HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE AND EDELMAN JJ

RICHARD JOHN McPHILLAMY APPELLANT

AND

THE QUEEN RESPONDENT

McPhillamy v The Queen
[2018] HCA 52
Date of Order: 9 August 2018
Date of Publication of Reasons: 8 November 2018
S121/2018

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the New South Wales Court of Criminal Appeal and, in lieu thereof, order:*

   (a) the appeal to that Court be allowed; and

   (b) there be a new trial.

On appeal from the Supreme Court of New South Wales

Representation

S J Odgers SC with S J Buchen for the appellant (instructed by Proctor & Associates)

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

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

McPhillamy v The Queen

Evidence – Criminal trial – Sexual offences – Tendency evidence – Admissibility – Where appellant acolyte and complainant altar boy – Where appellant alleged to have followed complainant into church's public bathroom and committed offences – Where evidence that appellant, while working as an assistant housemaster, sexually offended against homesick boarding students who sought out appellant in private bedroom led as tendency evidence – Where tendency expressed as appellant having sexual interest in young teenage boys under his supervision and to act on that interest – Where tendency evidence of acts occurring ten years before offences charged – Where no evidence other than complainant's evidence that appellant had offended again in ten year period – Where tendency evidence unchallenged in cross-examination – Whether tendency evidence possessed significant probative value.

Words and phrases – "sexual interest", "significant probative value", "tendency evidence", "tendency expressed at a high level of generality", "tendency to act in a particular way", "tendency to have a particular state of mind".

Evidence Act 1995 (NSW), ss 97, 101.

1 KIEFEL CJ, BELL, KEANE AND NETTLE JJ. This appeal is concerned with the admissibility of the evidence of "B" and "C" of the appellant's acts of sexual misconduct with them, as tendency evidence, on his trial for sexual offences against "A". The admissibility of the evidence is governed by the provisions of Pt 3.6 of the *Evidence Act 1995* (NSW). "B"'s and "C"'s evidence was unchallenged. The acts of which they complained occurred a decade before the alleged offending against "A", which offending was denied.

2 The Court of Criminal Appeal of the Supreme Court of New South Wales (Harrison and R A Hulme JJ; Meagher JA dissenting) was divided on the question of whether "B"'s and "C"'s evidence had significant probative value[1]. By grant of special leave, the appellant appealed to this Court[2]. On 9 August 2018, at the conclusion of oral argument, the Court made orders allowing the appeal, setting aside the orders of the Court of Criminal Appeal and in lieu thereof allowing the appeal to that Court and directing a new trial. These are our reasons for joining in those orders.

Procedural history and evidence

3 In February 2015, the appellant was tried in the District Court of New South Wales (Judge King SC and a jury) on an indictment that charged him in six counts with sexual offences against "A". The offences were alleged to have occurred on two separate occasions between 1 November 1995 and 31 March 1996 in the public toilets of the St Michael and St John's Cathedral, Bathurst. At the time, "A" was an 11-year-old altar boy under the supervision of the appellant, an acolyte.

4 "A" gave evidence that on a Saturday night before mass, the appellant had followed him into the toilet and masturbated in front of him[3]. He had encouraged "A" to masturbate and he had briefly touched "A"'s penis as he demonstrated how to masturbate[4]. The appellant had ejaculated. After this, the appellant and

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1 *Evidence Act*, s 97(1)(b).

2 [2018] HCATrans 073, 20 April 2018.

3 This conduct was charged as an aggravated act of indecency towards "A", a person under the age of 16 years, and under the appellant's authority: s 61O(1) of the *Crimes Act 1900* (NSW).

4 This conduct was charged as an aggravated indecent assault, "A" being under the age of 16 years: s 61M(1) of the *Crimes Act*.

"A" left the toilet and the service commenced. The remaining offences occurred a few weeks later. On a Saturday night before mass, the appellant again followed "A" into the toilet, where he masturbated in front of him[5], encouraged "A" to masturbate and commenced to manually stimulate "A"'s penis[6]. The appellant then said that he would show "A" "something even better" and he performed oral sex on "A". After this, the appellant required "A" to perform oral sex on him[7]. Shortly after commencing to do so, "A" began to gag and cry. The appellant comforted him and they left the toilet together. Later the appellant told "A" that he was "sorry that it had gone that far".

