IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S226 of 2016

BETWEEN:

ROBERT LINDSAY HUGHES

Appellant

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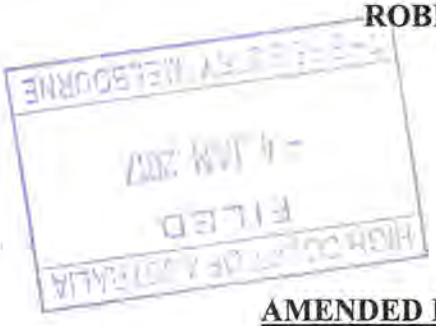
- v -

THE QUEEN

Respondent



AMENDED INTERVENER'S SUBMISSIONS

Part I: Suitability for publication on internet

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1.1 The Intervener certifies that this submission is in a form suitable for publication on the internet.

Part II: Basis of intervention

2.1 The Intervener seeks leave to intervene or appear as amicus curiae in this appeal.

2.2 Intervention is not sought to be made in support of either party in this appeal.

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Part III: Why leave should be granted

3.1 Intervention is sought to be made in respect of only ground 2 of the appeal, that is confined to the question of the correct approach to be adopted in relation to the tendency rule under section 97 of the uniform evidence legislation.

3.2 The principles relating to non-party intervention were recently restated by this Court in *Roadshow Films Pty Ltd v iiNet Ltd* as follows:[1]

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> In determining whether to allow a non-party intervention the following considerations, reflected in the observations of Brennan CJ in *Levy v Victoria*, are relevant. A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected.... Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra-curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation.
>
> Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist

[1] (2011) 86 ALJR 205, at 206 [2]-[4], [6]; see also *Levy v Victoria* (1997) 189 CLR 579, at 602-605

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it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose.

The grant of leave for a person to be heard as an amicus curiae is not dependent upon the same conditions in relation to legal interest as the grant of leave to intervene. The Court will need to be satisfied, however, that it will be significantly assisted by the submissions of the amicus and that any costs to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the expected assistance....

In considering whether any applicant should have leave to intervene in order to make submissions or to make submissions as amicus curiae, it is necessary to consider not only whether some legal interests of the applicant may be indirectly affected but also, and in this case critically, whether the applicant will make submissions which the Court should have to assist it to reach a correct determination....

3.3 The Victorian Director of Public Prosecutions is responsible for the prosecution on behalf of the Crown of all indictable offences in both the County Court and Supreme Court in Victoria.[2] In relation to sexual offence trials (particularly involving multiple complainants), the reception of tendency evidence is often disputed. The decision of the Victorian Court of Appeal in *Velkoski v R*[3] is an important decision in this context – it is routinely referred to in argument by parties in respect of the proposed adduction of tendency evidence.

3.4 In this appeal, the appellant seeks to have this Court endorse the decision in *Velkoski* as the correct approach to the resolution of any admissibility issue under section 97 of the uniform evidence legislation. However, the Intervener seeks to raise the following points:

(i) the decision in *Velkoski* was handed down in 2014 and a number of subsequent Victorian appellate decisions amply illustrate the unduly restrictive limitations of the decision;[4]

(ii) the decision in *Velkoski* has not been followed in New South Wales and has not been cited with approval in any other Australian jurisdiction in relation to the meaning of "significant probative value";

(iii) the New South Wales approach (as exemplified in both *R v Ford* and *R v PWD*) has been followed in both Tasmania and the Australian Capital Territory;[5] and

(iv) the Victorian Director of Public Prosecutions, whilst bound by the decision in *Velkoski*, does not accept the correctness of the decision.[6]

3.5 In respect of the principles governing a grant of leave, an endorsement by this Court of the decision in *Velkoski* would plainly "directly" affect the Director in the discharge of his statutory functions, particularly in relation to the joinder of charges in sexual offence trials involving multiple complainants. In the alternative, leave should be granted to appear as an *amicus* as the interests of the Director are plainly "indirectly" affected; and importantly, the submissions to be made on the correctness or otherwise of the reasons of the judgment in *Velkoski* are both important to the administration of criminal justice in this State and may not be sufficiently addressed by the submissions of either party in this application.[7]

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[2] See section 22(1)(a), Public Prosecutions Act 1994 (Vic)

[3] (2014) 45 VR 680

[4] See *Papazoglu v R* (2014) 45 VR 457; *Gentry (a Pseudonym) v R* (2014) 244 A Crim R 106; *Rapson v R* (2014) 45 VR 103; *R v Bright (a Pseudonym)* (2014) 45 VR 744; *Bauer (a Pseudonym) v R* (2015) 46 VR 382; *Ramon Harris (a Pseudonym) v The Queen* [2015] VSCA 112; *Hicks (a Pseudonym) v R* [2015] VSCA 201; *Sutton (a Pseudonym) v R* [2015] VSCA 251; *Uzun v R* [2015] VSCA 292; *Baker (a Pseudonym) v R* [2015] VSCA 323; *Page v R* [2015] VSCA 357; *DPP v Alexander (a Pseudonym)* [2016] VSCA 92

[5] See *Tasmania v Martin (No. 2)* (2011) 213 A Crim R 226; *Tasmania v W (No. 2)* (2012) 227 A Crim R 155; *Tasmania v H* [2015] TasSC 36; *R v Lam* (2014) ACTSC 49 – the position is not altogether clear in Northern Territory (see *R v JRW* [2014] NTSC 52)

[6] The correctness of the decision was sought to be challenged by the State Director of Public Prosecutions in the unsuccessful special leave application of *R v Ramon Harris (a Pseudonym)* [2015] HCATrans 334

[7] See *Wurridjal v Commonwealth* (2009) 237 CLR 309, at 312-314

Part IV: Applicable constitutional provisions, statutes and regulations

4.1 The tendency rule is set out in section 97(1)(b) of the uniform evidence legislation.[8] That provision reads as follows:

> 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 –
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> ...
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> (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.

4.2 A further restriction on tendency evidence adduced by the prosecution in criminal proceedings is set out in section 101(2) of the uniform evidence legislation. That provision reads as follows:

> Tendency evidence about an accused ... that is adduced by the prosecution cannot be used against the accused unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused.

Part V: Statement of issues sought to be raised by intervener

5.1 The Intervener has divided its submissions into the following categories:

1. *Grounds of appeal*
2. *Divergence in approach between jurisdictions*
3. *Statutory framework in Victoria*
4. *Common law principles*
5. *Does the common law test inform the content of the statutory rule?*
6. *An examination of the decision in Velkoski v R*
7. *New South Wales line of authority – a lower threshold*
8. *A further divergence in approach*
9. *Developments in Victoria ~~post-Velkoski~~*
10. *New South Wales response to Velkoski*
11. *An examination of the decision in Hughes v R*
12. *Approaches in other uniform evidence jurisdictions*
13. *Approach in Western Australia*
14. *Approach in England*
15. *Inferential reasoning underpinning the tendency rule*
16. *Conclusion*

1. Grounds of appeal

5.2 The grounds of appeal are set in the Notice of Appeal as follows:

> 1. The New South Wales Court of Criminal Appeal erred in:
>
> i. finding that the tendency evidence had significant probative value as required by s97 of the *Evidence Act 1995* (NSW);
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> ii. finding that the trial judge did not err in finding that the tendency evidence had significant probative value as required by s97 of the *Evidence Act;*
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> in circumstances where the alleged acts relied upon as tendency evidence were dissimilar in nature, context and circumstance.

