

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, STEWARD AND GLEESON JJ

TL

APPELLANT

AND

THE KING

RESPONDENT

TL v The King
[2022] HCA 35
Date of Hearing: 17 August 2022
Date of Judgment: 19 October 2022
S61/2022

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

J L Glissan QC with T Liu for the appellant (instructed by Jeffreys Lawyers)

S C Dowling SC with M L Millward for the respondent (instructed by
Director of 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

TL v The King

Evidence – Criminal trial – Admissibility – Tendency evidence – *Evidence Act 1995* (NSW), s 97(1)(b) – Where tendency evidence adduced to prove identity of offender – Where narrow class of possible perpetrators – Where other evidence identifying appellant as offender and tending to exclude other possible perpetrators – Whether Court of Criminal Appeal misapplied principles in *Hughes v The Queen* (2017) 263 CLR 338 – Whether tendency evidence required to bear close similarity to offence – Whether tendency evidence had "significant probative value".

Words and phrases – "close similarity", "identity of the offender", "probative value", "serious physical harm", "significant probative value", "tendency evidence".

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

1 KIEFEL CJ, GAGELER, GORDON, STEWARD AND GLEESON JJ. The appellant was convicted of the murder of his two and a half year old stepdaughter following a trial by jury in the Supreme Court of New South Wales, and consequently sentenced to imprisonment for 36 years, with a non-parole period of 27 years. The victim died as the result of blunt force trauma to her abdomen. The New South Wales Court of Criminal Appeal (Hoeben CJ at CL, Adamson and Bellew JJ) dismissed the appellant's appeal against conviction and sentence¹.

2 The single ground of appeal to this Court concerns the admission at trial of tendency evidence pursuant to s 97(1)(b) of the *Evidence Act 1995* (NSW) ("the Act"). The appellant contends that the Court of Criminal Appeal erred in its application of the majority's observation in *Hughes v The Queen*² that, where tendency evidence is adduced "to prove the identity of the offender for a known offence, the probative value of [the] tendency evidence will almost certainly depend upon *close similarity* between the conduct evidencing the tendency and the offence". Specifically, the appellant contends that the Court of Criminal Appeal was wrong to conclude that the requirement for close similarity should only arise when the tendency evidence is the only or predominant evidence that goes to identity and that a "class of exceptions" exists where there is evidence that only limited persons had the opportunity to commit the offence³, and in its conclusion that the tendency evidence had "significant probative value" as required by s 97(1)(b) of the Act.

3 For the following reasons, the Court of Criminal Appeal was correct to conclude that the disputed evidence was admissible. Accordingly, the appeal must be dismissed.

The trial

4 The issue at trial was ultimately whether the prosecution had proved beyond reasonable doubt that the person who had inflicted the blunt force trauma to the abdomen of the victim that caused her death was the appellant and that his intention at the time was to inflict grievous bodily harm. The appellant's case was that he did not harm the victim and that the prosecution could not exclude the reasonable

1 *TL v The Queen* [2020] NSWCCA 265.

2 (2017) 263 CLR 338 at 356 [39] (emphasis added).

3 *TL* [2020] NSWCCA 265 at [207].

Kiefel CJ
Gageler J
Gordon J
Steward J
Gleeson J

2.

possibility that she was killed by either of the two other persons present on the evening of her death.

5 The victim died in the early hours of 21 April 2014 in Coffs Harbour Hospital. A forensic pathologist performed an autopsy and found that the cause of death was blunt force trauma to the abdomen. Immediately prior to the victim's admission to hospital, she had been residing with her mother and the appellant. The mother and the appellant had commenced a relationship in November 2013 and they moved into a unit in Coffs Harbour together with the victim in February 2014. On occasions, the appellant's then 14 year old nephew also stayed at the unit. The appellant, the mother and the nephew were at the unit on the evening of 20 April 2014 and there is no dispute that they were the only people who had the opportunity to inflict the injuries from which the victim died. However, as explained below, the opportunity for the appellant to have inflicted the injuries was significantly greater than the opportunity for either the mother or the nephew. In this Court, the appellant acknowledged that the prosecution case against him was a strong one.

