency in various ways

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[22]-[23]; *Sokolowskyj v The Queen* (2014) 239 A Crim R 528 at 538 [43]-[44] per Hoeben CJ at CL (Adams J and Hall J agreeing at 542 [63], [64]).

141 See for example *R v Papamitrou* (2004) 7 VR 375 at 390-391 [31] per Winneke P (Ormiston JA and Buchanan JA agreeing at 396 [48], [49]); *R v Ford* (2009) 201 A Crim R 451 at 467 [44] per Campbell JA (Howie J and Rothman J relevantly agreeing at 489 [145], 491 [158]); *O'Keefe v The Queen* [2009] NSWCCA 121 at [65]-[68] per Howie J (McColl JA and Grove J agreeing at [1], [2]); *GBF* [2010] VSCA 135 at [29].

142 (1988) 165 CLR 292 at 294-295 per Mason CJ, Wilson and Gaudron JJ; [1988] HCA 50.

143 See *Fletcher* (2005) 156 A Crim R 308 at 322 [60] per Simpson J (McClellan CJ at CL and Rothman J relevantly agreeing at 310 [1], 339-340 [157]); *KJR v The Queen* (2007) 173 A Crim R 226 at 229 [4] per Simpson J (McClellan CJ at CL agreeing at 228 [1]), 236 [42]-[45] per Rothman J; *GBF* [2010] VSCA 135 at [27]; *Saoud* (2014) 87 NSWLR 481 at 490 [39]-[42] per Basten JA (Fullerton J and R A Hulme J agreeing at 494 [63], [64]); *El-Haddad* (2015) 88 NSWLR 93 at 112-113 [66]-[70] per Leeming JA (McCallum J and R A Hulme J agreeing at 124 [129], [130]).

in a range of circumstances which presented opportunities to offend[144]. The need for greater specificity was rejected by the Court of Criminal Appeal[145] on the basis that, notwithstanding that the tendency evidence related to "dissimilar circumstances and dissimilar acts", "what was common to [all] was that they represented occasions on which young females were present and the [appellant] used those occasions for the purpose of engaging in sexual activities with them". More specifically, it was said that "the conduct alleged was sexual in nature, directed towards young females, on occasions that presented themselves to the [appellant]"[146]. The Court thus perceived the underlying similarity (although their Honours shunned[147] use of such expressions as "the language of the common law relating to similar fact evidence") to be that "the conduct occurred opportunistically, as and when young female persons were in the [appellant's] company"[148]. On that basis, their Honours held[149] that the evidence adduced in support of the five tendencies alleged by the Crown "was correctly assessed as having significant probative value" in relation to each count.

157 Inasmuch as that reasoning suggests that the commission of sexual offences against female children under the age of 16 years is so unusual that evidence of an accused having committed a sexual offence against one female child is of itself significantly probative of the accused having committed a different kind of sexual offence against another female child, it should be rejected. The commission of sexual offences by adults against children of either sex is depraved and deplorable, but, regrettably, it is anything but unusual. That reality was central to the submissions of the Victorian Director of Public Prosecutions, intervening in this Court. In truth, such offences are far more prevalent than the murder of young female children, and yet there can be no doubt that evidence that an accused had murdered a female child could not, without more, be regarded as having significant probative value in proving that the accused murdered another female child. It would require something more,

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144 *Hughes* unreported, District Court of New South Wales, 14 February 2014 at 53-54 per Zahra DCJ; *Hughes* [2015] NSWCCA 330 at [198]-[199], [230].

145 *Hughes* [2015] NSWCCA 330 at [196]-[199].

146 *Hughes* [2015] NSWCCA 330 at [199].

147 *Hughes* [2015] NSWCCA 330 at [188]. Cf *Saoud* (2014) 87 NSWLR 481 at 490 [39] per Basten JA (Fullerton J and R A Hulme J agreeing at 494 [63], [64]); *El-Haddad* (2015) 88 NSWLR 93 at 113 [69]-[70] per Leeming JA (McCallum J and R A Hulme J agreeing at 124 [129], [130]).

148 *Hughes* [2015] NSWCCA 330 at [199].

149 *Hughes* [2015] NSWCCA 330 at [200].

such as, for example, similarities as between each child's relationship to the accused or the characteristics of each child, or the details of the actus reus or the circumstances in which the offence is alleged to have been committed, to give evidence of an accused having murdered one female child significant probative value in proving that the accused has murdered another[150].

158 Similarly, despite the disgust and loathing with which sexual offences against children are naturally to be regarded, the fact that an accused is shown to have committed a sexual offence against a female child is not, without more, significantly probative of the accused having committed a sexual offence against another female child[151]. For the reasons already given, something more is required, such as a logically significant degree of similarity in the relationship of the accused to each complainant; a logically significant connection between the details of each offence or the circumstances in which each offence was committed; a logically significant or recognisable modus operandi or system of offending; or, otherwise, some logically significant underlying unity or commonality, howsoever described, in order rationally to conclude that evidence of the accused having committed a sexual offence against one female child significantly increases the assessment of the probability of the accused having committed a sexual offence against another.

159 Inasmuch as the Court of Criminal Appeal's reasoning suggests that there is something sufficient in the fact of an accused having exploited an opportunity of a female child being in his company to commit a sexual offence against that child to make evidence of that offence significantly probative of his having exploited another opportunity of another female child being in his company to commit another sexual offence, the reasoning is too broadly expressed and likely, as it did in this case, to lead to error. In the scheme of things, sexual offences

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150 See for example *R v Folbigg* [2003] NSWCCA 17 at [32]-[34] per Hodgson JA (Sully J and Buddin J agreeing at [36], [37]); *Dupas (No 2)* (2005) 12 VR 601 at 606-609 [12]-[19] per Warren CJ, 622-624 [66]-[71], 625 [75]-[76] per Nettle JA (Harper AJA agreeing at 638 [114]); *R v Lane* (2011) 221 A Crim R 309 at 326 [62] per Simpson J (Howie J agreeing at 330 [85]). See generally *Pfennig* (1995) 182 CLR 461 at 488-490 per Mason CJ, Deane and Dawson JJ, 507-508 per Toohey J, 540-541 per McHugh J; *Smith* (1915) 11 Cr App R 229.

151 See *BRS v The Queen* (1997) 191 CLR 275 at 283 per Brennan CJ, 298-300 per Gaudron J, 304-305 per McHugh J, 331-332 per Kirby J; [1997] HCA 47; *KRM* (2001) 206 CLR 221 at 261 [120] per Kirby J; *R v Milton* [2004] NSWCCA 195 at [31] per Hidden J (Tobias J and Greg James J agreeing at [1], [57]); *Fletcher* (2005) 156 A Crim R 308 at 319-320 [49]-[50] per Simpson J (McClellan CJ at CL agreeing at 310 [1]), 341 [165]-[166] per Rothman J; *CGL* (2010) 24 VR 486 at 497 [39]-[40]; *GBF* [2010] VSCA 135 at [26]-[27].

against children are most commonly committed opportunistically against children in an offender's company. Consequently, the fact, of itself, that an accused is shown to have committed a sexual offence opportunistically against a female child in his company is not significantly probative of his having committed a sexual offence against another female child in his company on another occasion. Proof of one shows no more than that the accused is the kind of person who has committed an offence of that kind. Whether the commission of one such offence is significantly probative of an accused's commission of another will depend on the details and so, in result, on whether there is something more, such as a logically significant connection between the accused's exploitation of the various opportunities[152], or, as observed above, a logically significant degree of similarity in the accused's relationship with each complainant; or a logically significant connection between the details of each offence or the circumstances in which each was committed; or some logically significant recognisable modus operandi or system of offending; or, otherwise, some logically significant underlying unity or commonality, howsoever described, that as a matter of syllogistic reasoning renders it more likely that the complainant is telling the truth or that the accused committed the second offence. The Crown's case against the appellant, as the trial judge noted[153], did not identify or rely upon any particular feature of the appellant's conduct as orchestrating or manufacturing the opportunities in which the alleged offending was said to occur.

160 The Court of Criminal Appeal reasoned, by supposed analogy to the situation in *Doyle v The Queen*[154], that there were "two essential tendencies", that of a sexual interest in female children under 16 years of age and that of engaging in sexual conduct with female children under 16 years of age "in three different, but not significantly disassociated, contexts: of social and familial relationships; his daughter's relationships with her young friends; and the work environment"[155]. So to reason was erroneous. The second of the identified tendencies amounted to dividing up the general tendency said to be relevant to all counts (that of a sexual interest in female children under 16 years of age) into the constituent elements of that tendency and then treating each constituent element

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152 See for example *NAM v The Queen* [2010] VSCA 95 at [16]-[17] per Maxwell P (Buchanan JA agreeing at [25]), [28]-[29] per Nettle JA; *PNJ* (2010) 27 VR 146 at 151 [19]-[20].

153 *Hughes* unreported, District Court of New South Wales, 14 February 2014 at 54 per Zahra DCJ.

154 [2014] NSWCCA 4.

155 *Hughes* [2015] NSWCCA 330 at [197], [230].

as if it were a separate tendency of significant probative value in relation to all counts. It was not.

161 The analogy to *Doyle* was also misplaced. In *Doyle*, there was a single relevant tendency on the part of the accused to exploit his position of authority over his young male employees to obtain access to them for the purpose of engaging in sexual activities and thereby gratifying his sexual interest in young male persons[156]. Assuming the jury were satisfied of the existence of the alleged tendency, its existence had significant probative value in proving that the accused had committed another of the charged offences against young male employees by exploiting his position of authority over the employee in order to gain access to, and thereby engage in the alleged sexual activity with, a young male employee.