[8] See Evidence Act 1995 (Cth); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic); Evidence Act 2011 (ACT); Evidence (National Uniform Legislation) Act (NT)

2. The New South Wales Court of Criminal Appeal erred in:

i. holding that an "underlying unity" or "pattern of conduct" need not be established for tendency evidence to have significant probative value as required by s97 of the *Evidence Act*;

ii. rejecting the approach adopted by the Victorian Court of Appeal in *Velkoski v R* [2014] VSCA 121 which requires an assessment of the degree of similarity when considering whether the proposed tendency evidence has significant probative value.

2. Divergence in approach between jurisdictions

5.3 There is a clear divergence in approach between the appellate courts of Victoria and New South Wales in relation to the application of the tendency rule in criminal proceedings.[9] As the Victorian Court of Appeal in *Velkoski v R* recently observed:[10]

> Currently there are undoubted differences between the decisions of this court and the New South Wales Court of Criminal Appeal as to whether similarity of features need be present in order for evidence to be admissible as tendency evidence....
>
> Where there is an absence of remarkable or distinctive features in the manner in which the offences are committed, the difference in the law as stated by this court and the New South Wales Court of Criminal Appeal has left the law in a state of uncertainty as to the degree of similarity in the commission of the offences or the circumstances which surround the commission of the offences that is necessary to support tendency reasoning. One line of authority has held that some degree of similarity in the acts or surrounding circumstances is necessary before it will be sufficient to support tendency reasoning. Another line of New South Wales authority, that has not been followed in Victoria, has emphasised that tendency reasoning is not "based upon similarities," and evidence of such a character need not be present. These lines of authority within each court are not readily reconcilable.
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> Section 97(1)(b) is intended to address the risk of an unfair trial through the use of tendency reasoning by ensuring a sufficiently high threshold of admissibility. We consider the approach currently taken by the New South Wales Court of Criminal Appeal to tendency and coincidence goes too far in lowering the threshold to admissibility. To remove any requirement of similarity or commonality of features does not in our respectful opinion give effect to what is inherent in the notion of "significant probative value."

5.4 The issue raised on this appeal is whether the Victorian or New South Wales approach is correct in respect of the assessment of "significant probative value" for the purposes of section 97(1) of the uniform evidence legislation.

3. Statutory framework in Victoria

5.5 The tendency rule in Victoria is set out in section 97(1)(b) of the Evidence Act 2008 (Vic) – that provision is set out at para 4.1 above. A further restriction on tendency evidence adduced by the prosecution in criminal proceedings in Victoria is set out in section 101(2) of the Evidence Act 2008 (Vic) – that provision is set out at para 4.2 above.

5.6 The phrase "significant probative value" is not defined in the Act. However, the phrase "probative value" is defined in the Dictionary as follows:

> **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.

5.7 Thus, the assessment involves asking whether the evidence is capable, to a significant degree, of rationally affecting the assessment of the probability of the existence of a fact in issue. This is a subjective judgment or evaluation, but one referenced to a legal standard.[11]

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[9] See *El-Haddad v R* [2015] NSWCCA 10, at [35]

[10] (2014) 45 VR 680, at 687 [34], 717-718 [163]-[164] – in the extracted passage, the Victorian line of authority comprises *RHB v R* [2011] VSCA 295; *DR v R* [2011] VSCA 440 and *CEG v R* [2012] VSCA 55 and the New South Wales line of authority comprises *R v PWD* (2010) 205 A Crim R 75 and *R v BP* [2010] NSWCCA 330

[11] See *DAO v R* (2011) 81 NSWLR 568, at 589 [98], 604 [184]

4. Common law principles

5.8 The expressions "a tendency to act in a particular way" (or have a particular state of mind) and "significant probative value" are not creatures of the common law.

5.9 In *Pfennig v The Queen*,[12] this Court examined the basis for reception of similar fact or propensity evidence under common law principles. In the joint judgment of Mason CJ, Deane and Dawson JJ, their Honours referred to a passage drawn from the earlier decision in *Hoch v The Queen* with approval:

> So much was recognised by Mason CJ, Wilson and Gaudron JJ in *Hoch v R* where their Honours stated that the basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged. In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged.

5.10 Importantly, their Honours added that it was not essential to the admissibility of propensity evidence that it exhibit "striking similarity" or the like, although the evidence will usually lack the requisite probative force if it does not possess such characteristics.[13]

5.11 In a more recent decision of this Court in *Phillips v The Queen*,[14] the test for reception of similar fact or propensity evidence as set above in *Pfennig* was reaffirmed:[15]

> [N]either of those cases departed from a fundamental aspect of the requirements for admissibility: the need for similar fact evidence to possess some particular probative quality. The "admission of similar fact evidence … is exceptional and requires a strong degree of probative force". It must have "a really material bearing on the issues to be decided". It is only admissible where its probative force "clearly transcends its merely prejudicial effect". "[I]ts probative value must be sufficiently high; it is not enough that the evidence merely has some probative value of the requisite kind." The criterion of admissibility for similar fact evidence is "the strength of its probative force". It is necessary to find "a sufficient nexus" between the primary evidence on a particular charge and the similar fact evidence. The probative force must be "sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused". Admissible similar fact evidence must have "some specific connexion with or relation to the issues for decision in the subject case".

5.12 Thus, whilst the above passage contains a number of formulations, the word "significant" is not used although arguably various synonyms for the statutory phrase do appear.

5. Does the common law test inform the content of the statutory rule?

5.13 In an early decision on the uniform evidence legislation, the New South Wales Court of Criminal Appeal in *R v Ellis* addressed the issue of whether the common law test in *Pfennig v The Queen* continued to apply in relation to the reception of tendency evidence. In dismissing an appeal, Spigelman CJ stated:[16]

> As finally enacted in the *Evidence* Acts of both the Commonwealth and New South Wales, there are a number of indications in the regime for tendency and coincidence evidence, found in Pt 3.6, that the Parliaments intended to lay down a set of principles to cover the relevant field to the exclusion of the common law principles previously applicable.
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> First, the change of terminology is itself significant. What is referred to as "coincidence evidence" was previously referred to as "similar fact evidence". "Tendency evidence" was previously referred to as

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[12] (1995) 182 CLR 461, at 481-482 – citing *Hoch v The Queen* (1988) 165 CLR 292, at 294-295
[13] Ibid, at 482
[14] (2006) 225 CLR 303
[15] Ibid, at 320-321 [54]
[16] [2003] NSWCCA 319, at [74]-[75]

"propensity reasoning". The use of different terminology with precise and comprehensive definitions, manifests an intention to state the principles comprehensively and afresh....