6 The prosecution case was that the fatal injury or injuries were inflicted by the appellant when the victim was solely in his charge between about 7.33 pm and 7.49 pm on 20 April 2014, while the mother and nephew were away from the unit buying food for dinner. There was no dispute that the victim had been put to bed in her bedroom before the mother and nephew went out; that the appellant was alone with the victim during this period; and that, when the mother and nephew arrived home, they saw the appellant coming out of the victim's bedroom into the hallway.

7 There was no evidence that either the mother or the nephew entered the victim's bedroom after they returned to the unit with the dinner. The mother gave evidence that she did not go and check on the victim because the appellant told her that she was okay. The nephew denied having gone into the victim's bedroom on the evening of 20 April 2014.

8 In police interviews on 21 April 2014 and 1 May 2014, the appellant gave detailed accounts of having put the victim to bed with her mother. The appellant said that the victim was talking to them, as well as to the nephew, to whom she said goodnight as she was taken into her bedroom. However, at trial, the appellant gave evidence that the mother put the victim to bed. He said that the mother was present alone in the bedroom with the victim for three to five minutes before calling him in to say goodnight, after which the appellant returned to the lounge room. The appellant's evidence was that the mother was alone with the victim in the bedroom for a further one to two minutes. The respondent submitted that the

3.

latter one to two minute period, which would only be taken to have occurred if the appellant's evidence at trial was accepted, was the only opportunity the mother had to be alone with the victim.

9 The mother recalled putting the victim to bed on 20 April 2014 but could not recall if the appellant had helped her. The mother's evidence was that she did not notice anything unusual when she put the victim to bed. When interviewed on 21 April 2014, the nephew told police that he was present at the unit when the victim was put to bed by both the appellant and the mother.

10 It was not in dispute that immediately after the victim was put to bed, her mother and the appellant went to the outside back patio area of the unit, where they discussed dinner. The patio area was immediately adjacent to the victim's bedroom window, which was partially open. The nephew remained on the lounge, where he was watching television. The mother nominated the period spent outside discussing dinner as half an hour or less; to police, the appellant said it was about 10 to 15 minutes, but in evidence said it was just seven minutes. Neither the mother nor the appellant heard any sounds coming from the victim's bedroom during that period. The prosecution submitted that this period was the only opportunity that the nephew had to have inflicted the fatal injuries. The nephew denied going into the victim's bedroom at any time that evening. There was also evidence that, in intercepted telephone calls with members of his family, the appellant had said that the nephew did not harm the victim and had no opportunity to do so and that the appellant did not believe the nephew to be capable of harming the victim.

11 The appellant stated to interviewing police, and gave evidence at trial, that he went into the victim's bedroom twice whilst he was alone with her in the unit. The first time, he heard her cry, followed by the sound of the doorknob of her bedroom door. When he went to check on her, she was standing at the door crying "like she needed a spew" and some vomit or spit landed on his arm. He took her to the toilet, where she made some gagging noises but did not "spew at all", after which she said that she wanted to return to bed. The appellant gave evidence that when he checked on her a second time, the victim was making a "panting noise that she had never made before", and a "weeping noise that sounded like she had something in her throat". When asked why, in those circumstances, he closed the door to the victim's bedroom and returned to the lounge room, he said "I can't answer that" and that he did not know why he did not pick her up and take her into the lounge room.

12 Upon the return of the mother and the nephew, the appellant started to eat dinner in the lounge room with them. Before any of them had finished, the mother decided to check on the victim. As she got up to wash her hands, the appellant

Kiefel CJ
Gageler J
Gordon J
Steward J
Gleeson J

4.

went into the victim's bedroom, and brought the victim into the bathroom, where she became "floppy" and grey in colour. The appellant and the mother immediately took the victim to the emergency department at Coffs Harbour Hospital, arriving at 8.25 pm, at which point the victim was unconscious. After various procedures were performed, the victim was pronounced dead at 2.15 am on 21 April 2014.

13 The prosecution adduced evidence from a forensic pathologist, Dr Allan Cala, who performed an autopsy on the victim. Dr Cala's evidence was that the victim would have been "immediately and severely incapacitated" after she received the blunt force trauma to her abdomen. Dr Cala's evidence was that the victim would not have appeared "normal" for any period of time after the trauma, "before deteriorating". Dr Cala's evidence was that "[t]his type of very severe trauma is seldom seen in paediatric cases, even where large forces to the abdomen are acknowledged, such as in motor vehicle trauma". On the assumption that the victim conversed with her mother and the appellant as she was put to bed and said "[g]ood night" to the nephew, Dr Cala's opinion was that she was not, at that point, suffering from the injuries he observed at autopsy. Thus, his opinion was that the injuries were occasioned sometime after the victim was put to bed.

