HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 16 Aug 2022 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S61/2022
File Title:	TL v. The Queen
Registry:	Sydney
Document filed:	Form 27F - Outline of oral argument
Filing party:	Respondent
Date filed:	16 Aug 2022

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **TL**

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: The respondent certifies that this submission is in a form suitable for publication on the internet.

Part II:

Tendency evidence in "identification cases": No universal rule (RS [36]-[43])

1. The question of identity arises in criminal trials in different contexts. The capacity of tendency evidence to contribute to proof of the identity of an offender for a known offence depends not only on the tendency evidence itself but on the facts and circumstances of the case and the extent to which other evidence adduced by the tendering party contributes to proof of the offender's identity. The latter two matters, in combination, define the inferential burden that the tendency evidence is left to bear.

2. It is neither necessary nor desirable to attempt to lay down a universal rule or prescriptive test as to the degree of similarity required in every case where tendency evidence is relied upon to prove or contribute to proof of the identity of an offender for a known offence. The majority of the High Court did not do so in *Hughes v The Queen* [2017] HCA 20; (2017) 263 CLR 338. The question in each case will be, is the tendency evidence relevant and, if so, does it have significant probative value.

3. To require close similarity as a precondition to a finding of significant probative value in "identification cases" seeks artificially to classify tendency cases in which identity is in issue into a subset with different, more restrictive rules for the assessment of probative value, an approach not supported by the language of the statute or by logical considerations of relevance.

4. Such an approach is not consistent with the earlier observations of the majority in *Hughes v The Queen* at [34] (JBA 162) that s 97(1)(b) of the *Evidence Act 1995* (NSW) is not to be applied as if it had been expressed in terms of "underlying unity", "pattern of conduct" or "modus operandi" and ignores the strictures of the majority of this Court that such a gloss should not be put on the language of s 97(1)(b). It also fails to engage with the necessity to analyse the logical connection between the tendency evidence and the fact in issue.

Probative value is determined by an analysis of the logical connection between the fact in issue and the tendency evidence (RS [39]-[41])

5. The reference in *Hughes v The Queen* at [39] (JBA 163-164) to the need for close similarity in proceedings where tendency evidence is adduced to prove the identity of an offender has ready application to proceedings where the only evidence of substance led against the offender is the tendency evidence. However, there are cases where the identity of an offender is in issue that are of a quite different character, of which this case is one.

6. There is a logical distinction between similar fact "identification" cases where there is other evidence adduced that connects the accused to the charged offence, and those where there is none: CCA [197]-[198] (CAB 153). While close similarity may be necessary to identify an offender in a particular case, it is not a precondition for admissibility of tendency evidence in all cases where the issue of identity arises. Where there is substantial evidence that links the accused to the charged offence, close similarity will not be required to give the evidence significant probative value.

Identification of the fact in issue (RS [28]-[35])

7. The fact in issue in this matter was defined and refined beyond simply "proof of the identity of the offender for a known offence" because of:
   (a) The significance of the very limited pool of possible offenders (only three); and
   (b) The much greater opportunity of the appellant to commit the offence when compared to that of MW and DM.

The tendency evidence is not broad and generalized (RS [50]-[61])

8. The tendency was not expressed at a high level of generality. The appellant's assessment of particularity and similarity is unduly confined to consideration of the nature and degree of the injuries suffered (AS [18(d)]; [53]).

9. The charged offence and the tendency acts shared several similar features. Each was a deliberate physical assault committed by the appellant on the same victim when they were alone. Each was committed within weeks of one another. There was close similarity in that the appellant had repeatedly harmed the same victim. The fact that the appellant had done so on four occasions within weeks of the charged offence suggests a degree of animus or hostility towards the victim which significantly affects the assessment of the probability that he, and not MW or DM, was responsible for the fatal injuries: *Hughes v The Queen* at [154]-[155] (JBA 200-201); *R v Bauer* [2018] HCA 40; 266 CLR 56 at [48]; [62] (JBA 317; 324).

10. Proof of the prevalence of a tendency in the broader community has never been a requirement of admissibility of tendency evidence, which has always been held to involve the application of common sense and ordinary human experience: *Hughes v The Queen* at [57] (JBA 169).

11. In any event, evidence was led at trial that the other two people with opportunity to inflict the fatal injuries did not have a tendency to deliberately inflict physical harm to the victim.

12. Given the refinement of the fact in issue and the matters referred to above, the tendency evidence was, as the CCA recognised, capable of separating the appellant from the only other potential perpetrators. The CCA was correct to hold that the tendency evidence had significant probative value. The appeal should be dismissed.

No substantial miscarriage of justice (RS [62]-[69])

13. Were this Court to conclude that the tendency evidence should not have been admitted in whole or in part, the proviso to s 6(1) of the *Criminal Appeal Act 1912* (NSW) should be applied. This Court would be satisfied that the admissible evidence proves beyond reasonable doubt that the appellant was the person who inflicted the fatal injuries to the victim. The whole of the evidence leads inevitably to the conclusion that the appellant's denial of responsibility was so glaringly improbable that it could not give rise to a reasonable doubt as to his guilt. That the fatal blow or blows were accompanied by an intention to cause grievous bodily harm is proved by the extreme nature of the injuries inflicted. This Court, being satisfied that no substantial miscarriage of justice has actually occurred, would dismiss the appeal.

Dated: 16 August 2022

Sally Dowling SC

Director of Public Prosecutions

Counsel for the respondent