5.14 Importantly, his Honour expressed the view that the stringency of the common law test was not incorporated into the new statutory regime:[17]

> Since writing the above I have read the additional observations of Hidden and Buddin JJ. I do not agree with their Honours. In my opinion, the statutory formulation should operate in accordance with its terms. There is no need for an assumption that all such evidence is "likely to be highly prejudicial", nor for guidance that the test for admissibility is "one of very considerable stringency".

5.15 The Intervener supports the approach of Spigelman CJ in *Ellis* as to the construction of section 97 – such approach is consistent with this Court's judgment in *Papakosmas v The Queen* in respect of complaint evidence under the uniform evidence legislation.[18]

5.16 Importantly, as Hayne J observed during an oral hearing in which special leave was rescinded in *Ellis v The Queen*:[19]

> I would have thought that the principal guidance to be offered to the trial judge is, first, to identify what it is that the evidence will prove; second, to identify what is said to be the prejudice that attends upon the admission of the particular piece of evidence; and then to apply the words of the statute to the circumstances thus revealed, rather than to search for some set of synonyms intended somehow to translate the words of the Act.

6. An examination of the decision in Velkoski v R

5.17 In *Velkoski v R*,[20] the accused was convicted of 15 charges of committing an indecent act with a child under the age of 16 years. The charges related to 3 different complainants. The accused's wife ran a family day-care centre at their residential address. The accused was not a registered carer and was not supposed to supervise the children while in care. The accused denied all the allegations.

5.18 At trial, the prosecution relied upon evidence of each of the indictment charges as tendency evidence. The tendency notice was framed on the basis that "the accused had a sexual interest in young children attending the day-care centre run by his wife" and that "the accused was willing to act on that sexual interest by engaging in sexual acts with the complainants". The defence did not object to the reception of the tendency evidence at trial, but on appeal sought to resile from that concession.

5.19 In allowing an appeal against conviction, the Victorian Court of Appeal (Redlich, Weinberg and Coghlan JJA) summarised the position in Victoria as to the reception of tendency evidence as follows:[21]

> [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. [emphasis added]

5.20 After reviewing a number of earlier Victorian decisions, the Court of Appeal observed:[22]

> The requirement of "underlying unity", "modus operandi", "pattern of conduct" or "commonality of features" applies to similarities that cannot be described as "striking". These concepts continue to be regularly used to

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[17] Ibid, at [99]
[18] (1999) 196 CLR 297
[19] [2004] HCATrans 488
[20] (2014) 45 VR 680
[21] Ibid, at 682 [3]
[22] Ibid, at 698 [82], 719 [171]

provide guidance as to the strength of the tendency evidence. They are to be found in the preponderance of authority from this court and permeate its decisions. They remain, in our view rightly, a primary guide to the resolution of questions of admissibility. Because each of these concepts rests upon the existence of some degree of similarity of features between the previous acts and the offences charged, the law in Victoria now follows a somewhat different path to that currently followed by the New South Wales Court of Criminal Appeal....

The features relied upon must in combination possess significant probative value which requires far more than "mere relevance". In order 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. It is the degree of similarity of the operative features that gives the tendency evidence its relative strength. [emphasis added]

5.21 The Court of Appeal stated that tendency reasoning could be used in respect of those 7 charges which had the common feature of the accused encouraging the complainant to touch his penis or exposing it to the complainant.[23] However, the Court concluded that in respect of 9 charges, the conduct did not possess any distinctive or similar feature necessary to satisfy tendency reasoning – those charges included grabbing a male complainant's penis whilst play-fighting, placing his hand down the pants and touching a female complainant's vagina, placing his hand down the pants and touching a female complainant's bottom and rubbing his body against a female complainant's body.[24]

5.22 The Intervener challenges the correctness of the passages cited above (at para 5.20) from *Velkoski*. In short, there a number of vices that can be identified with this approach:

(i) the true task of the judge has been distracted ~~away~~ from an application of the statutory language to the facts of the case;
(ii) the statutory test deploys the common law approach to the admission of similar fact or propensity evidence; and
(iii) as highlighted in this Court's decision in *Pfennig*, "similarity of features" is not a pre-condition to admissibility even under the common law.

5.23 In *Velkoski*, the Victorian Court of Appeal exhaustively reviewed earlier Victorian authorities dealing with both tendency and coincidence evidence. Importantly, a number of those decisions had been the subject of an unsuccessful challenge to their correctness by the Victorian Director in the interlocutory appeal of *DPP v BCR* – the challenge was put on the basis that the cases were in conflict with New South Wales authority.[25]

5.24 Amongst those decisions, the case of *R v PNJ* is quite remarkable.[26] In that case, the accused was presented on 14 counts alleging that between 1965 and 1967 he had sexually assaulted three teenage boys who resided at a youth training centre at which the accused worked as a youth officer. The charges included acts of masturbation, oral sex and anal sex. The trial judge granted a certificate enabling an interlocutory appeal to be brought against a ruling that evidence in respect of each boy was cross-admissible as coincidence evidence.

5.25 On appeal, the Court of Appeal held that the evidence was not admissible as coincidence evidence. The Court held that, in determining admissibility, it was a mistake to treat as relevant similarities features of the alleged offending which reflected circumstances outside the accused's control. To qualify as a relevant similarity in circumstances such as these,

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[23] Ibid, at 721-722 [181]
[24] Ibid, at 722 [184]
[25] [2010] VSCA 229
[26] (2010) 27 VR 146 – the correctness of the decision in *PNJ* was doubted by Nettle JA (as he then was) in the later decision of *RHB v R* [2011] VSCA 295

there must be something distinctive about the way in which the accused took advantage of the setting or context. Furthermore, the Court held that there was nothing to distinguish the allegations against the accused from like allegations against other sexual offenders.

7. New South Wales line of authority – a lower threshold

5.26 An examination of the New South Wales authorities reveals that the threshold for reception of tendency evidence is somewhat lower than in Victoria – relevantly, it relates to the degree of similarity required before the evidence can be admitted. The high watermark appears to be the decision of the New South Wales Court of Criminal Appeal in *R v PWD*.[27]

5.27 In *R v PWD*, the accused was charged with 10 counts of sexual misconduct against 4 boys who were students at a school where the accused was the principal. The offending was said to have occurred between 1977 and 1992. The sexual acts alleged by each boy were different in nature – it ranged from rubbing, touching and mutual oral sex – and the acts were committed in different locations. The prosecution sought to lead tendency evidence in that the accused had a tendency to have a sexual interest in young male students and to engage in sexual activities with them. The trial judge ruled the evidence inadmissible on the basis that it lacked significant probative value because the acts described by each boy and the surrounding circumstances of each act were different to each other.