5 "A" did not report these assaults to anyone. He said that the appellant had told him that he, "A", was gay and that he needed to be careful because "everybody would turn against me". "A" made his first complaint about these assaults in April 2010 when he approached the Professional Standards Office of the Catholic Church seeking compensation. In a signed complaint, "A" falsely stated that the appellant had anally penetrated him on the second occasion. "A" later agreed to accept $30,000 from the Church by way of compensation. The Professional Standards Office forwarded "A"'s complaint to the police. In November 2012 "A" made a statement to the police. In that statement, "A" volunteered that his earlier allegation of anal penetration was false. At the trial, "A" agreed in cross-examination that he had been aware that the appellant had been charged with sexual offences against boys at the time he made his complaint to the Professional Standards Office.

6 "B" and "C" each gave evidence that he was a boarder at St Stanislaus' College, Bathurst ("the College") in 1985. Each had turned 13 in that year. At the time, the appellant was an assistant housemaster at the College. "B" said that on an occasion when he was homesick and upset he had gone to the appellant's bedroom. The appellant cuddled him and this progressed to him rubbing "B"'s genitals. On a second occasion, the appellant approached "B" as "B" stood naked by his locker after showering. The appellant "grabbed both my arse cheeks and

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5 This conduct was charged as the commission of an aggravated act of indecency towards "A", a person under the age of 16 years, who was under the appellant's authority: s 61O(1) of the *Crimes Act*.

6 This conduct was charged as an aggravated indecent assault, "A" being under the age of 16 years: s 61M(1) of the *Crimes Act*.

7 This conduct was charged as two counts of aggravated sexual intercourse, "A" being above the age of 10 years and under the age of 16 years and under the appellant's authority: s 66C(2) of the *Crimes Act*.

tried to, you know, separate them so to speak". This did not last long because "B" "gave him a mouthful". "B" later received a caning for swearing at the appellant.

7 "C" gave evidence of an occasion when he too had been homesick and upset and had visited the appellant in the appellant's room. The appellant massaged "C"'s shoulders and back. The massage progressed to the groin area and in the course of it, the appellant touched "C"'s genitals. On a subsequent occasion, the appellant massaged "C", who was again feeling homesick. On this occasion "C" fell asleep on the appellant's bed and woke to find the appellant kneeling beside him with his head near "C"'s groin. "C" felt a sensation of wetness around his penis. He got up and left the room. About a week later, the appellant apologised, saying that he had done the wrong thing and that he could be in a lot of trouble for it.

8 In his interview with the police, the appellant denied "A"'s allegations. The appellant did not give evidence. His case was that the allegations had been made up in support of a fraudulent claim for compensation at a time when "A" knew that the appellant had been charged in relation to sexual misconduct involving boys at the College but when "A" was not aware of the details of the misconduct.

9 The jury returned verdicts of guilty on each of the counts.

10 Before the trial, the prosecution served written notice on the appellant of its intention to adduce tendency evidence from "B" and "C"[8]. The appellant objected to the admission of the evidence. The objection was dealt with at a voir dire hearing before the jury was empanelled. At that hearing and at the trial, the tendency on which the prosecution relied differed in material respects from the particulars of the tendency set out in the written notice. It is not known whether the trial judge's conclusion, that the evidence of "B" and "C" was admissible, was based on his assessment of the probative value of the tendency particularised in the notice or the probative value of the tendency identified by the prosecutor in the course of oral submissions. Despite announcing that he would give reasons for ruling that the tendency evidence was admissible, his Honour failed to do so.

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8 *Evidence Act*, s 97(1)(a).