162 Essentially the same reasoning applied in *R v PWD*[157], to which the Court of Criminal Appeal also referred[158]. There, the single relevant tendency was of a school music teacher to use his position as such to select and encourage school boarders, "under the guise of offering solace to boys who were vulnerable" and who reported feelings of isolation and homesickness, to engage in sexual activities with him in order to gratify his sexual interest in male children[159]. In effect, each of *PWD* and *Doyle*, and cases like them[160], involved an underlying common course of conduct, or modus operandi, comprised of the constituent elements of (1) taking advantage of a particular position of authority or influence to obtain access to children under the accused's authority or influence in order to

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156 *Doyle* [2014] NSWCCA 4 at [86], [141], [148] per Bathurst CJ (Price J and Campbell J agreeing at [431], [472]).

157 (2010) 205 A Crim R 75, notwithstanding the way it was characterised at 91 [79] per Beazley JA (Buddin J and Barr JA agreeing at 93 [96], [97]).

158 *Hughes* [2015] NSWCCA 330 at [175].

159 *PWD* (2010) 205 A Crim R 75 at 82 [35], 90 [76], 91 [81], [83], 92 [87] per Beazley JA (Buddin J and Barr JA agreeing at 93 [96], [97]). See also *Saoud* (2014) 87 NSWLR 481 at 491 [45]-[46] per Basten JA (Fullerton J and R A Hulme J agreeing at 494 [63], [64]).

160 See for example *Papamitrou* (2004) 7 VR 375 at 390-391 [31] per Winneke P (Ormiston JA and Buchanan JA agreeing at 396 [48], [49]); *Fletcher* (2005) 156 A Crim R 308 at 321 [57] per Simpson J (McClellan CJ at CL agreeing at 310 [1]), 324-325 [67]-[70] per Rothman J; *PNJ* (2010) 27 VR 146 at 151 [19]-[20]; *DAO v The Queen* (2011) 81 NSWLR 568 at 600-601 [164]-[165], 606-607 [204]-[205] per Simpson J (Spigelman CJ, Allsop P, Kirby J and Schmidt J agreeing at 572 [1], 583 [71], 607-608 [211], 608 [212]); *Rapson v The Queen* (2014) 45 VR 103 at 114 [32]-[37].

gratify (2) a sexual interest on the part of the accused in children by (3) committing sexual offences against children; and, properly understood, it was the existence of that underlying course of conduct, comprised of those three elements, together with its employment in the case of each of the charged offences, that provided a logical unity to the tendency evidence which significantly affected the rational assessment of the probability that the accused was guilty of each of the alleged offences.

163 By contrast, for an offender to have a sexual interest in children, or even to be shown to have acted on it on occasion by taking advantage of a position of authority or influence to engage in sexual activities with children under his or her authority or influence, would not, of itself, be significantly probative of another offence alleged to have been committed in different circumstances which did not involve taking advantage of a position of authority or influence. Nor would the fact that an accused had in the past selected children of some vulnerability as part of a pattern of exploiting a position of authority to engage in sexual activities with children, of itself, be significantly probative of another offence involving a child of some vulnerability where that offence did not involve taking advantage of a position of authority or influence. To allege a tendency to select victims of some vulnerability is not significantly probative of such an offence because, in one respect or another, all children are vulnerable to sexual exploitation and all sexual offences against children involve taking advantage of that vulnerability.

164 What the foregoing serves to show, therefore, is that none of the individual constituent elements of the underlying course of conduct identified in *Doyle* and *PWD* would, if disaggregated, be of itself significantly probative of charged offences against other complainants. What made the identified modus operandi significantly probative of the alleged offences in those cases was that, assuming an absence of concoction or contamination, the fact that the accused was alleged to have committed each offence in the same or a substantially similar way made it significantly more probable that each complainant was telling the truth in alleging that the accused offended against him in the manner charged. That reasoning accords logically with the probability reasoning applied by this Court in *BRS v The Queen*[161]. The fact that an accused may have offended against one or even some children using that modus operandi would not, of itself, have made it significantly more probable that another child was telling the truth in alleging that the accused had committed a sexual offence against him or her in different circumstances involving a different modus operandi.

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161 (1997) 191 CLR 275 at 283 per Brennan CJ, 298-300 per Gaudron J, 309 per McHugh J.

Counts 1 to 6

165 So it is in this case. The circumstances of each complainant and the circumstances of the offending alleged in Counts 1 to 6 were such as to establish, if accepted, a tendency on the part of the appellant to take advantage of a position of custody, authority or control over female children staying in his home or where he was present in their homes to gratify his sexual interest in female children by committing essentially similar kinds of sexual offences against them. In effect, the evidence on those counts established a modus operandi which, assuming an absence of concoction or contamination between the complainants, rendered it significantly more probable that each of JP and SH was telling the truth in what she deposed as to the appellant's offending against her. Counsel for the appellant accepted in this Court that there were "operative similarities" in the offending alleged in Counts 1 to 6.

Counts 7, 8 and 9

166 Counts 7, 8 and 9 are more problematic. Because they allege offences against the same complainant, evidence in relation to each of those counts was cross-admissible in relation to each of the other of those counts. But, although the commission of the offences comprised in Counts 1 to 6 would render it more probable that the appellant committed the offences alleged in Counts 7 to 9 – since each of Counts 1 to 9 involved taking advantage of a position of custody, authority or control for the purpose of committing sexual offences against female children – the nature and circumstances of the offending comprised in Counts 1 to 6 were significantly different from those of Counts 7 to 9. It might not be possible for this Court to identify error[162] in a conclusion that there was sufficient similarity to render evidence of the former relevant to proof of the latter, and vice versa, and thereby that the evidence was not excluded by s 97. But it does not appear that there was sufficient similarity, or other underlying unity, about that evidence to conclude, for the purposes of s 101, that its probative value outweighed its potential prejudicial effect, namely, that the jury would reason impermissibly that, because the appellant was the kind of person who would commit offences of the kind alleged in Counts 1 to 6, he should be convicted of Counts 7 to 9; and vice versa[163].

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162 See *Saoud* (2014) 87 NSWLR 481 at 483-484 [5]-[6] per Basten JA (Fullerton J and R A Hulme J agreeing at 494 [63], [64]).

163 See and compare *AE* [2008] NSWCCA 52 at [42], [45]; *Sokolowskyj* (2014) 239 A Crim R 528 at 540-541 [56]-[57] per Hoeben CJ at CL (Adams J and Hall J agreeing at 542 [63], [64]).

Counts 10 and 11

167 It is clear, however, that evidence that the appellant may have committed the offences comprised in Counts 1 to 6, or indeed, for that matter, in Counts 7 to 9, did not render it significantly more probable that the appellant committed offences in the very different circumstances alleged in Counts 10 and 11; and that evidence that the appellant may have committed the offences comprised in Counts 10 and 11 did not render it significantly more probable that the appellant committed the offences comprised in Counts 1 to 9. The acts alleged to comprise Count 10 occurred in the context of a reciprocated relationship, and those alleged in Count 11 were dissimilar in nature (at least in respect of Counts 1 to 6, 9 and 10) and occurred outside a domestic setting. Equally, although the evidence of LJ, CS and VR, if accepted, may have had significant probative value in proving the offence comprised in Count 11, given the very different circumstances of offending, the appellant's different relationship to the complainants and the different nature of the offending as between Count 11 and Counts 1 to 10, the evidence of LJ, CS and VR would not have significantly increased the probability that the appellant committed any of the other offences. So much was acknowledged in the trial judge's treatment of that evidence[164]. For similar reasons, although the evidence of BB and AA may have had significant probative value in relation to proof of the offences comprised in Counts 1 to 9, it did not significantly increase the probability of the appellant having committed the offences comprised in Counts 10 and 11; and, although the evidence of VOD that the appellant exposed his penis may have had significant probative value in relation to proof of Count 11, it did not significantly increase the probability of the appellant having committed the offences comprised in Counts 1 to 9 or Count 10.

Crown's alternative argument

168 It was suggested by the Crown in the course of argument that, even if a sexual interest in female children under 16 years of age and a disposition to act on that interest were not significantly probative of the charged offences within the meaning of s 97, there were in fact common features of the appellant's alleged conduct that rendered the evidence relating to each count significantly probative of each other count. Those features were said to be that each offence involved risk-taking; that the offending was "brazen" in the sense that it was committed in places where there was a high risk of being caught; that, in some cases, the offending was comprised of fleeting or furtive acts of touching; and, in other cases, that the offending involved the exposure of the appellant's penis. In fact, however, the identification of those features serves further to demonstrate not

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164 *Hughes* unreported, District Court of New South Wales, 14 February 2014 at 55 per Zahra DCJ.

only the significant differences between the alleged acts of offending and, therefore, the consequent illogicality of conceiving of the evidence relating to each count as significantly probative of all counts, but also the difficulty faced by the jury in considering the admitted evidence and seeking to decide each count separately.