5.28 On a Crown appeal, the New South Wales Court of Criminal Appeal held that the evidence was admissible as tendency evidence as it possessed significant probative value. Beazley JA (with whom Buddin J and Barr AJ agreed) stated:[28]

> The authorities are clear that for evidence to be admissible under s 97 there does not have to be striking similarities, or even closely similar behaviour....
>
> The evidence sought to be relied upon, if accepted by the jury, would demonstrate that the respondent was a person who was sexually attracted to young male students and acted upon that predilection in various ways and at different times, but in a setting where the students to whom he directed his sexual attentions were boarders, who were homesick, did not fit in with the normal pattern of school life in various ways, for example, by not developing friendships or by having discipline problems, and who were thus vulnerable. [emphasis added]

5.29 In relation to the above passage extracted from *R v PWD*, the Court in *Velkoski* observed:[29]

> The words highlighted in the passage set out above from *PWD* are difficult to reconcile with both the early decisions of this court dealing with tendency and coincidence evidence.... It reduces the threshold for admissibility, in relation to tendency evidence, to behaviour that need not even be "closely similar". Distinctiveness, underlying unity, and the need for a pattern of behaviour would, it appears, be put to one side.

5.30 Importantly, the approach adopted by Beazley JA replicates the approach adopted by Campbell JA in the earlier decision of *R v Ford*.[30]

5.31 In *R v Ford*, the accused was charged on trial with 1 count of sexual intercourse without consent and 2 counts of indecent assault against three different female complainants. The incidents were alleged to have occurred when the females stayed at his house at different times after attending a party, were asleep and had consumed alcohol. The counts were severed. The trial judge ruled that the prosecution could not lead tendency evidence in that the evidence in respect of the indecent assault charges was inadmissible on the count of sexual intercourse without consent.

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[27] (2010) 205 A Crim R 75 – special leave to appeal was refused by this Court (see *PWD v R* [2011] HCATrans 32)
[28] Ibid, at 91 [79], 92 [87]
[29] (2014) 45 VR 680, at 708 [120]
[30] (2009) 201 A Crim R 451

5.32 On appeal, the Court of Criminal Appeal held that the ruling of the trial judge was incorrect. In delivering judgment, Campbell JA (with whom Howie and Rothman JJA agreed) stated:[31]

> The second flaw is the judge's apparent view that the tendency evidence must itself show a tendency to commit acts that are closely similar to those that constitute the crime with which a particular accused is charged. That is not so. All that a tendency need be, to fall within the chapeau to section 97(1), is "a tendency to act in a particular way"....
>
> The case law contains examples of the way in which a tendency to engage in a particular type of behaviour can be relevant to whether an accused has committed a particular crime charged, even though that tendency does not in itself involve performance of a contravention of the same provision of the criminal law as that charged, or closely similar behaviour....
>
> In my view there is no need for there to be a "striking pattern of similarity between the incidents". All 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. In my view, it meets that test. [emphasis added]

5.33 The approach taken in both *Ford* and *PWD* was endorsed by Hodgson JA (with whom Price and Fullerton JJ agreed) in *BP v R*:[32]

> It is not necessary in criminal cases that the incidents relied on as evidence of the tendency be closely similar to the circumstances of the alleged offence, or that the tendency be a tendency to act in a way (or have a state of mind) that is closely similar to the act or state of mind alleged against the accused; or that there be a striking pattern of similarity between the incidents relied on and what is alleged against the accused: *Ford* at [38], [125], *PWD* at [64]–[65]. However, generally the closer and more particular the similarities, the more likely it is that the evidence will have significant probative value.

5.34 Finally, in *RH v R*,[33] the offending involved sexual misconduct by a foster father against a child in his care. During a voir dire, details emerged of a further complaint by another child against the accused. The accused had already pleaded guilty to a number of charges of sexual offending against a third child. The prosecution sought to lead evidence in relation to tendency on the part of the accused to have a sexual interest in young girls, to sexually assault young girls in his care, and to use his authority as a foster carer to gain access to them for this purpose. The trial judge permitted the prosecution to adduce evidence from both complainants and the child to whom the earlier convictions related.

5.35 In dismissing an appeal against the trial judge's ruling, Ward JA referred to with approval Beazley JA's statement in *PWD* (in relation to similarity):[34]

> Similarly, in the present case, the tendency evidence (if accepted by the jury) would demonstrate that the appellant had a tendency sexually to abuse young girls who were vulnerable in the sense that they had been removed from troubled households and placed in his and his wife's foster care. The differences in the particular acts complained of by the respective complainants do not diminish the significant probative value of their evidence.

5.36 Thus, in summary form, the main point of difference between New South Wales and Victoria lies in the degree of similarity required before tendency evidence can be admitted – in New South Wales, there is no need for the behaviour in question to be "closely similar" (see *Ford* and *PWD*), whereas in Victoria there needs to be "some degree of similarity" of features between the relevant acts and the offences charged (see *Velkoski*). Unfortunately, there are other points of divergence between the two jurisdictions.

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[31] Ibid, at 465-466 [38], 466 [41], 485 [125]

[32] [2010] NSWCCA 303, at [108] – likewise the decisions in both *Ford* and *PWD* were cited with approval in *FB v R* [2011] NSWCCA 117, at [26]-[27]

[33] (2014) 241 A Crim R 1

[34] Ibid, at 25 [143]

8. A further divergence in approach

5.37 However, the Intervener points to another real difference in approach between Victoria and New South Wales in relation to the reception of tendency evidence under the uniform evidence legislation – and, that is the weight to be accorded to the "nature" of the act itself.

5.38 Perhaps the point is best illustrated by reference to the decision of *DR v R*.[35] In that case, the Victorian Court of Appeal considered the correctness of a trial judge's ruling as to the admissibility of tendency and coincidence evidence in a case involving alleged incest against two step-daughters. The Court observed:[36]

> It does not seem to us that the sexual abuse of a child, stepchild or grandchild by their parent, step parent or grandparent is such a common occurrence that it should be regarded as having limited probative value in relation to an allegation that the applicant has abused another child, step child or grandchild. As Hodgson JA said in *BP v R* [[2010] NSWCCA 303], "it is unusual for a parent or grandparent to do acts of the kind described by each witness". We would therefore be inclined to hold that evidence that a person had committed sexual offences against a child, stepchild or grandchild has significant probative value as evidence of a tendency to offend against other children in the family.

5.39 However, in *Velkoski v R*, the Court rejected this approach stating:[37]

> The dicta in this passage is that incestuous behaviour is itself such an uncommon occurrence as to render evidence by more than one complainant admissible without any need for a distinctive pattern of offending to be shown, or any similarity in the background circumstances surrounding the offending. It might be thought, with respect, that this case comes close to adopting the approach which seems to have recently commended itself to the New South Wales Court of Criminal Appeal, and would lower the threshold of admissibility in a way inconsistent with the weight of authority in this court.

5.40 In short, the Intervener supports the general approach adopted in the New South Wales decision of *BP* (followed in *DR*).

9. Developments in Victoria ~~post-Velkoski~~

5.41 The decision in *Velkoski v R* has been applied as the seminal authority in Victoria on tendency and coincidence evidence under the uniform evidence legislation – however, a number of ~~subsequent~~ decisions amply illustrate how closely aligned the *Velkoski* approach is to the "striking similarity" test now eschewed under the common law.