The use made of the tendency evidence at the trial

11 Regardless of the reasons that informed the trial judge's decision to admit the tendency evidence, the determination of whether the trial miscarried in consequence of its admission is concerned with the use made of the evidence at the trial[9]. In closing submissions, the prosecutor acknowledged that "A" had made a false, serious allegation against the appellant at the time he sought compensation from the Catholic Church. The prosecutor invited the jury to consider that there was "significant other evidence" which, if accepted, put "A"'s testimony "in a wholly different light". The prosecutor continued:

> "Two other grown men, ['B'] and ['C'], have both given evidence in this trial that the [appellant] engaged in sexual activities with them. … [T]he Crown says their evidence was that the [appellant] used opportunities on separate occasions, when he was alone with each of them, to touch them sexually. The evidence of each of those people, ['B'] and ['C'], the evidence they gave here was never challenged on behalf of the [appellant], was it?"

12 After reminding the jury of "B"'s and "C"'s evidence, the prosecutor made this submission:

> "The Crown says the evidence that you heard from ['B'] and ['C'] and ['A'] shows that the [appellant] had a sexual attraction or interest in young teenage males. He acted on it in his dealings with ['B'] and with ['C'] when he was alone with them. The Crown says he acted on it with ['A'], too, just like ['A'] told you. … ['B'] and ['C'] [were] never challenged as to the truth of what they said. The Crown says you have every reason to accept them as honest, reliable witnesses who told the truth about what [the appellant] did to them, and that you should act on their evidence when you are assessing the reliability of the complainant, ['A'], and what he had to say."

13 Before "B" and "C" were called to give evidence, the trial judge directed the jury about the use that might be made of their evidence. His Honour instructed that:

> "The Crown will argue that the evidence of those two witnesses demonstrate that [the appellant] had a tendency to act in a particular way;

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9 *R v Bauer (a pseudonym)* (2018) 92 ALJR 846 at 864 [61]; [2018] HCA 40.

> that is, to by his conduct demonstrate a sexual interest in male children in their early teenage years who were under his supervision.
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> …
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> If you find that [the appellant] had a sexual interest in male children in their early teenage years, who were under his supervision, and that he had such an interest in ['A'], it may indicate that the particular allegations are true."

14 In the course of the summing-up, the trial judge instructed the jury in essentially the same terms with respect to the use that might be made of "B"'s and "C"'s evidence.

15 The directions were not the subject of complaint, nor was the sufficiency of the trial judge's warning not to reason that, because the appellant may have committed a crime or been guilty of some misconduct, he was generally of bad character and for that reason was a person likely to have committed the offences with which he was charged.

Tendency evidence

16 The scheme of the *Evidence Act* with respect to the admission of tendency evidence about a defendant adduced by the prosecution in a criminal proceeding is explained in *Hughes v The Queen*[10]. Section 97(1) conditions the admission of evidence to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind, on the court's assessment that the evidence will, by itself or taken with other evidence adduced by the party seeking to adduce it, have "significant probative value". Section 101(2) provides that, in a criminal proceeding, tendency evidence about a defendant that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect the evidence may have on the defendant.

The analyses in the Court of Criminal Appeal

17 In their joint reasons, Harrison and R A Hulme JJ concluded that the tendency evidence strongly supported the prosecution case[11]. Their Honours said

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10 (2017) 92 ALJR 52; 344 ALR 187; [2017] HCA 20.

11 *McPhillamy v The Queen* [2017] NSWCCA 130 at [128].

that any differences between the circumstances in which the 1985 conduct occurred and the circumstances of the offences described by "A" did not detract from the "overriding similarity" of the conduct on each occasion[12]. Their Honours considered that it was open to the jury, applying its collective wisdom and common sense, to reason that a sexual interest in young teenage boys was unlikely to become attenuated over an interval of ten years[13].

18 Given the generality of the tendency on which the prosecution relied, Meagher JA, in dissent, did not consider that the suggested similarities in the conduct were determinative of the probative value of the evidence. His Honour reasoned that while the earlier conduct manifested a sexual interest in young teenage boys, it did not show the appellant's preparedness to act on that interest in the circumstances described by "A"[14].

19 It was not necessary for Meagher JA to deal with the appellant's submission that the prosecution was precluded from using the tendency evidence under s 101(2), given his conclusion that the evidence did not meet the threshold test under s 97(1)(b). His Honour stated that, had it been necessary, he would have rejected the appellant's submission that in addition to the prejudice that was likely to arise in any event, "B"'s and "C"'s evidence risked prejudice to the defence in "four additional respects". Those respects were that the evidence showed that the appellant: preyed on boarders who were vulnerable, alone and homesick; attempted to fellate "C" while "C" was asleep; would be regarded as responsible for the caning which "B" received for swearing at him; and was associated with the institutional sexual abuse said to have occurred at the College[15].