14 Dr Cala gave evidence that, if she had already sustained the injuries he observed, it was "highly unlikely" that the victim would have been capable of getting out of bed, walking to the bedroom door, playing with the doorknob and standing at the door while the appellant came and answered it. If the appellant's account of the victim's condition when he first went into her bedroom after the mother and the nephew left the unit were accepted, it necessarily followed that the fatal injuries had not yet been inflicted. On this basis, the respondent contended that the injuries could only have been inflicted by the appellant, who was the only person known to have had contact with the victim after the mother and the nephew left to buy dinner. This contention was disputed by the appellant, who argued that his evidence that he could not recall the mother going into the victim's bedroom before or after going to buy dinner did not exclude the possibility that the mother went into the bedroom at some point after her return from buying dinner.

Disputed evidence and rulings

15 The prosecution sought to adduce two categories of tendency evidence. The admissibility of both categories was disputed on the appeal to this Court. In an amended tendency notice dated 19 March 2017, given pursuant to s 97(1)(a) of the Act, the prosecution identified the tendency sought to be proved as the appellant's tendency to act in a particular way, namely to "deliberately inflict physical harm on the child", that is, the victim. That tendency notice was directed at the first category of evidence ("the burns evidence").

5.

16 As to the burns evidence, on the first day of the trial, the trial judge (Latham J) admitted into evidence a folder of documents comprising transcripts of interviews with lay witnesses, expert evidence and photographs, in support of a contention that the appellant was responsible for placing the victim in scalding hot water on the morning of 10 April 2014 – that is, 10 days before the victim suffered the fatal injury or injuries – resulting in burns to the sides of her feet and buttocks, and that the burns were not accidentally sustained⁴. There was no dispute that the victim had sustained some first degree burns and one third degree burn (to her right foot) while in the appellant's care, by coming into contact with hot water.

17 The burns evidence included evidence from Dr Christine Norrie, a forensic physician, that it would only take about five seconds for a child to suffer a third degree burn from water at a temperature of 60 degrees centigrade. Dr Norrie said that immediate and severe pain would result and that a child exposed to such hot water would "scream blue murder". Dr Norrie said that the patterns of the burns indicated that the victim was sitting in the bath when the hot water rose and burned around that part of the skin that was pressed against the floor of the bath. Dr Norrie's ultimate conclusion was that it appeared that the victim was forced to sit down in the bath. The burns evidence was capable of establishing that the appellant had deliberately immersed the victim in scalding hot water, causing the burns.

18 The trial judge rejected the appellant's principal objection to the burns evidence, being that the prevailing evidence established that the burns were accidentally inflicted and that the appellant enjoyed a positive and caring relationship with the victim, such that the evidence lacked significant probative value. Her Honour also rejected the appellant's objection under s 101(2) of the Act, that the probative value of the evidence did not substantially outweigh any prejudicial effect it may have on him. In this Court, the appellant did not challenge the trial judge's finding with respect to s 101(2). In admitting the burns evidence, the trial judge foreshadowed a jury direction that the jury could not use the tendency evidence unless satisfied beyond reasonable doubt that the appellant deliberately placed the victim in hot water "with the intention to cause the child *serious* harm, and that such harm was thereby occasioned" (emphasis added). This statement indicates that the trial judge may have understood the asserted tendency to involve the deliberate infliction of serious physical harm upon the victim, and not merely physical harm.

Kiefel CJ
Gageler J
Gordon J
Steward J
Gleeson J

6.

19 The second category of tendency evidence ("the complaint evidence") was admitted in the course of the trial and comprised three pieces of hearsay evidence as evidence of the previously identified tendency. This complaint evidence was admitted without an additional tendency notice. The first piece comprised evidence from the partner of the victim's maternal uncle, Ms S, that, in late March 2014, the victim had stayed overnight at Ms S's house and Ms S noticed a bruise on the victim's right forearm. She asked the victim what had happened and the victim told her "[the appellant] did it, [the appellant] hurt me". Ms S asked her "when did he hurt you" and the victim did not answer and went off and played. The second piece of complaint evidence was a text message sent at 7.25 am on 10 April 2014 from the mother to the appellant, stating "[the victim] just came in telling me you hurt her neck again [sad face]". The third piece of complaint evidence was evidence from Ms W, the maternal grandmother of the victim. The evidence was that, some weeks before Easter 2014, the victim said "[t]hat's it Grandma, you've been naughty. I am going to ring [the appellant] and he will punch you in the face like he does to me", and the victim then pretended to punch herself.