5.42 In *Murdoch (a Pseudonym) v R*,[38] the accused was convicted at a retrial on multiple charges of having sexually abused two of his daughters. The prosecution sought to rely on tendency and coincidence evidence in the retrial. In allowing an appeal against conviction, Priest JA (with whom Redlich and Coghlan JJA agreed):[39]

> Moreover, even without the real possibility of contamination which existed, in my opinion the evidence relied upon – with, perhaps, the exception of the use of the vitamin E cream, and the "take it to the grave" remark – could not be regarded as possessing significant probative value. It will be remembered that the prosecution relied on the similarity in age of the complainants; the conduct; that the complainants were the appellant's daughters; that the conduct occurred when the mother was away; that the offending occurred in the bedroom; and that the complainants both left home because of the offending. Putting to one side the use of the vitamin E cream, and the "take it to the grave" remark, none of the other items of evidence relied upon demonstrated the kind of remarkable, distinctive or unusual features which would have justified their admission under s 97, or the kind of similarities necessary for their admission under s 98. [emphasis added]

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[35] [2011] VSCA 440
[36] Ibid, at [88]
[37] (2014) 45 VR 680, at 707 [115]
[38] (2013) 40 VR 451 – decision cited with approval in *Velkoski* at paras [123]-[132] of the judgment
[39] Ibid, at 476 [102]

5.43 In *Reeves (a Pseudonym) v R*,[40] the accused was charged with sexual offences against his step-daughter and biological daughter. The two incidents were more than three years apart. The trial judge ruled that the evidence of the step-daughter and the biological daughter was cross-admissible as tendency evidence. On appeal against conviction, Maxwell ACJ (with whom Coghlan JA agreed) observed:[41]

> Successive decisions of this court and of the New South Wales Court of Criminal Appeal (NSWCCA) have used words such as "remarkable", "unusual", "improbable" and "peculiar" when characterising the kinds of conduct which is properly the subject of tendency evidence. As the court made clear in *RBH*, it is the "degree of peculiarity", or the extent to which the conduct can be said to be "remarkable", which will guide the assessment of probative value....
>
> Impermissible propensity reasoning is to the effect that the accused is "the kind of person" who would have committed the offence in question. Tendency evidence of this kind is quite different. It is evidence of quite specific (remarkable or unusual) conduct by the accused in particular circumstances which makes it more probable that he acted in the same way in similar circumstances on a different occasion.

5.44 In a dissenting judgment, Priest JA appears to travel further down the common law path:[42]

> In my view, the tendency evidence in this case did not possess a high degree of cogency. To adopt the language of the court in *PNJ* (although uttered in the context of an examination of coincidence evidence), "[t]he allegation that such acts were committed is, sadly, unremarkable"; and "is a commonplace in sexual offending of this kind, and cannot be said to distinguish the applicant's offending from that of any other such offender". It must be acknowledged that both complainants were young girls and family members, but, when considering offending of this generic kind, there is nothing particularly unusual about those factors. Nor, it must be said, is there anything particularly unusual about the offending occurring when the complainants were under the appellant's care, or when others were in the premises where the events occurred. Importantly, from my perspective, the nature of the activities was markedly different. True it is that the activities with each complainant involved touching on the vagina, and removal of clothing to permit direct touching, but unhappily those are aspects which are not uncommon in this kind of case.

5.45 The Intervener submits that the approach adopted by the Victorian Court of Appeal in both *Murdoch (a Pseudonym)* and *Reeves (a Pseudonym)* is inconsistent with the task required under section 97. Appellate courts in both Victoria and New South Wales have eschewed "striking similarity" as a necessary criterion for the reception of tendency evidence – yet to require the evidence to be "remarkable" or "different in nature to that of any other sexual offender" is to simply reintroduce "striking similarity" under the guise of a different label. Importantly, such language finds no statutory fiat in the language of the provision itself and is a further reminder of the vice inherent in any *Velkoski*-type approach to the reception of tendency evidence in a criminal trial.

10. New South Wales response to Velkoski

5.46 In *Elomar & Ors v R*,[43] five accused were placed on trial for conspiracy to do acts in preparation for a terrorist act or acts. Each accused was convicted after a lengthy trial. On appeal, an issue arose as to whether an accused's state of mind may be used to support tendency reasoning.

5.47 The New South Wales Court of Criminal Appeal declined to follow the decision in *Velkoski v R* insofar as it related to evidence of "state of mind" led as tendency evidence. The Court (Bathurst CJ, Hoeben CJ at CL and Simpson J) stated:[44]

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[40] (2013) 41 VR 275 – decision cited with approval in *Velkoski* at paras [117] & [133] of the judgment
[41] Ibid, at 289 [53], 292 [66]
[42] Ibid, at 299 [94]
[43] (2014) 316 ALR 206
[44] Ibid, at 280 [370]-[371]

The Court of Appeal of Victoria has held that evidence of a state of mind is not admissible as tendency evidence: *Velkoski v R* [2014] VSCA 121 (*Velkoski*). At [173] the court distilled a number of principles from the relevant authorities. It stated principle (f) in the following way:

> (f) The offender's state of mind is frequently relied upon in the Crown's notice of tendency evidence to cover the offender's interest in particular victims and his willingness to act upon that interest. That the offender has such a state of mind discloses only rank propensity which is not admissible as tendency evidence. It shows only that he is the kind of person who is disposed to and commits crimes of the type charged. Resort to that particular state of mind to support tendency reasoning is impermissible, highly prejudicial and unnecessary. *Once the jury is satisfied that the acts relied upon as tendency have been committed, the offender's state of mind adds nothing.* Reference to it is calculated to divert the jury from focussing upon the extent to which the similar features of the previous acts render the occurrence of the offence charged more likely ... [Italics added.]

If, by this paragraph, the Victorian Court of Appeal is asserting that s 97 of the Evidence Act does not permit evidence of the offender's state of mind to be used as or establishing a particular tendency then, with respect, we consider it to be incorrect, and should not be followed in this State. There is no such limitation in the statute, the limitations on tendency evidence being those contained in s 97 itself and s 101. Further, at the point when admissibility of evidence is under consideration, it cannot be known whether "the jury is satisfied that the acts relied upon as tendency have been committed". Indeed, at that time, a jury may not have been empanelled, and, even if it has, will not have reached any conclusions about the commission of the tendency evidence acts. Evidence of the state of mind of the accused may be very relevant to their reaching that satisfaction. In the second place, the very point of s 97 is that evidence of a state of mind is, once the preconditions have been met, permissible to provide the foundation for, or part of the reasoning process towards, an inference that the person committed the offence charged. At [173(f)] of *Velkoski* does not state the law as it is understood in NSW.