20 Had it been necessary to address this aspect of the appellant's submission, Meagher JA would not have found that these matters presented a risk of prejudice beyond "the prejudice that it is accepted was likely to arise in any event"[16]. The latter reference was to the risk that the jury might reason that the appellant is likely to have committed the offences against "A" because the

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12 *McPhillamy v The Queen* [2017] NSWCCA 130 at [127].

13 *McPhillamy v The Queen* [2017] NSWCCA 130 at [129].

14 *McPhillamy v The Queen* [2017] NSWCCA 130 at [115]-[117].

15 *McPhillamy v The Queen* [2017] NSWCCA 130 at [121].

16 *McPhillamy v The Queen* [2017] NSWCCA 130 at [121].

appellant is a sexual deviant, or that jurors might be so emotionally affected by the evidence as to disregard the appellant's case and the trial judge's directions to assess the evidence without prejudice, or that jurors might be disinclined to give the appellant the benefit of the doubt[17].

21 Harrison and R A Hulme JJ appear to have misapprehended Meagher JA's analysis of the prejudicial effect of the tendency evidence. Their Honours rejected the appellant's submissions on s 101(2) purportedly for the reasons given by Meagher JA[18]. This was a rejection of the four "additional" matters. In the result, the majority do not appear to have undertaken the task of identifying whether, as Meagher JA found, the tendency evidence carried a risk of prejudice of one or more of the kinds summarised above and, if it did present that risk, determining whether the probative value of the evidence substantially outweighed it.

The submissions

22 The appellant adopted Meagher JA's analysis, submitting that the evidence of "B" and "C" did not strongly support the existence of the asserted tendency in 1995-1996, nor did the asserted tendency – to act on his sexual interest in young teenage boys under his supervision – strongly support proof of a fact in issue. A focus of the appellant's submissions was the preclusion of the use of tendency evidence by the prosecution in a criminal proceeding unless its probative value substantially outweighs any prejudicial effect it may have on the defence case. The appellant submitted that there was a real danger that "B"'s and "C"'s evidence would be given disproportionate weight and that it would provoke an emotional response clouding the jury's assessment of whether the prosecution had discharged the onus of proof. The appellant maintained that the four additional matters should not have been rejected in assessing the prejudicial effect of the admission of "B"'s and "C"'s evidence.

23 The respondent took issue with any suggestion that the tendency that it sought to prove was expressed at a high level of generality. It contended that the demonstrated tendency was of the appellant's sexual interest in a narrow class: young teenage boys aged between 11 and 13 who were under his supervision. The evidence was said to be strongly probative of the appellant's motive to

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17 *McPhillamy v The Queen* [2017] NSWCCA 130 at [121] and at [82] quoting *Sokolowskyj v The Queen* (2014) 239 A Crim R 528 at 539 [48], [50] per Hoeben CJ at CL.

18 *McPhillamy v The Queen* [2017] NSWCCA 130 at [130].

commit the offences. Proof of the tendency showed that the appellant had previously overcome any inhibitions and had acted on his sexual interest in young teenage boys. Absent the tendency evidence, the respondent submitted, the jury might have been troubled by the unlikelihood that a mature adult would follow a young teenage boy into a public toilet and sexually molest him.

24 The respondent was critical of Meagher JA's conclusion that the "absence of sufficient similarity" between the tendency evidence and the charged acts deprived the tendency evidence of significant probative value[19]. The respondent submitted that in this respect his Honour's analysis is inconsistent with the majority reasons in *Hughes*.

25 The respondent supported the Court of Criminal Appeal majority's analysis that a sexual interest in young teenage boys is unlikely to become attenuated over the space of ten years. In this respect, the respondent's argument called in aid the decision of the Court of Appeal of England and Wales in *R v Cox*[20].