169 Axiomatically, all criminal behaviour involves risk-taking and sexual offending in particular involves a very great degree of risk-taking. Consequently, to say that evidence of one offence is significantly probative of another simply because each involves risk-taking is facile. Granted, the alleged offending in relation to Counts 1, 3 to 8 and 11 was "brazen", but on any view it was much less so in relation to Counts 2, 9 and 10. Similarly, while Counts 7 to 9 and some of the evidence of uncharged acts involved fleeting or furtive touching, the acts alleged to comprise Counts 1 to 6 and 10 were more prolonged and Count 11 did not involve any touching at all. And while Counts 3 to 8 and 11 involved exposure of the appellant's penis, only Counts 7 and 8 (and, arguably, Count 11 also) involved exposure in a public place (therefore comprising what was described in oral argument as exhibitionist conduct), and there was no exposure of the appellant's penis alleged in relation to Count 1, 2, 9 or 10.

Conclusion as to probative value

170 It should be concluded that the trial judge and the Court of Criminal Appeal were in error in holding that: the evidence of EE and SM was admissible in proof of the offences comprised in Counts 1 to 9; the evidence of JP, SH, AK, BB and AA was admissible in proof of the offences comprised in Counts 10 and 11; and the evidence of VOD was admissible in proof of the offences comprised in Counts 1 to 10. There was further error to the extent that the jury were not directed that they could not use the evidence of LJ, CS and VR in proof of Counts 1 to 10.

Directions to the jury

171 The appellant did not contend in this Court that the directions given to the jury were inadequate, but rather that the inadmissibility of the evidence admitted as tendency evidence became apparent from the manner in which the jury were directed as to the use of that evidence. It should be observed, however, that the directions were both wrong and inadequate. They may well have followed the Criminal Trial Bench Book, as the Court of Criminal Appeal observed[165], but they failed to engage with the task of explaining to the jury, in relation to each count, in terms which the jury would have been likely to understand, what use could and could not be made of each witness's evidence in relation to the proof of

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165 *Hughes* [2015] NSWCCA 330 at [228].

each count[166]. Contrary to the holding of the Court of Criminal Appeal[167], it was not sufficient to discharge that responsibility for the trial judge to tell the jury that they must be "concerned with the particular and precise occasions alleged by each of the complainants in relation to each count".

172 There was, too, a further problem with the directions. Even if the jury had been properly directed as to which of each witness's evidence was admissible in proof of each count, or had gleaned as much from what they were told, it was highly likely that the jury would have been incapable of adhering to the directions. That difficulty arises from the inclusion on one indictment of a plethora of counts involving disparate sexual offences against disparate classes of complainants in disparate circumstances, with the consequence that, while some of the evidence admissible in relation to some counts was also admissible in relation to some other counts, a considerable percentage of it was not. As a result, even if the jury had been properly directed as to which parts of the evidence were admissible in relation to each count and which parts were not, the process of reasoning conscientiously in accordance with those directions would have been so complex as to result in a high probability of the jury simply dealing with all of the evidence as a job lot relevant to each and every count[168]; a process which in this case was likely to result in a conclusion that the appellant was, generally, a sexual deviant[169]. In reality, the only way in which that risk could have been avoided would have been to sever the indictment and try Counts 1 to 9 separately from Counts 10 and 11[170]. Even then, the evidence admissible in relation to Count 10 would not have been cross-admissible in relation to Count 11, or vice versa. But, at least, with a trial of only two counts, it might more safely have been assumed that the jury could and would comply with directions not to treat the evidence relevant to one count as relevant to the other.

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166 See generally *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3; *Hargraves v The Queen* (2011) 245 CLR 257 at 275-276 [42] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 44.

167 *Hughes* [2015] NSWCCA 330 at [227].

168 *De Jesus v The Queen* (1986) 61 ALJR 1 at 3-4 per Gibbs CJ; 68 ALR 1 at 4-6; [1986] HCA 65; *R v TJB* [1998] 4 VR 621 at 629-631 per Callaway JA (Phillips CJ and Buchanan JA agreeing at 623, 634).

169 *Sokolowskyj* (2014) 239 A Crim R 528 at 539 [48], 540-541 [56]-[57] per Hoeben CJ at CL (Adams J and Hall J agreeing at 542 [63], [64]).

170 *Phillips* (2006) 225 CLR 303 at 327-328 [78]-[79]; *GBF* [2010] VSCA 135 at [52]-[54].

Reasons not to depart from the orthodox approach

173 What I have written thus far is orthodox in that it reflects the understanding and application of s 97 that until relatively recently has been followed in most decisions of Australian trial judges and courts of criminal appeal, including the New South Wales Court of Criminal Appeal in, at least, *Sokolowskyj v The Queen*[171], *Saoud v The Queen*[172] and *El-Haddad v The Queen*[173]. It is, however, opposed to the approach to the application of s 97 more lately preferred by some judges of the New South Wales Court of Criminal Appeal[174] and by that Court in this case. Because of the fundamental importance of the issue, it is appropriate that I explain in more detail why the orthodox approach should be adhered to.

Orthodox approach

174 The orthodox approach to the application of s 97 is grounded in recognition of the dangers that attend the receipt of tendency evidence[175]. This is the same concern as informed the common law rules for the exclusion of similar fact and other propensity evidence[176]. Section 97 was enacted against the background of the common law exclusionary rules for similar fact and other

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171 (2014) 239 A Crim R 528 at 537-538 [40]-[45] per Hoeben CJ at CL (Adams J and Hall J agreeing at 542 [63], [64]).

172 (2014) 87 NSWLR 481 at 491 [44]-[46], 492 [49]-[52] per Basten JA (Fullerton J and R A Hulme J agreeing at 494 [63], [64]).

173 (2015) 88 NSWLR 93 at 112-114 [65]-[76] per Leeming JA (McCallum J and R A Hulme J agreeing at 124 [129], [130]).

174 See, for example, statements to the effect that no close similarity or pattern need be established: *PWD* (2010) 205 A Crim R 75 at 91 [79] per Beazley JA (Buddin J and Barr AJ agreeing at 93 [96], [97]); *Winter v The Queen* [2013] NSWCCA 231 at [105] per Bellew J (Hoeben CJ at CL and Barr AJ agreeing at [1], [200]); *AC v The Queen* [2016] NSWCCA 21 at [57]-[60] per Davies J (Hidden J and Adamson J agreeing at [1], [107]).

175 *Australian Competition and Consumer Commission v CC (NSW) Pty Ltd* (1999) 92 FCR 375 at 401 [101]; *Fletcher* (2005) 156 A Crim R 308 at 322 [59]-[60] per Simpson J (McClellan CJ at CL and Rothman J relevantly agreeing at 310 [1], 339-340 [157]); *GBF* [2010] VSCA 135 at [27].

176 See generally *Hoch* (1988) 165 CLR 292 at 297 per Mason CJ, Wilson and Gaudron JJ, 301 per Brennan and Dawson JJ; *Melbourne v The Queen* (1999) 198 CLR 1 at 16-19 [36]-[43] per McHugh J; [1999] HCA 32.

propensity evidence and, for that reason, is to be read in light of those rules. Certainly, it must now be accepted that s 97 "manifests an intention to state the principles comprehensively and afresh" and, therefore, that it is the language of s 97 that determines the manner in which tendency evidence is to be treated[177]. But the process of reasoning necessary to determine whether evidence sought to be tendered as tendency evidence is capable of having significant probative value within the meaning of s 97 is, logically and necessarily, the same process of probability reasoning that was applied at common law. As Simpson J rightly said on behalf of the New South Wales Court of Criminal Appeal in *R v Fletcher*[178]:

> "Of course, decisions such as *Hoch* no longer govern the admissibility of evidence of tendency (see *Ellis*). But that does not necessarily render cases such as *Hoch* irrelevant. There is no reason why the reasoning that led the High Court to accept the admissibility of similar fact evidence in appropriate cases before the enactment of the *Evidence Act* should not guide the reasoning process in the evaluation of whether tendered evidence is capable of having, or would have, significant probative value."

175 It is also to be observed that the orthodox approach to the application of s 97 was established in a series of cases in New South Wales commencing shortly after the introduction of the provision in 1995. The courts recognised[179] that, in order for tendency evidence to be truly of significant probative value in proof of acts charged, it was necessary as a matter of logical probability reasoning to be able to identify similarities or other connections between that evidence and the acts charged. The position was complicated by the view taken by some judges[180] that, in light of *Pfennig v The*

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177 *R v Ellis* (2003) 58 NSWLR 700 at 716 [74]-[75] per Spigelman CJ (Sully J, O'Keefe J, Hidden and Buddin JJ agreeing at 719 [101], [102], [103]).

178 (2005) 156 A Crim R 308 at 322 [60] (McClellan CJ at CL and Rothman J relevantly agreeing at 310 [1], 339-340 [157]).

179 See for example *Lock* (1997) 91 A Crim R 356 at 362-363; *R v AH* (1997) 42 NSWLR 702 at 709 per Ireland J (Hunt CJ at CL and Levine J agreeing at 703, 709); *R v Colby* [1999] NSWCCA 261 at [122]-[125] per Mason P (Grove J and Dunford J agreeing at [217], [218]); *R v Martin* [2000] NSWCCA 332 at [68] per Ireland AJ (Fitzgerald JA and Smart AJ agreeing at [9]-[10], [12]-[13]); *Symss v The Queen* [2003] NSWCCA 77 at [51] per Sheller JA (James J and Smart AJ agreeing at [121], [122]).

180 See for example *Lock* (1997) 91 A Crim R 356 at 363; *AH* (1997) 42 NSWLR 702 at 709 per Ireland J (Hunt CJ at CL and Levine J agreeing at 703, 709); *WRC* (2002) 130 A Crim R 89 at 101-102 [25]-[29] per Hodgson JA (Kirby J relevantly agreeing at 133 [124]).