5.48 In *Saoud v R*,[45] Basten JA (with whom Fullerton and RA Hulme JJA agreed) described the judgment in *Velkoski* as involving a "thorough and troubling analysis". Without deciding whether the opinions expressed in *Velkoski* were correct, his Honour summarised the general principles in relation to tendency evidence as follows:[46]

> First, the provisions of the *Evidence Act* have effected change to common law principles, which are no longer to be applied. It follows that, whilst there may be assistance to be derived from the common law cases with respect to the underlying principles which inform the exclusion of tendency and coincidence evidence, those cases provide limited guidance as to the circumstances in which such evidence may now be admitted.
>
> Secondly, although there is no necessary harm in using concepts which became familiar in the common law cases, such as the fact that evidence reveals "unusual features", "underlying unity", "system" or "pattern", which are essentially neutral as to the level at which such features are demonstrated, the language of "striking similarities" suggesting a particular strength of probability reasoning is no longer apt, because it is inconsistent with the test of "significant probative value": Simpson J in *Fletcher* at [60], commenting on a passage from *Hoch v The Queen* (1988) 165 CLR 292 at 294–295.
>
> Thirdly, reliance on such language may distract (by creating a mindset derived from common law experience) and may provide little guidance in applying the current statutory test....
>
> Fourthly, attention to the language of s 97 (and s 98) has the practical advantage of focusing attention on the precise logical connection between the evidence proffered and the elements of the offence charged. Thus, rather than asking whether there is "underlying unity" or "a modus operandi" or a "pattern of conduct" the judge can focus on the particular connection between the evidence and one or more elements of the offence charged.
>
> Fifthly, there is an awkwardness in the separation of "tendency" evidence and "coincidence", at least in some circumstances. Thus, in a case such as the present, where there was no issue as to the identity of the alleged offender, but rather a dispute as to the occurrence of the offences, evidence of the accused's conduct on another occasion will combine the implausibility of independent complainants both falsely describing similar conduct with the inference that a person who conducted himself in a particular way on one occasion may well have done so again on another.
>
> Sixthly, "tendency" 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,

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[45] (2014) 87 NSWLR 481
[46] Ibid, at 490-491 [38]-[44]

because 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.

5.49 In short, the Intervener supports the approaches propounded by the New South Wales Court of Criminal Appeal in both *Elomar & Ors* and *Saoud* – the decisions concentrate on the language of the statute rather than any resort to common law principles.

11. An examination of the decision in Hughes v R

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5.50 In *Hughes v R*,[47] the accused was convicted of 10 sexual offences against 4 female victims under the age of 16 years. The relevant offences included digital penetration of a child's vagina, rubbing a child's vagina, masturbation of the accused's penis, rubbing the accused's penis on a child's vagina, exposing the accused's penis and rubbing the accused's penis against a child's face. The trial judge ruled that the prosecution could lead tendency evidence at the accused's trial. The tendency notice contained 5 particulars, including a tendency to have a sexual interest in female children under 16 years (particular state of mind) and a tendency to engage in sexual conduct with females aged under 16 years (namely touching in a sexual way, exposing his penis, having the child come into contact
20 with his penis, touching the child's vagina and performing sexual acts upon the victims). The prosecution called 11 tendency witnesses, including the complainants – the prosecution led the tendency evidence in relation to the counts on the indictment. The defence at trial was that the charged acts did not occur.

5.51 On appeal, the tendency ruling was challenged on the grounds that the trial judge had erred in his finding that the evidence had "significant probative value" within the meaning of section 97(1), and had erred in failing to exclude the evidence under section 101. The New South Wales Court of Criminal Appeal dismissed this ground of appeal.

30 5.52 The trial judge in *Hughes* approached the assessment required under section 97(1) in accordance with the test propounded by Hunt J in *R v Lockyer*, namely:[48]

> "Significant" probative value means something more than mere relevance but something less than a "substantial" degree of relevance. The evidence must be "important" or "of consequence".

5.53 The trial judge in *Hughes* then addressed the degree of similarity required as between the tendency evidence and the particular acts allegedly undertaken by the accused. Importantly, the trial judge held that it was not necessary that the acts or state of mind the subject of the tendency evidence be "closely" or "strikingly" similar to the acts constituting the crime,
40 citing the judgment of Campbell JA in *R v Ford* as authority for that proposition.[49]

5.54 However, the trial judge concluded that there were a number of features of the evidence that involved "closely similar" conduct on the part of the accused. Further, notwithstanding that there were differences in the sexual acts alleged against the accused in the various counts and in the circumstances in which they were allegedly committed, the trial judge ruled that the differences did not deplete the proposed tendency evidence of its probative value. In short, the proposed evidence demonstrated a pattern of behaviour that established a "tendency to take advantage of situations which arose where the accused came into contact with young female children".

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[47] [2015] NSWCCA 330

[48] (1996) 89 A Crim R 457, at 459 – this approach was consistent with New South Wales authority (see *DSJ v R* (2012) 84 NSWLR 758 and *BJS (No 2) v R* (2013) 231 A Crim R 532)

[49] (2009) 201 A Crim R 451, at 485 [125] – see also *R v PWD* (2009) 205 A Crim R 75 and *BJS (No 2) v R* (2013) 231 A Crim R 532 as authority for the same proposition

5.55 Thus, the trial judge admitted the evidence of the complainants in respect of all counts on the indictment and the evidence of the other witnesses as tendency evidence in respect of some of the counts on the indictment (and with some limitations in respect of the other witnesses). On appeal, it was submitted that both the sexual acts and the circumstances surrounding the acts were different in nature and not capable of being the subject of any alleged tendency.

5.56 In dismissing the appeal, the New South Wales Court of Criminal Appeal (Beazley P, Schmidt and Button JJ) stated:[50]

> It needs to be understood at the outset that evidence that a person had a particular tendency is adduced for the purpose of providing the foundation for an inference that the person was more likely to act in a particular way or have a relevant state of mind on the particular occasion that is subject of the charge or charges …
>
> The New South Wales authorities have not accepted that it is necessary, for evidence to be admissible as a "tendency" that it exhibit, to use the language of the common law relating to similar fact and propensity evidence, "underlying unity", "a modus operandi" or a "pattern of conduct": *Velkoski v R*…. As Basten JA (Fullerton and R A Hulme JJ agreeing) said in *Saoud v R* … "such language … may provide little guidance in applying the current statutory test". Rather, the admissibility of tendency evidence requires that it have "significant probative value". [citations omitted]
>
> The extent and nature of any similarity is nonetheless relevant to that question, as was articulated by this Court in *Ford*….
>
> In making the assessment whether evidence tendered as tendency evidence has significant probative value, regard will inevitably be had to similarities in the conduct relevant to the offence. That is different from requiring that the conduct bear similarities to the conduct with which the person is charged. This was emphasised by the Court in *Saoud* where Basten JA observed, at [44], that "the nature of the similarities will depend very much on the circumstances of the case".
>
> The critical point made in these authorities is that tendency evidence need not show a tendency to commit acts that constitute the crime or crimes with which the accused is charged. There only needs to be a "tendency … to act in a particular way" (s 97(1)) relevant to the conduct subject of the charge….
>
> When regard is had to the inferential nature of tendency evidence and the requirement that it be relevant evidence, it is apparent that tendency evidence is not only directed to the particular type of conduct that constitutes an element of the charge. There is a wide range of evidence relevant to the determination of the guilt of a person of a particular crime….