20 In admitting the complaint evidence, the trial judge described the asserted tendency as the tendency to behave towards the victim in an "inappropriately physical *and violent* fashion" (emphasis added). Again, this language indicates that her Honour may have conceived the asserted tendency as graver than the tendency stated in the amended tendency notice. Her Honour rejected the appellant's objection, under s 137 of the Act, that the probative value of the evidence was outweighed by the danger of unfair prejudice to the appellant. That conclusion was not challenged in this Court. As is apparent, the trial judge imported additional elements into the asserted tendency. These additional elements were that the tendency involved violence and the infliction of serious physical harm.

21 Ultimately, in the trial judge's summing up, her Honour identified the relevant tendency to the jury as a tendency to deliberately inflict physical harm upon the child.

Reasoning of the Court of Criminal Appeal

22 Hoeben CJ at CL delivered the principal judgment of the Court of Criminal Appeal on the appeal against conviction. Adamson J substantially agreed and Bellew J wholly agreed. The grounds of appeal included, relevantly, that the trial judge had erred in admitting the burns evidence and the complaint evidence as tendency evidence.

Burns evidence

23 Before the Court of Criminal Appeal, the appellant contended that the burns evidence was not sufficiently similar to the blunt force trauma that caused the victim's death such that it was not admissible as tendency evidence. Hoeben CJ at CL concluded that the differences in nature and degree between the burns sustained by the victim and the blunt force trauma that caused her death were not fatal to the admissibility of the burns evidence⁵. His Honour considered that the burns evidence was to be assessed with the other evidence that the appellant was one of only three persons who had the opportunity to commit the alleged offence⁶. Considered in that context, his Honour concluded that the burns evidence had significant probative value.

24 Hoeben CJ at CL considered that the requirement for "close similarity" between the conduct evidencing the tendency and the charged offence, identified in the majority's reasoning in *Hughes*, should arise when the tendency evidence is the only or predominant evidence that goes to the identity of the offender⁷. This case fell within the "class of exceptions" to that requirement contemplated by the majority in *Hughes*, noting that the undisputed fact that only three persons had the opportunity to kill the victim was "decisive evidence"⁸, and "of fundamental importance"⁹. Hoeben CJ at CL noted that the burns evidence "involved the same victim in the same house in the same family and they were close in time"¹⁰, and concluded that the identity of the victim was a matter of "close similarity" and that the burns evidence otherwise disclosed "some similarities"¹¹. His Honour identified as a further similarity that, on the prosecution case, the incident in the bath involved a deliberate act of cruelty which was not spontaneous, because of the time required for a sufficient quantity of hot water to accumulate in the bath to

5 *TL* [2020] NSWCCA 265 at [195].

6 *TL* [2020] NSWCCA 265 at [203].

7 *TL* [2020] NSWCCA 265 at [207].

8 *TL* [2020] NSWCCA 265 at [207].

9 *TL* [2020] NSWCCA 265 at [215].

10 *TL* [2020] NSWCCA 265 at [208].

11 *TL* [2020] NSWCCA 265 at [215].

Kiefel CJ
Gageler J
Gordon J
Steward J
Gleeson J

8.

cause the burns that were observed¹². Similarly, the force needed to cause the victim's substantial injuries could only have been deliberate and not accidental¹³. Finally, Hoeben CJ at CL considered that the fact that the bath incident and the victim's death were "very close" in time, and the fact that they involved the same victim, "meant that even one previous episode of *abuse* by the [appellant] would have significant probative value in determining from the three possible suspects, who it was who murdered [the victim]"¹⁴.

25 Adamson J considered that, in the context of the appellant's case at trial, it was not necessary for the tendency evidence to bear particular hallmarks, which could identify a perpetrator (by distinguishing them from others) on the basis of similarity of conduct, as long as the tendency evidence was significantly probative of the alleged tendency¹⁵. Her Honour considered that evidence of other acts of "spontaneous cruelty or intentional harm to the deceased were therefore highly relevant to establish the identity of the deceased's killer by establishing the alleged tendency to deliberately inflict physical harm on the deceased"¹⁶.