Queen[181], it was necessary, at least for the purposes of s 101 of the *Evidence Act*, that tendency evidence be unquestionably at odds with any reasonable possibility consistent with innocence. That idea was rejected in *R v Ellis*[182]. But nothing said in *Ellis* altered the logic of the probability reasoning which is the *raison d'être* of tendency evidence[183]. Accordingly, judges in New South Wales rightly continued to describe the logically requisite touchstone of significant probative value in terms of similarities and other compelling connections between evidence sought to be admitted as tendency evidence and acts charged.

176 By way of example, *R v Ford*[184], which is sometimes, but wrongly, identified as a point of departure from the orthodox approach to the application of s 97[185], accepted that evidence admitted as tendency evidence had significant probative value where that evidence showed a pattern of offending or modus operandi comprised of the accused sexually assaulting young women who: (1) had stayed over at the accused's house after attending a party there, (2) had consumed a significant amount of alcohol and (3) were asleep, in circumstances where (4) there was a risk of the accused's offending being discovered by others[186]. Campbell JA emphasised[187] that the tendency evidence was of similar offending that was "fairly unusual". In *BP v The Queen*, the significant probative value of the evidence admitted as tendency evidence was found[188] to inhere in the relatively unusual phenomenon of an accused committing similar sexual offences against female lineal descendants. In *DAO v The Queen*, Simpson J found no

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181 (1995) 182 CLR 461.

182 (2003) 58 NSWLR 700 at 717-718 [88]-[94] per Spigelman CJ (Sully J, O'Keefe J, Hidden and Buddin JJ agreeing at 719 [101], [102], [103]).

183 See *Ellis* (2003) 58 NSWLR 700 at 719 [104]-[105] per Hidden and Buddin JJ (Spigelman CJ disagreeing at 719 [99]).

184 (2009) 201 A Crim R 451.

185 See for example *Velkoski v The Queen* (2014) 45 VR 680 at 699 [83].

186 *Ford* (2009) 201 A Crim R 451 at 460 [25]-[27], 467 [44] per Campbell JA (Howie J and Rothman J relevantly agreeing at 489 [145], 491 [158]).

187 *Ford* (2009) 201 A Crim R 451 at 467 [44] per Campbell JA (Howie J and Rothman J relevantly agreeing at 489 [145], 491 [158]). See also *GBF* [2010] VSCA 135 at [29].

188 [2010] NSWCCA 303 at [100], [112] per Hodgson JA (Price J and Fullerton J agreeing at [142], [143]).

error in the trial judge's reasoning[189] that the significant probative value of the tendency evidence admitted in that case lay in demonstrating a modus operandi or pattern engaged in by the accused, as a priest, in targeting and grooming possible victims to engage in sexual misconduct with him.

177 Similarly, as has been seen, in *PWD* it was held[190] that the significant probative value of evidence of a variety of different sexual offences was that each of them had been committed according to a pattern of offending that, assuming absence of concoction and contamination, made it significantly more probable that each complainant was telling the truth in what he alleged. Likewise in *Doyle*, which has also been referred to, the significant probative value of the evidence sought to be tendered as tendency evidence was identified[191] as the pattern of behaviour, evident in each offence, that comprised the accused exploiting his position of authority over his young male employees to obtain access to them and thereby gratify his sexual interest in young males. The significant probative value of that evidence was that, assuming absence of concoction and contamination, the fact that each complainant could independently attest to having been subjected to the same modus operandi or pattern of offending significantly increased the probability that each of them was telling the truth. These cases are, therefore, properly to be understood as specific to the particular tendency evidence in each of those cases and the probability reasoning which it supported in the particular circumstances of that case.

178 In *Sokolowskyj*, the Court of Criminal Appeal held that, on a charge of having indecently assaulted an eight year old complainant in the public bathroom of a shopping centre, evidence said to establish that the accused had a tendency "to have sexual urges and to act on them in public in circumstances where there was a reasonable likelihood of detection"[192] was not significantly probative of the offence charged because of the large qualitative distinction between, on the one hand, the offences of exhibitionism disclosed by the tendency evidence, which involved either public masturbation or exposure of the accused's genitals, and, on the other, engaging in non-consensual, physical contact with the genitals of an

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189 (2011) 81 NSWLR 568 at 599-600 [160]-[165], 606-607 [202], [204]-[205] (Spigelman CJ, Allsop P, Kirby J and Schmidt J agreeing at 572 [1], 583 [71], 607-608 [211], 608 [212]).

190 (2010) 205 A Crim R 75 at 82 [35]-[36], 91 [81], [83] per Beazley JA (Buddin J and Barr AJ agreeing at 93 [96], [97]).

191 [2014] NSWCCA 4 at [86], [141], [147]-[148] per Bathurst CJ (Price J and Campbell J agreeing at [432], [472]).

192 (2014) 239 A Crim R 528 at 534 [29] per Hoeben CJ at CL (Adams J and Hall J agreeing at 542 [63], [64]).

underage complainant. As Hoeben CJ at CL observed[193], in relation to the actions on which the proffered tendency evidence was based:

> "[P]ublic display was an essential ingredient and the sexual gratification or thrill was apparently achieved by such public exposure of his genitals to women. The offence under consideration was very different. The appellant is said to have taken steps to prevent discovery by latching the change room door and by warning the complainant not to tell anyone, otherwise he would take retributive action against her family.
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> ... In assessing the extent of the probative value of the evidence, the focus had to be on the fact in issue to which the evidence was said to logically relate. ... [T]he focus of the prosecution was on generalised sexual activity, which involved neither an assault nor a child. The focus of the tendency evidence should have been on the logical link to the elements of the offence charged, in this case involving both an assault and a child victim."

179 More recently, in *Saoud*, Basten JA distinguished aspects of an accused's conduct disclosed by evidence sought to be tendered as tendency evidence that were "largely unremarkable" from those that were significantly probative of the tendency alleged[194]. Importantly, as his Honour observed[195]:

> "Tendency evidence can take various forms; it is not necessarily based on the conduct of the accused on separate occasions. On the other hand, when it is there will be an inherent element of similar behaviour in order to demonstrate a tendency, absent which the section is not engaged."

And later[196]:

> "'[T]endency' evidence will usually depend upon establishing similarities in a course of conduct, even though the section does not refer (by contrast with s 98) to elements of similarity. That inference is inevitable, because

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193 *Sokolowskyj* (2014) 239 A Crim R 528 at 538 [43]-[44] per Hoeben CJ at CL (Adams J and Hall J agreeing at 542 [63], [64]).

194 (2014) 87 NSWLR 481 at 492 [51]-[52] (Fullerton J and R A Hulme J agreeing at 494 [63], [64]).

195 *Saoud* (2014) 87 NSWLR 481 at 487 [28] (Fullerton J and R A Hulme J agreeing at 494 [63], [64]).

196 *Saoud* (2014) 87 NSWLR 481 at 491 [44] (Fullerton J and R A Hulme J agreeing at 494 [63], [64]).

> that which is excluded is evidence that a person has or had a tendency to act in a particular way, or to have a particular state of mind. Evidence of conduct having that effect will almost inevitably require degrees of similarity, although the nature of the similarities will depend very much on the circumstances of the case."

180 Critics of the orthodox approach to the application of s 97 denounce it as improperly substituting the complexities of common law conceptions for the plain and ordinary terms of the provision. They say that the evident purpose of the provision is to create a simple and less demanding criterion of admissibility, and that it is the duty of the court to give the provision its full effect[197]. But the difficulty with shibboleths of that order is that the s 97 criterion of admissibility is not simple. Doubtless, it is the duty of the court to give effect to statutes according to their terms and not to graft on additional requirements. And, possibly, it is true to say, as Basten JA observed in *Saoud*[198], that to continue to describe the relevant criteria of significant probative value in common law terms, such as similarity of offending or circumstances of offending, modus operandi or other underlying unity, may tend to distract some trial judges from looking for relevant indications of significant probative value. But, whatever nomenclature is considered preferable, and it is to be observed that nothing better has yet emerged, where the Parliament enacts aspirational legislation, like s 97 of the *Evidence Act*, in protean, open-textured terms like "significant probative value", it is up to the court to formulate rules that define its meaning and facilitate consistency in its application; and, for that purpose, it is appropriate to seek guidance in the common law[199]. As Leeming JA recently observed on behalf of the New South Wales Court of Criminal Appeal in *El-Haddad*[200]:

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197 See for example Cossins, "The Behaviour of Serial Child Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials", (2011) 35 *Melbourne University Law Review* 821 at 857. See also *Elomar v The Queen* (2014) 316 ALR 206 at 280 [371]; *BC v The Queen* [2015] NSWCCA 327 at [81] per Beech-Jones J (Simpson JA agreeing at [1]).

198 (2014) 87 NSWLR 481 at 490 [40] (Fullerton J and R A Hulme J agreeing at 494 [63], [64]). So much was also recognised in *Director of Public Prosecutions v Boardman* [1975] AC 421 at 452-453 per Lord Hailsham of St Marylebone.

199 See generally *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 per Mason J; [1985] HCA 48; *R v Lavender* (2005) 222 CLR 67 at 81-82 [36] per Gleeson CJ, McHugh, Gummow and Hayne JJ; [2005] HCA 37.

200 (2015) 88 NSWLR 93 at 112 [66] (McCallum J and R A Hulme J agreeing at 124 [129], [130]).