5.57 Importantly, the Court rejected the approach adopted by the Victorian Court of Appeal in *Velkoski* in relation to the section 97 gateway:[51]

> For the reasons we have given, we do not accept that the language used by the Victorian Court of Appeal represents the law in New South Wales. We recognise, however, that although s 97, unlike s 98, does not use the language of similarity, the greater the similarities, the more readily will a court find that that the evidence has significant probative value. Nor, as we have already examined above, does s 97 require that there be an "underlying unity", a "pattern of conduct", or the like. That is the language of the common law relating to similar fact evidence.

5.58 In short, the Intervener harbours no doubt that the facts as set out in this appeal would have most likely resulted in a different conclusion in Victoria under a *Velkoski* microscope.

12. Approaches in other uniform evidence jurisdictions

5.59 In Tasmania, the New South Wales decision in *R v PWD* has been cited with approval in relation to the admissibility of tendency evidence.[52]

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[50] [2015] NSWCCA 330, at [160], [166]-[167], [183]-[185]
[51] [2015] NSWCCA 330, at [188]

5.60 A similar approach has been adopted in the Australian Capital Territory. For example, in *R v Lam*, Refshauge J stated:[53]

> It is, however, clear that there is no requirement for "distinctive" conduct nor, in relation to tendency evidence, as opposed to coincidence evidence, is it necessary for the evidence to be based on similarities, as pointed out by Beazley JA, with whom Buddin J and Barr AJ agreed, in *R v PWD*.... Nevertheless, the closer and more particular the similarities between the tendency evidence and the evidence of the offences, the more likely it is that the evidence will have significant probative value: *BP v R*.... [citations omitted]

10 ***13. Approach in Western Australia***

5.61 Western Australia has not yet adopted the uniform evidence legislation regime. However, the reception of propensity evidence in a criminal trial is not governed by the common law in that state but rather by statute. Section 31A(2) of the Evidence Act 1906 (WA) provides:

> Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers –
>
> (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
>
> 20 (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

5.62 In *Dair v Western Australia*, Steytler P analysed the meaning of the expression "significant probative value" found in section 31A(2)(a). His Honour stated:[54]

> Before evidence can have significant probative value it must be such as "could rationally affect the assessment of the probability of the relevant fact in issue to a significant extent: ie, more is required than mere ... relevance".... Heydon ... suggests that significant probative value is something more than mere relevance but
>
> 30 something less than a "substantial" degree of relevance and that it is a probative value which is "important" or "of consequence". He makes the point that the significance of the probative value of tendency evidence must depend on the nature of the facts in issue to which it is relevant and the significance or importance which that evidence may have in establishing the fact: *Lockyer* (1996) 89 A Crim R 457 at 459 .... [citations omitted]

5.63 The above analysis was subsequently approved in *Horsman v Western Australia*[55] and *Buiks v Western Australia*.[56] On appeal to this Court, the correctness of the analysis was not challenged by either party.[57] This approach was adopted by the trial judge in this appeal. Or, in other words, the evidence must be "influential" in the context of fact-finding.[58]

40 5.64 But this approach differs to that which operates in Victoria – for example, Priest JA (Ashley and Buchanan JJA agreeing) in *Semaan v R* held that "significant" should be interpreted as requiring something closer to "substantial" than "important" or "of consequence".[59]

5.65 Importantly, the Western Australian Court of Appeal has held that propensity evidence about an accused can have significant probative value without the need to show similarity of sexual acts and even where the relevant acts were committed at different times and places.[60] This approach of course resonates closely with that which is adopted in New South Wales.

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[52] See, for example, *Tasmania v Martin (No. 2)* (2011) 213 A Crim R 226, at 247 [60]; *Tasmania v W (No. 2)* (2012) 227 A Crim R 155, at 162-163 [15]; *Tasmania v H* [2015] TasSC 36, at [12]
[53] [2014] ACTSC 49, at [27]
[54] (2008) 36 WAR 413, at 429 [61]
[55] (2008) 187 A Crim R 565, at 572 [22]
[56] (2008) 188 A Crim R 362, at 373-374 [45]
[57] *Stubley v Western Australia* (2011) 242 CLR 374, at 379-380 [12]
[58] See *IMM v The Queen* (2016) 330 ALR 382, at 391 [46]
[59] [2013] VSCA 134, at [38]; see also *Murdoch (a Pseudonym) v The Queen* [2013] VSCA 272, at [79] per Priest JA
[60] *See Donaldson v Western Australia* (2005) 31 WAR 122, at 155 [149]

14. Approach in England

5.66 The reception of "bad character" evidence of an accused is also now governed by statute rather than the common law in England. Section 101(1) of the Criminal Justice Act 2003 (UK) sets out 7 gateways for the admissibility of such evidence.

5.67 For the purposes of these submissions, only para (d) of section 101(1) is pertinent:

> In criminal proceedings evidence of the defendant's bad character is admissible if, but only if –
> ...
> (d) it is relevant to an important matter in issue between the defendant and the prosecution ...

5.68 Section 103(1) provides a definition of the expression "matter in issue". For the purposes of these submissions, only para (a) is pertinent:

> For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include –
>
> (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence ...

5.69 Whilst unquestionably the statutory text is different to that of section 97 of the uniform evidence legislation, it is of interest to note the approach adopted by the English Court of Appeal as to the "nature" of the act under examination. For example, in *R v D & Ors*, the Court held that evidence that an accused had viewed child pornography was capable of being adduced at trial for sexual assault on a child under section 101(1)(d) of the Act to demonstrate a propensity for offences involving the sexual abuse of children.

5.70 In delivering judgment of the Court, Hughes LJ (with whom Roderick Evans and Gloster JJ agreed) stated:[61]

> Evidence that a defendant collects or views child pornography is of course by itself evidence of the commission of a criminal offence. That offence is not itself one involving sexual assault or abuse or indeed of any sexual activity which is prohibited. It is obvious that it does not necessarily follow that a person who enjoys viewing such pictures will act out in real life the kind of activity which is depicted in them by abusing children. It follows that the evidence of possession of such photographs is not evidence that the defendant has demonstrated a practice of committing offences of sexual abuse or assault. That, however, is not the question for the purposes of gateway D. The question under gateway D is whether the evidence is relevant to an important matter in issue between the defence and the Crown. Is it relevant to demonstrate that the defendant has exhibited a sexual interest in children?
>
> It seems to us that this is a commonsense question which must receive a commonsense answer. The commonsense answer is that such evidence can indeed be relevant. A sexual interest in small children or pre-pubescent girls or boys is a relatively unusual character trait. It may not be quite as unusual as it ought to be, but it is certainly not the norm. The case against a defendant who is charged with sexual abuse of children is that he has such an interest or character trait and then, additionally, that he has translated the interest into active abuse of a child. The evidence of his interest tends to prove the first part of the case. In ordinary language to show that he has a sexual interest in children does make it more likely that the allegation of the child complainant is true, rather than having coincidentally been made against someone who does not have that interest. For those reasons, we are satisfied that evidence of the viewing and/or collection of child pornography is capable of being admissible through gateway D. We emphasise that it does not follow that it is automatically admissible. There is nothing automatic about any of these bad character provisions. They require an exercise of judgment, specific, in every trial. Moreover, to say that the evidence is capable of admission under gateway D is only the first part of the exercise for the court. The court must also direct its attention to whether it is unfair to admit the evidence and of course in some cases it might be. [emphasis added]