The probative value of "B"'s and "C"'s evidence

26 As explained in *Hughes*, assessment of the probative value of tendency evidence requires the court to determine the extent to which the evidence is capable of proving the tendency. Assuming the evidence has the capacity to do so, the court must then assess the extent to which proof of the tendency increases the likelihood of the commission of the offence[21]. The tendency may be to have a particular state of mind or to act in a particular way. A mature man's sexual interest in young teenage boys is a tendency to have a particular state of mind. The evidence of "B" and "C" was capable of establishing that the appellant had such an interest. In this Court, it was not disputed that it is an interest of a kind that is likely to be enduring.

27 Proof of the appellant's sexual interest in young teenage boys may meet the basal test of relevance, but it is not capable of meeting the requirement of significant probative value for admission as tendency evidence. Generally, it is the tendency to *act* on the sexual interest that gives tendency evidence in sexual

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19 Citing *McPhillamy v The Queen* [2017] NSWCCA 130 at [68], [116]-[117].

20 [2007] EWCA Crim 3365.

21 *Hughes v The Queen* (2017) 92 ALJR 52 at 66 [41] per Kiefel CJ, Bell, Keane and Edelman JJ; 344 ALR 187 at 199.

cases its probative value. The tendency on which the prosecution relied was to act on the appellant's sexual interest in male children in their early teenage years who were under his supervision. The evidence demonstrating that tendency was confined to "B"'s and "C"'s evidence of events that occurred in 1985. As Meagher JA noted, there was no evidence that the asserted tendency had manifested itself in the decade prior to the commission of the alleged offending against "A".

28 In *Cox* it was held that, at the accused's trial for the indecent assault of his pubescent babysitter, evidence of his conviction for the indecent assault of a pubescent girl some 20 years earlier was rightly admitted. Hughes LJ, giving the judgment of the Court, held that as a matter of ordinary common sense the fact that the accused had many years earlier demonstrated a sexual interest in a pubescent girl made it more likely that he had committed the offence with which he was charged[22].

29 The admissibility of the evidence of the conviction was governed by the provisions of the *Criminal Justice Act 2003* (UK) relating to evidence of a defendant's bad character. The evidence was received under s 101(1)(d), which states that evidence of a defendant's bad character is admissible if it is relevant to an important matter in issue between the defendant and the prosecution. "[M]atters in issue between the defendant and the prosecution" include whether the defendant has a propensity to commit offences of the kind with which he or she is charged[23]. Such a propensity may be established by evidence of the defendant's conviction for an offence of that kind[24].

30 *Cox* was concerned with the *relevance* of the evidence of the earlier conviction. It may be accepted that the evidence that the appellant had acted on his sexual interest in young teenage boys on the occasions with "B" and "C" is relevant to proof that he committed the offences alleged by "A", but it is not admissible as tendency evidence unless it is capable of significantly bearing on proof of that fact. In the absence of evidence that the appellant had acted on his sexual interest in young teenage boys under his supervision in the decade following the incidents at the College, the inference that at the dates of the offences he possessed the tendency is weak.

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22 *R v Cox* [2007] EWCA Crim 3365 at [29].

23 *Criminal Justice Act*, s 103(1)(a).

24 *Criminal Justice Act*, s 103(2)(a).

31 Moreover, where, as here, the tendency evidence relates to sexual misconduct with a person or persons other than the complainant, it will usually be necessary to identify some feature of the other sexual misconduct and the alleged offending which serves to link the two together[25]. The suggested link in this case is the appellant's tendency to act on his sexual interest in young teenage boys who were under his supervision. The supervision exercised by the appellant as assistant housemaster in 1985 over vulnerable, homesick boys in his care has little in common with the supervision exercised in his role as acolyte over "A", an altar boy, when the two were at the Cathedral for services in 1995-1996. The evidence does not suggest that "A" was vulnerable in the way that "B" and "C" were vulnerable. The tendency to take advantage of young teenage boys who sought out the appellant in the privacy of his bedroom is to be contrasted with "A"'s account that the appellant followed him into a public toilet and molested him.