> "The statutory text did not emerge from a vacuum. Where as here the legislative text is patently open-textured, the immediate context – namely, its replacement of common law rules restricting the use of a particular type of evidence – is especially apt to illuminate its legal meaning."

181 Furthermore, such rules having been propounded in the form of the orthodox approach to the application of s 97, and thereafter the legislation having been re-enacted in the same terms, as it was in New South Wales in 2007 and by the Commonwealth in 2008[201], the presumption is that the Parliament expects the orthodox approach to be adhered to[202]. It is then the duty of the court to do just that.

Legislative background

182 Until the enactment in 1995 of the uniform evidence legislation, the principal Act governing evidence in New South Wales was the *Evidence Act* 1898 (NSW). The *Evidence Act* 1898 made no provision for tendency evidence – it left that to the common law – and, in the New South Wales Law Reform Commission's 1978 *Working Paper on Evidence of Disposition*, the Commission stated[203], on the basis of its review of the body of common law authority relating to the admissibility of what is now known as tendency evidence, that, although it supported the incorporation of the relevant rules into statute, it did not support any reform "substantially widening or narrowing" the rules. Of the common law relating to similar fact evidence, the Commission said[204]: "[w]e think it is neither too inclusionary nor too exclusionary".

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201 See *Evidence Amendment Act* 2007 (NSW), Sched 1 [38]; *Evidence Amendment Act* 2008 (Cth), Sched 1, item 42.

202 See *Ex parte Campbell; In re Cathcart* (1870) LR 5 Ch App 703 at 706 per James LJ; *Platz v Osborne* (1943) 68 CLR 133 at 141 per Rich J, 145-146 per McTiernan J, 146-147 per Williams J; [1943] HCA 39; *Thompson v Smith* (1976) 135 CLR 102 at 109 per Gibbs J (Mason J and Aickin J agreeing at 109); [1976] HCA 56. See generally Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 136-137 [3.43].

203 New South Wales Law Reform Commission, *Working Paper on Evidence of Disposition*, (1978) at 74 [4.5].

204 New South Wales Law Reform Commission, *Working Paper on Evidence of Disposition*, (1978) at 65 [4.1].

183 In July 1979, the then Commonwealth Attorney-General referred the Australian Law Reform Commission to review[205]:

> "the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements".

Six years later, in 1985, the Commission released its Interim Report[206].

184 Among other things, the Interim Report dealt with the common law's concern with the potential for jurors to overestimate the value of and to be improperly influenced by tendency evidence. It reprised the New South Wales Law Reform Commission's concern about substantially altering the common law rules. The Commission found that the common law's disdain of tendency evidence was supported by a substantial body of psychological research[207]. That research showed behaviour tends to be highly dependent on situational factors and not, as previously postulated, on personality traits, and that the ability to predict future behaviour from past behaviour, therefore, depends on the similarity of situations[208]. But, as the research also established, people are inclined to attribute the behaviour of others to enduring personality traits and to underestimate the role of situational factors. People also tend to infer personality traits from limited knowledge of a person (called the "halo effect") and thereafter fail to discriminate between diverse behaviours[209]. Jurors are, too, less reluctant to convict an accused if informed of his or her previous misconduct because they feel either that the gravity of their decision is lessened or that there is some basis

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205 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at xi.

206 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985). As to the relevance of Law Reform Commission material, see generally Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 89-90 [3.3]-[3.4], 92-93 [3.7].

207 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 456 [800], 460-464 [810].

208 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 451-452 [796]-[797].

209 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 454 [799].

for punishment, even if it is not established that the accused committed the crime charged[210]. The Commission thus concluded[211] that:

> "The research confirms the need to maintain strict controls on evidence of character or conduct and for such evidence to be admitted only in exceptional circumstances. It demonstrates, however, that the emphasis of the law should be changed. For the sake of accurate fact-finding, fairness and the saving of time and cost, the law should maximise the probative value of the evidence it receives by generally limiting it to evidence of conduct occurring in circumstances similar to those in question. Only for special policy reasons should other evidence of character or conduct be received."

185 The draft legislation proposed by the Interim Report[212] was shaped accordingly. Clause 91 relevantly provided that evidence that a person "did a particular act or had a particular state of mind" was not admissible to prove that the person has or had a tendency to do a similar act or to have a similar state of mind unless it were reasonably open to find that "all the acts or states of mind, and the circumstances in which they were done or existed, [were] substantially and relevantly similar". Clause 93 relevantly provided that, in criminal proceedings, evidence of the kind referred to in cl 91 was not admissible to prove a tendency to do a similar act or to have a particular state of mind unless the evidence had "substantial probative value". Clause 93(3) provided that the probative value of the evidence was to be determined by the court with regard to:

> "(a) the nature and extent of the similarity;
>
> (b) the extent to which the act or state of mind to which the evidence relates is unusual;
>
> (c) in the case of evidence of a state of mind – the extent to which the state of mind is unusual or occurs infrequently; and
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> (d) in the case of evidence of an act –

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210 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 455-456 [799].

211 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 456 [800].

212 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 2 Appendix A.

(i) the likelihood that the defendant would have repeated the act;

(ii) the number of times on which similar acts have been done; and

(iii) the period that has elapsed between the time when the act was done and the time when the defendant is alleged to have done the act that the evidence is adduced to prove."

186 In 1987, the Australian Law Reform Commission released its final Report, to which an amended draft bill was annexed. What had appeared in cl 91 of the previous draft now appeared in clls 86 and 87 of the amended draft in the following form[213]:

"**Exclusion of tendency evidence**

86. Evidence of the character, reputation or conduct of a person, or of a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way or to have a particular state of mind.

...

Exception: conduct (including of accused) to prove tendency

87. Where there is a question whether a person did a particular act or had a particular state of mind and it is reasonably open to find that –

(a) the person did some other particular act or had some other particular state of mind, respectively; and

(b) all the acts or states of mind, respectively, and the circumstances in which they were done or existed, are substantially and relevantly similar,

the tendency rule does not prevent the admission or use of evidence that the person did the other act or had the other state of mind, respectively."

Clause 89 of the amended draft bill provided for "further protections" in criminal proceedings and was, in substance, expressed in identical terms to those of cl 93 in the previous draft.

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213 Australian Law Reform Commission, *Evidence*, Report No 38, (1987), Appendix A at 173.

187 In 1988, the New South Wales Law Reform Commission released its response to the Australian Law Reform Commission's Report and recommended the adoption of the amended draft bill, subject to minor amendments[214]. In March 1991, an Evidence Bill was introduced into the New South Wales Parliament ("the NSW Bill") in substantively the same form as was proposed by the New South Wales Law Reform Commission, and therefore also by the Australian Law Reform Commission. What had been cl 86 of the Australian Law Reform Commission's amended draft bill was included as cl 83 of the NSW Bill. What had been cl 87 was reproduced in cl 84 of the NSW Bill and the "further protections" of cl 89 were included in cl 86. In the second reading speech, it was said[215] that the purpose of introducing the NSW Bill was "to expose it for public consideration and comment".

188 In October 1991, an Evidence Bill was introduced into the Commonwealth Parliament ("the Commonwealth Bill") with provisions that differed in some relevant respects from those of the NSW Bill, and therefore also from the amended draft bill recommended by the Australian Law Reform Commission in 1987. Clause 103 of the Commonwealth Bill set out the exclusionary rule in similar terms to cl 83 of the NSW Bill, but eschewed any requirement that, for tendency evidence to be admissible in criminal proceedings, it must have "substantial probative value", a requirement found in cl 86(2) of the NSW Bill. Additionally, in place of the list of considerations relevant to the assessment of probative value that had appeared in cl 86(4) of the NSW Bill and cl 89(3) of the Australian Law Reform Commission's amended draft bill, cl 105 of the Commonwealth Bill provided that in criminal proceedings:

> "**(2)** ... tendency evidence is not to be adduced by the prosecution unless:
>
> (a) the evidence tends to prove a fact in issue, otherwise than merely by tending to prove:
>
> (i) the commission of an offence other than the offence with which the defendant is charged; or
>
> (ii) that the defendant has a predisposition to commit an offence; and

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214 New South Wales Law Reform Commission, *Evidence: Report*, LRC 56, (1988) at 4 [1.7], 25 [2.38].

215 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 March 1991 at 1436.

(b) the probative value of the evidence outweighs its merely prejudicial effect on the defendant.

(3) ... tendency evidence is not to be adduced by the prosecution if:

(a) the evidence concerns the occurrence of 2 or more events; and

(b) the defendant disputes the occurrence of those events; and

(c) there is a rational view of the evidence that is inconsistent with the defendant being found guilty of any offence with which he or she is charged in the proceeding."

189 It is to be observed, however, that, far from being a fresh or novel approach to tendency evidence, cl 105(2)(b) in effect reflected the common law's *Christie* discretion[216] and cl 105(3)(c) embodied the essence of the common law rule of exclusion of propensity evidence propounded in *Pfennig*[217]. In the second reading speech introducing the Commonwealth Bill, it was stated[218] that both it and the NSW Bill would provide "a basis for consideration" of a uniform evidence law.