Complaint evidence

26 The Court of Criminal Appeal refused leave to the appellant to argue that the complaint evidence was inadmissible hearsay evidence on the basis that it did not satisfy the exceptions in s 65 or s 66 of the Act¹⁷. Hoeben CJ at CL observed that, once the complaint evidence was admitted, it was available for use as tendency evidence¹⁸. In his view, the combination of the complaint evidence and the fact that there were only three persons who could have committed the offence gave the complaint evidence significant probative value because it was capable of separating the appellant from the other two persons and identifying him as the perpetrator of the crime. His Honour concluded that the complaint evidence "taken

12 TL [2020] NSWCCA 265 at [209].

13 TL [2020] NSWCCA 265 at [209].

14 TL [2020] NSWCCA 265 at [224] (emphasis added).

15 TL [2020] NSWCCA 265 at [307].

16 TL [2020] NSWCCA 265 at [308].

17 TL [2020] NSWCCA 265 at [230], [266].

18 TL [2020] NSWCCA 265 at [273].

at its highest does indicate a tendency to act *violently* towards [the victim] and if accepted by the jury, was capable of identifying the [appellant] as the person responsible for [the victim's] death"¹⁹. Similarly to the trial judge, his Honour's reasoning was based on a different and more specific tendency than appeared in the prosecution's amended tendency notice.

27 Adamson J considered that her Honour's reasons in relation to the burns evidence also applied to the admissibility of the complaint evidence²⁰.

Assessment of the significant probative value of tendency evidence

28 Assessment of the probative value of evidence requires that the possible use to which the evidence might be put be taken at its highest²¹. Taking evidence at its highest assumes that the evidence is reliable and credible²². This assumption will only be displaced where the evidence could not be accepted by a rational jury²³. To be admissible under s 97(1)(b), the court must think that the evidence will have significant probative value, based on an assessment of the evidence both by itself and "having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence". For evidence to have "significant probative value", it "should make more likely, to a significant extent, the facts that make up the elements of the offence charged"²⁴; in other words, the evidence must be "important" or "of consequence" to the assessment of the probability of the existence of a fact in issue²⁵. It is sufficient if the disputed evidence together with

19 *TL* [2020] NSWCCA 265 at [276] (emphasis added).

20 *TL* [2020] NSWCCA 265 at [312].

21 *IMM v The Queen* (2016) 257 CLR 300 at 313 [44]; *R v Bauer (a pseudonym)* (2018) 266 CLR 56 at 91 [69].

22 *IMM* (2016) 257 CLR 300 at 312 [39], 315 [52].

23 *IMM* (2016) 257 CLR 300 at 312 [39]; *Bauer* (2018) 266 CLR 56 at 91-92 [69].

24 *Hughes* (2017) 263 CLR 338 at 356 [40].

25 *Hughes* (2017) 263 CLR 338 at 368-369 [81], 370 [86], 423 [215]. See also *IMM* (2016) 257 CLR 300 at 314 [46], 327 [103].

Kiefel CJ
 Gageler J
 Gordon J
 Steward J
 Gleeson J

10.

other evidence makes significantly more likely any facts making up the elements of the offence charged²⁶.

29 There is no general rule that demands or requires close similarity between the conduct evidencing the tendency and the offence²⁷. Such a rule is not required by the text of s 97. The authorities establish that similarity is relevant to, but not determinative of, probative value²⁸. Indeed, universal rules are to be avoided, as the relevant facts are determinative in tendency cases²⁹. Other things being equal, evidence of a more generally expressed tendency is less likely to satisfy the threshold of "significant probative value"³⁰. That is because, while generalised tendency notices may be supported by a broader array of evidence, that evidence will often not be significantly probative of the fact or facts in issue³¹. The specificity of the tendency has a direct impact on the strength of the inferential mode of reasoning³². Put in different terms, that is why tendency evidence must have significant probative value³³. Otherwise, s 97 is reduced to relevance, which is addressed in s 55³⁴.

30 The majority's observation in *Hughes* as to the general requirement for "close similarity" where identity is the relevant fact in issue should be understood

26 *Hughes* (2017) 263 CLR 338 at 356 [40].