32 "B"'s and "C"'s evidence established no more than that a decade before the subject events the appellant had sexually offended against each of them. Proof of that offending was not capable of affecting the assessment of the likelihood that the appellant committed the offences against "A" to a significant extent[26]. It rose no higher in effect than to insinuate that, because the appellant had sexually offended against "B" and "C" ten years before, in different circumstances, and without any evidence other than "A"'s allegations that he had offended again, he was the kind of person who was more likely to have committed the offences that "A" alleged. The tendency evidence did not meet the threshold requirement of s 97(1)(b) of the *Evidence Act*. This conclusion makes it unnecessary to address the submissions respecting s 101(2) of that Act.

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25 *Hughes v The Queen* (2017) 92 ALJR 52 at 69 [64] per Kiefel CJ, Bell, Keane and Edelman JJ; 344 ALR 187 at 204; *R v Bauer (a pseudonym)* (2018) 92 ALJR 846 at 863 [58].

26 *R v Bauer (a pseudonym)* (2018) 92 ALJR 846 at 863 [58].

33 EDELMAN J. I agree with the reasons of Kiefel CJ, Bell, Keane and Nettle JJ for joining in the orders allowing the appeal at the conclusion of oral argument. The following are brief additional reasons why I joined in the orders. These reasons concern why the features of the appellant's alleged tendency conduct with other persons, "B" and "C", were not sufficiently "linked"[27] to the alleged offending with the complainant, "A", for the tendency conduct to have significant probative value within s 97(1) of the *Evidence Act 1995* (NSW).

34 In *Hughes v The Queen*[28], in the same context as this appeal, involving tendency evidence being led to establish the commission of the offence rather than the identity of the offender, the majority said:

> "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."

35 As to the first matter – the extent to which the evidence supports the tendency – the jury were directed that the alleged tendency of the appellant was to act in a particular way that demonstrated "a sexual interest in male children in their early teenage years who were under his supervision". The evidence of "B" and "C" provided some support for the appellant having that tendency at the time of trial. It assisted to establish that the appellant had a state of mind involving a sexual interest in early teenage male children under his supervision and a willingness to act upon that state of mind. But that support was not strong. Unlike in *Hughes*, where the tendency evidence was also expressed in reasonably general terms, the evidence in this case was given only by two witnesses. Their evidence involved two incidents that occurred a decade before the date of the alleged offences against "A".

36 As to the second matter – the extent to which the tendency makes more likely the facts making up the charged offence – the tendency was expressed at a high level of generality. The reference to supervision was as a matter of context: it was not alleged that the appellant had a tendency to abuse his authority over children in any particular way, such as taking advantage of the homesickness of "B" and "C", in order to facilitate acts of the nature of the alleged offending. Nor was it alleged that the appellant had a tendency to act impulsively with a risk of detection. Nor was it alleged that the acts, or their circumstances, bore any similarity to the alleged offences, other than as demonstrating a sexual interest in

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27 *R v Bauer (a pseudonym)* (2018) 92 ALJR 846 at 863 [58]; [2018] HCA 40.

28 (2017) 92 ALJR 52 at 66 [41], see also at 69 [61], [64]; 344 ALR 187 at 199, see also at 204; [2017] HCA 20.

early teenage boys. The tendency was described no more specifically than "acting" upon the appellant's sexual interest in early teenage male children under his supervision.

37 In this Court, the respondent attempted to rectify the high level of generality at which the tendency was expressed by describing the tendency as follows:

> "[O]n a number of previous occasions, the appellant had fondled the genitals of young teenage boys and/ or engaged in acts of oral sex with them in circumstances where the appellant was in a position of authority and supervision over the boy, where there had been relatively little grooming and where there was a risk of detection (either by way of complaint from the boy in question, or as a result of a person walking in on the appellant when he was with the boy)." (footnote omitted)

38 It is unnecessary to consider whether this more specific tendency arising from the appellant's alleged acts against "B" and "C", if proved, could have significant probative value for proof of the alleged offences against "A", a decade later. The appellant was not confronted with an alleged tendency with this degree of specificity.

39 The weakness of the support in the evidence for the alleged tendency, combined with the weakness of the support that the tendency had for the alleged offences, had the effect that the evidence of "B" and "C" was not of significant probative value.