190 In 1995, the Commonwealth Parliament enacted the *Evidence Act* 1995 (Cth) and the New South Wales Parliament enacted the *Evidence Act* 1995 (NSW) in the same terms. Significantly, s 97 of the Acts provided for "[t]he tendency rule" in terms which required that, to be admissible, tendency evidence must have *significant* probative value. The single stipulation of s 97(1)(b) was that:

> "the *court thinks* that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value." (emphasis added)

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216 Referring to *R v Christie* [1914] AC 545. See *Police v Dunstall* (2015) 256 CLR 403 at 416-417 [26] per French CJ, Kiefel, Bell, Gageler and Keane JJ; [2015] HCA 26.

217 (1995) 182 CLR 461 at 481-484 per Mason CJ, Deane and Dawson JJ, 506 per Toohey J.

218 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 15 October 1991 at 1930.

191 Section 101 of the Acts replaced the "further restrictions" in cl 105 of the Commonwealth Bill with a single stipulation that tendency evidence would be inadmissible in criminal proceedings unless:

> "the probative value of the evidence *substantially* outweighs any prejudicial effect it may have on the defendant." (emphasis added)

192 The change in s 97 from the list of criteria for the assessment of probative value (as had been included in cl 86 of the NSW Bill) to the test of what the court *thinks* would constitute significant probative value appears to have been calculated to afford the court greater scope for the development of relevant criteria. But the change in s 101, from the requirements that the probative value of the evidence exceed its prejudicial effect and that there be no rational view of the evidence consistent with innocence (as had been included in cl 105 of the Commonwealth Bill) to the requirement that the probative value of the evidence *substantially* outweigh any prejudicial effect, presents as having been designed to replace the combined effect of the *Christie* discretion and the exclusionary rule from *Pfennig* with something very close to the terms of the more flexible common law rule of exclusion propounded by the House of Lords in *Director of Public Prosecutions v P*[219], advocated by McHugh J in *Pfennig*[220], and subsequently adopted in Victoria in the form of s 398A of the *Crimes Act* 1958 (Vic)[221]. And that is hardly surprising in view of the Commissioners and consultants who were involved in the drafting of the legislation proposed by the Australian Law Reform Commission and the individuals involved with the Senate Standing Committee on Legal and Constitutional Affairs that considered the Act before its enactment[222]. They included eminent criminal judges and counsel who were thoroughly familiar with those developments. Moreover, at the time of enactment of the uniform legislation in 1995, there was already a body of case law in England and Australia regarding the application of those terms[223]. Consistently, therefore, with the precept that, where Parliament enacts

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219 [1991] 2 AC 447 at 460-461 per Lord Mackay of Clashfern LC (the other Law Lords agreeing at 463).

220 (1995) 182 CLR 461 at 513-514, 516, 529-532.

221 As inserted by *Crimes (Amendment) Act* 1997 (Vic), s 14.

222 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at xii; Senate Standing Committee on Legal and Constitutional Affairs, *Evidence Bill 1993*, Interim Report, (1994), Appendix 1-2.

223 See discussions in *R v Best* [1998] 4 VR 603 at 612 per Callaway JA (Phillips CJ and Buchanan JA agreeing at 604, 620); *Papamitrou* (2004) 7 VR 375 at 389-390 [29]-[30] per Winneke P (Ormiston JA and Buchanan JA agreeing at 396 [48], [49]); *R v EF* (2008) 189 A Crim R 463 at 468 [24]-[27] per Weinberg JA

(Footnote continues on next page)

legislation using words that have been judicially construed[224], Parliament is presumed to intend them to have that effect, the orthodox approach to the application of s 97 rightly built on that case law.

193 In 2004, the Australian Law Reform Commission, in conjunction with the New South Wales Law Reform Commission, undertook a review of the uniform evidence legislation. In the associated Issues Paper, the Commission observed[225] that the "additional requirement in criminal proceedings that the probative value of the evidence substantially outweigh the prejudicial effect it may have ... is a major impediment to the admission of tendency and coincidence evidence of child witnesses" in light of allegations of concoction. The Issues Paper posed[226] the questions of whether s 101 should be amended to provide that, where the probative value of tendency evidence substantially outweighs its possible prejudicial effect, it must not be ruled inadmissible merely because it may be the result of concoction and whether there should be special provisions applying to tendency evidence where a series of sexual offences are alleged by child, or any, complainants. In the subsequent Report, the Commission reiterated concerns about tendency evidence and noted that a review of psychological research conducted since its 1985 Interim Report confirmed, and in some instances strengthened, the basis for the Commission's original recommendation that the admission of tendency evidence should be strictly controlled[227]. Consequently, the Commission did not recommend that any changes be made to the uniform evidence legislation in respect of tendency evidence[228] and, apart from turning

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(Nettle JA and Mandie AJA agreeing at 464 [1], 473 [56]). See also *Simpson* (1994) 99 Cr App R 48 at 53-54; *R v H* [1995] 2 AC 596.

224 See *Platz v Osborne* (1943) 68 CLR 133 at 141 per Rich J, 145-146 per McTiernan J, 146-147 per Williams J; *Thompson v Smith* (1976) 135 CLR 102 at 109 per Gibbs J (Mason J and Aickin J agreeing at 109). See generally Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed (2014) at 136-137 [3.43].

225 Australian Law Reform Commission, *Review of the Evidence Act 1995*, Issues Paper 28, (2004) at 124-125 [8.40]. See also Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report No 84, (1997) at 334-335 [14.89], Recommendation 103.

226 Australian Law Reform Commission, *Review of the Evidence Act 1995*, Issues Paper 28, (2004) at 126, Questions 8-8, 8-9.

227 Australian Law Reform Commission, *Uniform Evidence Law*, Report 102, (2005) at 83-85 [3.19]-[3.25]; Australian Law Reform Commission, *Evidence*, Report No 26 (Interim), (1985), vol 1 at 456 [800].

228 Australian Law Reform Commission, *Uniform Evidence Law*, Report 102, (2005) at 370 [11.17].

the criteria of admissibility from a negative stipulation into a positive requirement[229], none have since been made. In those circumstances, it must be taken that the established orthodox approach to s 97, which was evident in New South Wales courts particularly in the decade after the enactment of s 97, did accord with the operation of the section intended by Parliament.

No justification for lowering the bar

194 Despite the legislature's implicit approval of that orthodox approach, the decision of the Court of Criminal Appeal in this case amounts to saying that, notwithstanding the absence of any particular similarity in the offending itself or the circumstances of the offending, or any other feature of underlying unity, howsoever expressed, evidence that an accused has committed acts of sexual misconduct against females ranging in age from six years (in the case of SH) to mid-twenties (in the case of LJ) in a variety of different circumstances establishes a tendency to commit sexual offences against female children as and when an opportunity presents, and that the existence of that tendency is of such significant probative value as to make evidence of all of the alleged sexual misconduct admissible as tendency evidence in proof of each charged offence. Until now, no other Australian decision has gone so far in lowering the bar of admissibility, and, assuming it remains essential to our system of criminal justice that it is better that ten guilty persons should escape than one innocent person suffer[230], there is no justification in principle or as a matter of statutory interpretation for so lowering the bar.

195 According to the Crown, the decision of the Court of Criminal Appeal in this case derives support from an earlier decision of the New South Wales Court of Criminal Appeal in *BC v The Queen*[231]. In that case, the Court[232] held that it was permissible to tender evidence of an escalating succession of sexual offences alleged to have been committed by the accused between the ages of 11 and 28 in proof of each of the alleged offences. In the Crown's submission, *BC* shows that it is open to the Crown to aggregate evidence of different sexual misconduct alleged to have occurred over a period of years as a pattern of behaviour which establishes a tendency to commit sexual offences and that such a tendency is of

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229 See *Evidence Amendment Act* 2007 (NSW), Sched 1 [38]; *Evidence Amendment Act* 2008 (Cth), Sched 1, item 42.

230 Blackstone, *Commentaries on the Laws of England*, (1769), bk 4, ch 27 at 352. See *R v Carroll* (2002) 213 CLR 635 at 643-644 [21]-[24] per Gleeson CJ and Hayne J; [2002] HCA 55.

231 [2015] NSWCCA 327.

232 *BC* [2015] NSWCCA 327 at [81], [87], [101] per Beech-Jones J (Simpson JA agreeing at [1], Adams J dissenting at [70]-[71]).

sufficient significant probative value to render it admissible under s 97 in proof of each alleged sexual offence.

196 There are two difficulties with that argument. The first, which is sufficient reason in itself to reject the argument, is that, properly understood, *BC* was decided, according to the orthodox approach to the application of s 97, on the basis that the evidence established "a pattern of behaviour, modus operandi, system or pattern and common threads ... in the [accused's] conduct"[233]. As Beech-Jones J observed:

> "The allegations had a number of common or similar features, namely the young age at which some of the complainants were first abused and then abused later when they were older, the complainants were each known to the [accused], the above occurred in a context where he was trusted to exercise some form of supervision of them, and he did not force himself on the complainants but sought their consent or made a request. True it is that not all features were present with all complainants but that was not necessary."

197 The same orthodox approach leads to the conclusion expressed earlier in these reasons that the evidence relating to Counts 1 to 6, including the evidence of BB and AA, was cross-admissible as between Counts 1 to 6 and that the evidence relating to Counts 7 to 9, again including the evidence of BB and AA, was cross-admissible as between Counts 7 to 9. *Non constat*, however, that, in the absence of a pattern of behaviour, modus operandi or "common threads", it is permissible to aggregate a succession of disparate sexual offences alleged to have been committed over a period of years in proof of some general tendency towards sexual misconduct.