27 *Hughes* (2017) 263 CLR 338 at 354-356 [34], [37], [39].

28 See, eg, *Hughes* (2017) 263 CLR 338 at 354-356 [34], [37], [39].

29 *Hughes* (2017) 263 CLR 338 at 355-356 [39]-[40], 371 [92], 392 [154], 396 [159], 408 [179].

30 *Hughes* (2017) 263 CLR 338 at 363 [64], 421-422 [208], 426 [224]. See also *R v Nassif* [2004] NSWCCA 433 at [51]; *O'Keefe v The Queen* [2009] NSWCCA 121 at [64]; *El-Haddad v The Queen* (2015) 88 NSWLR 93 at 113 [72]; cf *Sutton v The Queen* (1984) 152 CLR 528 at 535.

31 *Hughes* (2017) 263 CLR 338 at 363 [64], 392 [153], 426 [224]; *McPhillamy v The Queen* (2018) 92 ALJR 1045 at 1052 [36]-[38]; 361 ALR 13 at 21.

32 *Cross on Evidence*, 13th Aust ed (2021) at 842-843 [21252].

33 *Hughes* (2017) 263 CLR 338 at 377 [109], 393-394 [155].

34 *Hughes* (2017) 263 CLR 338 at 363 [64], 375 [105], 391 [153].

as postulating a situation in which there is little or no other evidence of identity apart from the tendency evidence, and the identity of the perpetrator is "at large"³⁵. In this case, there was important evidence of identity, including the evidence that the appellant was one of only three persons who had the opportunity to inflict the fatal injuries and the evidence pointing against the likelihood that either the mother or the nephew was the perpetrator. In the face of this important evidence, it could not be assumed that "close similarity" between the conduct evidencing the tendency and the offence was required to meet the threshold of significant probative value.

31 The appellant's contention that, to meet the threshold of significant probative value of identity, the asserted tendency must be able to identify an accused from the other potential perpetrators of the charged offence tends to conflate probative value and proof. In this case, the issue is whether the tendency evidence could rationally make it more likely, to a significant extent, that the appellant inflicted the blunt force trauma (or, conversely, make it more likely, to a significant extent, that the mother and the nephew did not inflict the blunt force trauma). As in *Hughes*, that question requires consideration of two interrelated but separate matters: (1) the extent to which the evidence supports the asserted tendency; and (2) the extent to which the asserted tendency makes more likely the fact or facts sought to be proved by the evidence³⁶.

32 Ultimately, the appellant did not complain that the tendency evidence lacked substantial probative value because it was directed to a tendency to deliberately inflict physical harm upon the victim, without the further specifications that the tendency involved violence and the infliction of serious harm. Those additional specifications would have significantly reduced the generality of the asserted tendency.

33 As has been explained³⁷, the trial judge and the prosecution imported elements into the asserted tendency in addition to those stated in the amended

35 See, eg, *Ilievski v The Queen* [2018] NSWCCA 164; *R v UD* [2020] ACTSC 45; *R v Lewis* [2021] NTSC 40. See also *O'Keefe* [2009] NSWCCA 121; *Bryant v The Queen* (2011) 205 A Crim R 531 at 545 [79].

36 *Hughes* (2017) 263 CLR 338 at 356 [41]; *McPhillamy* (2018) 92 ALJR 1045 at 1050 [26], 1051-1052 [34]; 361 ALR 13 at 19, 21. See also *Bauer* (2018) 266 CLR 56 at 89 [62].

37 See [15], [20].

Kiefel CJ
Gageler J
Gordon J
Steward J
Gleeson J

12.

tendency notice. So, for example, the trial judge described it as a tendency to "behave towards the child in an inappropriately physical and violent fashion". The Court of Criminal Appeal described it as a tendency to "act violently towards [the victim]"³⁸. There were two problems with that approach. The asserted tendency in the notice was too general, covering acts that did not necessarily involve violence; the prosecution accepted it could have included a smack, limiting its capacity to separate the appellant from the mother, "who, on the appellant's evidence, had occasionally smacked the child on the leg or thereabouts". Second, reformulation of a tendency without providing a notice under s 97(1)(a) may render evidence inadmissible³⁹. The insufficient particularisation of the asserted tendency in the amended notice, the subsequent reformulation of that tendency absent formal amendment, the absence of a separate tendency notice for the complaint evidence, and the resulting non-compliance with s 97(1)(a), should not be condoned.