198 As was earlier recorded[234], the Crown contended that there were some common features of the appellant's offending in this case, including furtive touching of female children's breasts and vaginal areas; the exposure of his penis; the causing of contact between his penis and female children; and sexual misconduct in the vicinity of other persons. On the Crown's submission, it did not matter that these features were relevant to only some counts. It did not matter that the age of some complainants varied markedly from some of the others, or that the offences alleged to have been committed against some of the complainants were markedly different from the offences alleged to have been committed against some of the others, or that the circumstances in which some of

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233 *BC* [2015] NSWCCA 327 at [101] per Beech-Jones J (Simpson JA agreeing at [1]). The controversy in that case related to the application of s 101: see at [70]-[71] per Adams J dissenting.

234 See [168] above.

the alleged offences were committed were markedly different from the circumstances of offending for some of the others. In particular, it was said, it did not matter that the alleged act of making a female child come into contact with the appellant's penis in the case of Count 10 occurred while standing kissing the 15 year old EE, but in the case of Count 9 occurred while positioning the head of the nine year old AK on his lap in order to administer medicated ear drops at her mother's request. The significance of such differences in effect evaporated, it was contended, once the evidence of each of the alleged offences and uncharged acts was aggregated. So viewed, it was submitted, the totality of the evidence established a pattern of the appellant satiating a perverted sexual interest in female children, albeit doing so by different kinds of sexual offences, at different times and places, in different circumstances, as and when opportunities arose, which the appellant neither orchestrated nor arranged[235].

199 That contention bespeaks the second difficulty with the Crown's argument, which is the profundity of its consequences. If accepted, it would mean that, whenever an accused is alleged to have committed a succession of different sexual offences against a succession of children, in different circumstances, each having no more in common with the others than that each is committed opportunistically, evidence of all of the alleged offences is admissible in proof of each of them on the basis that, while none taken alone establishes anything of significant probative value in relation to any of the others, together all of them establish a tendency to commit sexual offences against children, and that is to be taken as being of significant probative value in relation to the proof of each of the offences on the basis that a tendency to commit sexual offences makes it significantly more likely that the accused has committed the sexual offence with which he or she is charged.

200 If that is to be regarded as acceptable, what then is to be the limit to the admission of tendency evidence? Does it, for example, follow that, where an accused is charged with a dozen counts of theft alleged to have been committed against as many female victims ranging between six and 24 years of age, each in different circumstances, by different means and for different amounts, together those allegations represent such a pattern of interconnected behaviour as to establish a tendency to commit theft from young female victims that renders the entirety of that evidence admissible in proof of each count? Presumably not, but, if not, what is the difference?

201 The answer which the Crown and the Victorian Director of Public Prosecutions offered in the course of argument was that sexual offences of the kind in issue here are different because a tendency to commit sexual offences

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235 See *Hughes* unreported, District Court of New South Wales, 14 February 2014 at 53-54 per Zahra DCJ.

against children is such an exceptional phenomenon as to make evidence of one such offence significantly probative of an offender having committed another. That answer is not persuasive. To adopt and adapt the reasoning of Simpson J in *Fletcher*[236]:

> "While it may be tempting to think, for example, that evidence of a sexual attraction to [female children] has probative value in a case where the allegations are, as here, of sexual misconduct with [female children], an examination must be made of the nature of the sexual misconduct alleged and the degree to which it has similarities with the tendency evidence proffered. There will be cases where the similarities are so overwhelming as to amount to what, in pre-*Evidence Act* days was called 'similar fact' evidence, showing 'a striking similarity' between the acts alleged; and there will be cases where the similarities are of so little moment as to render the evidence probative of nothing."

202 Admittedly, and obviously, the commission of sexual offences against children is unusual by the standards of ordinary decent people. But it is not unusual in comparison to other crimes. As the Victorian Director of Public Prosecutions submitted, the bulk of the work of criminal courts in this country is devoted to dealing with sexual offences and the bulk of those offences are sexual offences against children. And, as is apparent from the psychological studies which the Australia Law Reform Commission emphasised in 1985 and 2005, the fact of sexual offending is not, of itself, a sound basis for the prediction of further sexual offending[237]. The probability of further offending depends on circumstantial and situational considerations of the kind that inform the orthodox application of s 97.

203 Certainly, Parliament could enact legislation that treats disparate sexual offences committed in different circumstances at different times in different places against different children as significantly probative of the commission of each other. Given the very extensive publicity and information which is nowadays devoted to sexual offences against children, it may be that Parliament will one day choose to do so. But, for the reasons already stated, it should not be thought that that was Parliament's purpose when enacting s 97. And, it is to be remembered that, despite the questions posed in the course of the Australian Law

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236 (2005) 156 A Crim R 308 at 319-320 [50] (McClellan CJ at CL agreeing at 310 [1]).

237 See generally Australian Law Reform Commission, *Uniform Evidence Law*, Report 102, (2005) at 80-81 [3.9]-[3.11], 82 [3.14], 85 [3.25].

Reform Commission's review of the uniform evidence legislation[238] and more recent proposals for reform[239], Parliament has never made any substantive amendment to s 97 for the purpose of ensuring greater admissibility than the orthodox approach allows. Consistently, therefore, with the dialogue between the courts and Parliament that is manifest in the rules of statutory construction, it would be wrong to suppose that it had.

Velkoski and the position in Victoria

204 Finally, for the sake of completeness, it should be mentioned that, in the course of argument, counsel for the appellant called in aid comments by the Victorian Court of Appeal in *Velkoski v The Queen*[240] that, although the New South Wales Court of Criminal Appeal and the Victorian Court of Appeal were for some time at one in following the orthodox approach to the application of s 97, the New South Wales Court of Criminal Appeal has in more recent decisions approved the admission of evidence as tendency evidence that, by the standards of the orthodox approach to the application of s 97, did not rise to the level of significant probative value. Counsel for the appellant submitted that *Velkoski* lends support to the contention that the Court of Criminal Appeal was in error in this case in its treatment of the tendency evidence.

205 The Victorian Director of Public Prosecutions, in support of the Crown, submitted to the contrary that *Velkoski* was wrongly decided, and should not be endorsed by this Court, because it required a similarity or connection between tendency evidence and the "operative features" of the charged acts[241].

206 If *Velkoski* were properly to be read as requiring a similarity or connection between tendency evidence and the "operative features" of charged acts, it would go too far. As has been explained, what is required is a logically significant

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238 Australian Law Reform Commission, *Review of the Evidence Act 1995*, Issues Paper 28, (2004) at 126, Questions 8-8, 8-9.

239 Royal Commission into Institutional Responses to Child Sexual Abuse, *Evidence (Tendency and Coincidence) Model Provisions*, Public Consultation Draft, (2016); Cossins, "The Behaviour of Serial Child Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials", (2011) 35 *Melbourne University Law Review* 821 at 860-861. See also *Evidence Act* 1906 (WA), s 31A, which was inserted in 2004 by s 13 of the *Criminal Law Amendment (Sexual Assault and Other Matters) Act* 2004 (WA).

240 (2014) 45 VR 680 at 713 [142], 715 [152], 717-718 [163]-[164].

241 That argument was based on the reasons expressed in *Velkoski* (2014) 45 VR 680 at 682 [3], 719 [171].

connection between either the acts in question, or the circumstances of the offending, or the relationship of the accused to the complainants, or some other aspect of the factual matrix that as a matter of syllogistic reasoning affects an assessment of the probability of the existence of a fact in issue. But whether or not *Velkoski* should be read as going too far, it does assist in illuminating the illogic of departing from the orthodox approach to the application of s 97. *Velkoski* emphasises that to show only that an accused has a sexual interest in a number of complainants and is willing to act upon it as occasion presents is to show no more than that the accused is the type of person who is disposed to and does commit sexual offences. That is no more than a mere propensity to commit sexual offences and, as has been shown, it would not, without more, be significantly probative of the accused having committed another sexual offence.

207 Counsel for the Crown contended that the real error in *Velkoski* was that the Victorian Court of Appeal ignored the statutory language of s 97. In his submission, evidence which demonstrates that an accused has a sexual attraction to female children under 16 years of age and is disposed to act upon it as occasion presents is evidence which is highly probative of the accused having a "particular state of mind" and so, therefore, plainly admissible in accordance with the words of the section. By requiring anything more to render such evidence admissible, it was submitted, the orthodox approach is clearly opposed to the terms of s 97 and, therefore, should be rejected.

208 It is, however, the Crown's contention which is opposed to the language of the section, for to posit that an otherwise unparticularised sexual interest in female children under 16 years of age is a "particular state of mind" is to deny the statutory requirement of particularity. As Edelman J observed in effect in the course of argument, it traduces particularity to similarity at a very high or abstract level of generality. And, at such a high or abstract level of generality, the criterion of admissibility becomes no more than, or no different from, the test of relevance under s 55. That cannot be the purpose of s 97.

Conclusion and orders

209 The admission of the tendency evidence in relation to all counts occasioned a substantial miscarriage of justice. As was conceded by the Crown, there can be no question of the application of the proviso[242]. Accordingly, the appeal should be allowed, the convictions quashed and the sentences passed below set aside, and it should be ordered that a new trial be had on all counts except Count 10.

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242 *Criminal Appeal Act* 1912 (NSW), s 6(1).

210 GORDON J. This appeal concerns a question of statutory construction of s 97(1)(b) of the *Evidence Act* 1995 (NSW), which provides relevantly that evidence adduced for the purpose of proving that an accused has or had a tendency to act in a particular way or to have a particular state of mind is inadmissible unless "the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value".