Extent to which the evidence supported the tendency to deliberately inflict physical harm on the victim

34 Ultimately, the appellant did not dispute that the burns evidence supported the asserted tendency and, further, that the third degree burn was evidence of the deliberate infliction of serious physical harm to the victim.

35 By contrast, the appellant argued that the complaint evidence disclosed nothing about his state of mind which could provide a cogent and logical basis to infer that he *deliberately* hurt the victim on previous occasions, such that it could not provide proof of the asserted tendency. This submission fails to take the complaint evidence at its highest. Each item of complaint evidence was capable of supporting a conclusion that the appellant had deliberately caused serious physical harm to the victim. Having regard to the short period in which the complaints were made, between about late March 2014 and about 10 April 2014, the evidence was capable of supporting a conclusion that the appellant had a tendency to deliberately inflict serious physical harm on the victim.

Extent to which the tendency made it more likely that the appellant intentionally inflicted the injuries that caused the victim's death

36 The appellant argued that the burns and complaint evidence lacked significant probative value because it did not exhibit "close similarity" to the

38 *TL* [2020] NSWCCA 265 at [276].

39 See, eg, *Parkinson v Alexander* [2017] ACTSC 201 at [66]-[70].

infliction of blunt force trauma that caused the victim's death. According to the appellant, the conduct that killed the victim was so unprecedented, or so extreme, that nothing that had happened in the past made it more likely that it was the appellant, rather than the mother or the nephew, who had engaged in that conduct.

37 Without the additional elements of violent conduct inflicting serious physical harm, it is doubtful that the tendency evidence could have met the threshold of significant probative value. However, the appellant did not complain about the incorporation of those elements by the trial judge and there was no serious suggestion that both the burns evidence and the complaint evidence did not concern acts of violence and the infliction of serious physical harm. When these aspects of the tendency evidence are recognised, and having regard to the other evidence of identity, the tendency was sufficiently striking that its existence was capable of being important to a conclusion that the appellant was the perpetrator and, accordingly, the burns and complaint evidence had the requisite significant probative value for admissibility under s 97(1)(b). First, the tendency to deliberately and violently inflict serious physical harm on the victim concerned acts directed to a single person, suggesting hostility on the part of the appellant towards the victim⁴⁰. Second, and noting the caution required in making an observation about human experience where there is a normal abhorrence of such a tendency⁴¹, that tendency in relation to a victim who was a very young, and necessarily defenceless, child is abnormal and therefore unlikely to be shared by other persons who had the opportunity to inflict the fatal injuries. In order to conclude that the tendency evidence had significant probative value, it was not necessary for the prosecution to neutralise or disprove the existence of the same tendency on the part of the other possible perpetrators, although, as set out above, there was evidence that made it less likely that either the mother or the nephew had the asserted tendency. Third, the probative value of the evidence was increased by the close proximity in time between the charged offence, the burns incident and the complaints: all relevant events occurred within the space of about one month.

38 This is a case in which the threshold of significant probative value was capable of being met without the close similarity insisted upon by the appellant. Apart from the burns and complaint evidence, there was strong evidence identifying the appellant as the perpetrator. First, there was evidence that the

40 *Hughes* (2017) 263 CLR 338 at 392-393 [154]-[155]. See also *Bauer* (2018) 266 CLR 56 at 82 [48], 88 [60], concerning the sexual interest of an accused in a particular complainant.

41 *Hughes* (2017) 263 CLR 338 at 377 [109].

Kiefel CJ
Gageler J
Gordon J
Steward J
Gleeson J

14.

appellant was one of only three people with the requisite opportunity. Second, as explained above, the appellant was the only person who had an opportunity to inflict the fatal injuries when the others were not present, either in the unit or immediately outside the open window to the victim's bedroom. Third, there was evidence that tended to exclude the mother and the nephew as the perpetrator. In each case, their opportunity to inflict the abdominal injuries was restricted to a time when there were two other persons in close proximity and there was no evidence to suggest that either of them had acted on that limited opportunity. In the case of the mother, the evidence was that she was an attentive and caring mother who regularly sought medical attention for the victim when she was concerned for her welfare. In the case of the nephew, the appellant himself had discounted the nephew as being in any way responsible for the infliction of the abdominal injuries.

Conclusion

39 The appeal must be dismissed.