211 The answer particularly affects the trial of a person charged with multiple sexual offences and how such a trial should be conducted. The answer is not limited to trials in New South Wales. It affects the trial of such a person, and how their trial should be conducted, under and in accordance with the *Evidence Act* 1995 (Cth), the *Evidence Act* 2001 (Tas), the *Evidence Act* 2008 (Vic), the *Evidence Act* 2011 (ACT) and the *Evidence (National Uniform Legislation) Act* (NT).

Tendency evidence

212 Tendency evidence provides a foundation for inferring that a person "has or had a tendency to act in [a particular] way or to have a particular state of mind, the existence of which tendency makes it more probable that the accused acted in a particular way or had a particular state of mind at the time or in the circumstances of the alleged offence"[243].

213 It follows that it is necessary to identify the tendency "to act in a particular way, or to have a particular state of mind" that is sought to be proved by the particular piece of tendency evidence, and the strength of the inference that can be drawn from that evidence.

214 That task must be undertaken separately in relation to each piece of evidence. However, in undertaking the task, the court is not to disregard other evidence, including other tendency evidence. That is the consequence of the language of s 97(1)(b), which relevantly provides that tendency evidence may meet the significant probative value threshold "either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence". The limitation implicit in that statutory language is that regard is not to be had to evidence adduced or sought to be adduced by another party to the proceeding.

215 That task is not undertaken in a vacuum. Identifying the tendency said to be proved by the tendency evidence "is no more than a step on the way" in

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243 *IMM v The Queen* (2016) 257 CLR 300 at 328 [104]; [2016] HCA 14. See also s 97(1) of the Evidence Act.

reasoning to a conclusion about the ultimate question posed by s 97(1)(b)[244]: the extent to which the tendency evidence could rationally affect the assessment of the probability of the existence of a fact in issue. It has been said that, for evidence to have "significant" probative value, the evidence must be "important" or "of consequence"[245]. That is, "the evidence must be influential in the context of fact-finding"[246].

216 Substantially for the reasons given by Nettle J, I agree that:

(1) The "probative value" of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue[247].

(2) Each count on a multiple count indictment must be considered separately and questions about tendency evidence must be decided separately by reference only to the evidence adduced or sought to be adduced that is relevant to *that* count[248].

(3) Whether a piece of evidence has "significant probative value" must be considered separately in relation to each count on the indictment because the facts in issue will differ on each count[249].

(4) Whether tendency evidence has "significant probative value" in relation to a particular count must be decided for each count by reference to the facts in issue on *that* count[250].

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244 See *Gardiner v The Queen* (2006) 162 A Crim R 233 at 260 [124].

245 *IMM* (2016) 257 CLR 300 at 314 [46], 327 [103]. See also *Lockyer* (1996) 89 A Crim R 457 at 459.

246 *IMM* (2016) 257 CLR 300 at 314 [46].

247 See s 3(1) of the Evidence Act; definition of "probative value" in Pt 1 of the Dictionary to the Evidence Act.

248 See *KRM v The Queen* (2001) 206 CLR 221 at 234 [36], 257 [106], 260 [118], 263-264 [132]-[133]; [2001] HCA 11; *MFA v The Queen* (2002) 213 CLR 606 at 617 [34]; [2002] HCA 53.

249 See, eg, *Rapson v The Queen* (2014) 45 VR 103.

250 See, eg, *Phillips v The Queen* (2006) 225 CLR 303 at 317-318 [44]-[47]; [2006] HCA 4.

(5) Determining whether tendency evidence has "significant probative value" requires precise particularisation of each tendency alleged as well as logical analysis of how the alleged tendency, if proved by the identified evidence, relates to the facts in issue in respect of *the specific* count being considered, in order to determine if the identified evidence would have significant probative value in relation to those facts in issue[251].

(6) Evidence that an accused has committed an offence is not, without more, significantly probative of the accused having committed the offence in question[252].

(7) Tendency evidence has "significant probative value" where, for example, that evidence provides some logically significant underlying unity or commonality which rationally permits a conclusion that evidence of the accused having committed a sexual offence against one person significantly increases the probability of the accused having committed a sexual offence against another person[253].

(8) Evidence with "significant probative value" may also include, but is not limited to, evidence that there is a logically significant degree of similarity in the relationship of the accused to each complainant; a logically significant connection between the details of each offence or the circumstances in which each offence was committed; or a logically significant or recognisable *modus operandi*, system of offending, or pattern of conduct.

217 That set of principles reflects three matters. First, it reflects the dangers attending the reception of tendency evidence that have long been recognised[254]. Those dangers were recognised, not eliminated, by the enactment of s 97. What was and remains necessary, as a matter of logical probability, are identified similarities or other logically significant connections between the evidence and the facts in issue.

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251 See, eg, *HML v The Queen* (2008) 235 CLR 334 at 350-352 [4]-[5]; [2008] HCA 16; *IMM* (2016) 257 CLR 300 at 314 [46].

252 See, eg, *BBH v The Queen* (2012) 245 CLR 499 at 525 [70]-[71]; see also at 522 [61]; [2012] HCA 9.

253 See, eg, *Hoch v The Queen* (1988) 165 CLR 292 at 294-295; [1988] HCA 50; *Pfennig v The Queen* (1995) 182 CLR 461 at 482; [1995] HCA 7.

254 Reasons of Gageler J at [71]-[77], [83], [85] and Nettle J at [184], [193].

218 Second, it reflects what Gageler J describes as a "conservative approach"[255]. As his Honour puts it, a tendency to be sexually interested in female children or a tendency to engage in sexual activities with female children opportunistically is insufficient to bear on the probability that a person who had such a tendency engaged in a particular sexual activity with a particular female child on a particular occasion to an extent that can properly be evaluated as significant. More is required. As already noted, that additional factor may, for example, take the form of some logically significant underlying unity or commonality which rationally permits a conclusion that evidence of the accused having committed a sexual offence against one person significantly increases the probability of the accused having committed a sexual offence against another person.

219 Third, it reflects that, if admission of the evidence is sought to be justified by describing the "tendency" in broad terms and without the kind of logically significant similarity, connection, underlying unity or commonality referred to earlier, evidence of any sexual misconduct, whether against an adult or a child, may be admitted as tendency evidence at the trial of offences against children. That is not how s 97(1)(b) operates or was intended to operate.

220 That third matter is illustrated here by considering how the tendency evidence of the wardrobe assistants ("LJ", "CS" and "VR") bears upon count 11 – an offence of committing an act of indecency towards "SM" when she was 12 or 13 years old.

221 SM had worked with the appellant on a television series called *Hey Dad..!* from eight years of age. In relation to count 11, her evidence was that the appellant came out of his dressing room on the *Hey Dad..!* set and stood in front of a mirror in view of SM, made eye contact with her, undid his belt, allowed his trousers to drop to the floor, pulled down his underpants and exposed his penis in the mirror. He then wiggled his hips back and forth, looking at SM in the mirror and then at his penis. SM also gave evidence of uncharged acts, which included that, when sat on the appellant's lap for publicity photographs, he would pick her up with his hands on her chest and put his hand underneath her, sometimes moving his hands to touch her vagina.

222 LJ, CS and VR also worked with the appellant on the set of *Hey Dad..!*. LJ, CS and VR were adult women. Each gave evidence of other uncharged acts[256]. For example, in relation to separate uncharged acts, LJ and VR gave evidence that, when they went to wake the appellant in his dressing room, he was

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255 Reasons of Gageler J at [111].

256 Reasons of Nettle J at [135]-[138].

naked. Evidence of those uncharged acts was admitted as tendency evidence in relation to count 11.

223 The Court of Criminal Appeal upheld the trial judge's conclusion on the admissibility of the tendency evidence, including the evidence of the wardrobe assistants. Two essential tendencies were referred to, and adopted, by the Court of Criminal Appeal – a tendency to have a sexual interest in female children under 16 years of age and a tendency to engage in sexual conduct with female children under 16 years of age, where those tendencies were exhibited in three different but not significantly disassociated contexts: "of social and familial relationships; [the appellant's] daughter's relationships with her young friends; and the work environment"[257]. Count 11 is concerned with the last context – the work environment.

224 The Court of Criminal Appeal's application of the "two essential tendencies" to the evidence of the wardrobe assistants meant that the evidence of the wardrobe assistants was admissible as tendency evidence notwithstanding that the wardrobe assistants were not female children under the age of 16. Aside from the fact that the evidence of the wardrobe assistants related to incidents in the "work environment", the Court of Criminal Appeal did not explain, and it is not apparent, how that evidence relates to the "two essential tendencies". That approach illustrates not only the difficulty with relying on highly generalised tendencies, but also the difficulty with not undertaking the relevant analysis separately in relation to each piece of evidence on each count on the indictment.

Resolution of appeal

225 Both Gageler J and Nettle J conclude that the evidence of "EE", the complainant in relation to count 10, was not admissible on the other counts on the indictment. I agree with that conclusion. The relationship between the appellant and EE was not and could not be consensual, but the nature of their relationship was undoubtedly different from that between the appellant and each of the other complainants. As Gageler J notes[258], in light of the prosecution's concession, that conclusion is sufficient for the convictions on counts 1 to 9 and 11 to be quashed.

226 I agree with the orders proposed by Gageler J and Nettle J.

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257 *Hughes v The Queen* [2015] NSWCCA 330 at [197].

258 Reasons of Gageler J at [115].