5.71 The approach adopted by the English Court of Appeal is redolent of the approach adopted by Hodgson JA in *BP v R* as to the "unusual" nature of the act (judged by reference to

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[61] [2011] 4 All ER 568, at 571-572 [6]-[7]

ordinary norms of behavior) providing probative force to the evidence. However, it contrasts sharply with the approach adopted by Priest JA in *Reeves (a Pseudonym) v R.*

15. Inferential reasoning underpinning the tendency rule

5.72 As the New South Wales Court of Criminal Appeal observed in *Hughes v R*, evidence that a person had a particular tendency is adduced for the purpose of providing the foundation for an inference that the person was more likely to act in a particular way or have a particular state of mind on the particular occasion that is subject of a charge.[62] Tendency evidence has been described as "no more than a building block or stepping stone" which provides the basis for inferring that on a relevant occasion "a person behaved in a particular way or had a particular state of mind".[63] Or, to put it another way, the tendency rule proceeds on the basis of inferential reasoning that people behave consistently in similar situations.[64]

5.73 The language of section 97 is quite specific – it talks of a person having a tendency "to act in a particular way" rather than having a tendency "to commit a particular act". The expression is thus much broader, encompassing the possibility of different (but obviously somewhat related) acts falling within a particular tendency. Thus, any suggestion that the tendency should be interpreted as requiring a high degree of specificity is not borne out by the statutory language used.

5.74 The word "way" is defined in the *Oxford Dictionary* [online] as meaning "method, style or manner of doing something" – again this suggests that a broader definition needs to be accorded to the expression used in section 97. Unlike section 98 (the coincidence rule), section 97 does not speak of similarities in respect of relevant acts.

5.75 Thus, the expression itself contemplates that the actions of an accused may be different provided they can be encompassed within the requisite descriptor "way". This is particularly apposite in relation to sexual offending as there is a multiplicity of acts that can occur, yet all such acts fall within the single category of sexual misconduct. That this is so was expressly recognised by the New South Wales Court of Criminal Appeal in *DAO v R* where Simpson J (with whom Spigelman CJ, Allsop P, Kirby and Schmidt JJ agreed) observed:[65]

> [E]vidence of more serious conduct may support allegations of less serious conduct just as evidence of less serious conduct may support allegations of more serious conduct. Each case will depend upon its own facts …

5.76 The above point was also made in the joint judgment of Nettle and Gordon JJ in the recent decision of this Court in *IMM v The Queen*:[66]

> [E]vidence of uncharged sexual acts is capable of having significant probative value in the proof of charged sexual acts even where the uncharged sexual acts and the charged sexual acts are of essentially different kinds. Such may be the nature of one human being's sexual attraction to another, and the likelihood that a sexual attraction is fulfilled or sought to be fulfilled on different occasions by different sexual acts of different kinds, that evidence of uncharged sexual acts, although different from the charged sexual acts, has the capacity to show that the alleged offender had an ongoing sexual attraction to the complainant and endeavoured to gratify it in a variety of ways.

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[62] See *Hughes v R* [2015] NSWCCA 330, at [160]; see also *Gardiner v R* (2006) 162 A Crim R 233, at 260 [124]; *R v Cittadini* (2008) 189 A Crim R 492, at 495 [23]; *Chen v R* [2011] NSWCCA 145, at [96]; *FB v R* [2011] NSWCCA 217, at [23]; *Elomar & Ors v R* (2014) 316 ALR 206, at 278 [359]

[63] See *DAO v R* (2011) 81 NSWLR 568, at 603 [180]

[64] See *FB v R* [2011] NSWCCA 217, at [23]

[65] (2011) 81 NSWLR 568, at 606 [201]

[66] (2016) 330 ALR 382, at 420-421 [178]

5.77 Furthermore, for an adult to engage in sexual misconduct with a child is to act in "a particular way", notwithstanding it may involve a wide range of behaviours from touching to penetrative activity. It is also to act in "an unusual way" since it does not represent a normal standard of behaviour for a person. In short, this means that any previous sexual conduct with a child shows that an accused person has a tendency to act in an unusual way.[67]

5.78 Importantly, tendency evidence involving multiple complainants often involves two related strands of reasoning (as identified in *Saoud v R*) – namely, where there is a dispute as to the occurrence of offences rather than identity, the evidence of the accused's conduct on another occasion will combine the implausibility of independent complainants both falsely describing similar conduct with the inference that a person who conducted himself in a particular way on one occasion may well have done so again on another. This former strand of reasoning is often disregarded in the evaluative assessment – it does not relate to coincidence reasoning (under section 98) but rather relates to the probability of a complainant providing a false account.[68]

5.79 Stripped back to its basics, the real issue that has bedevilled both the common law rule and now the statutory rule is the rationality of the inferential reasoning process which is required in order to admit the propensity or tendency evidence. Some simple examples can hopefully illustrate this tension.

- **Example 1** – V alleges that A has sexually touched her on the vagina on 3 separate occasions. In respect of the first incident, B is an eyewitness and will give evidence for the prosecution. The prosecution files a tendency notice alleging that A has a tendency to act in a particular way, namely touch V's vagina. A denies the offending.

  If the jury accepts B's account as supporting V's testimony, then the jury is entitled to use tendency reasoning in assessing V's testimony in respect of the other 2 incidents. It is not controversial that tendency evidence would be admitted under both the decisions in *Velkoski* and *Hughes*.

  The process of inferential reasoning is strong – if A has committed a particular sexual act upon V, then it is probable that he has committed an identical act upon V on subsequent occasions. A has both a sexual interest in V and is willing to act on that interest (as supported by B).

- **Example 2** – V alleges that A has sexually touched her on the vagina on 1 occasion, on the breast on a second occasion and on the bottom on a third occasion. In respect of the first incident, B is an eyewitness and will give evidence for the prosecution. Here the prosecution must file a tendency notice which has a higher level of abstraction, alleging that A has a tendency to act in particular way, namely touch V's body in a sexual manner. A denies the offending.

  If the jury accepts B's account as supporting V's testimony, then the jury is entitled to use tendency reasoning in assessing V's testimony in respect of the other 2 incidents. It is not controversial that tendency evidence would be admitted under *Hughes* as the acts are not required to be closely similar – however, under *Velkoski* the evidence is unlikely to be admitted unless the prosecution can establish a particular modus operandi or pattern of conduct (as the acts are quite dissimilar).

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[67] See A Cossins, *The Behaviour of Serial Child Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials* (2011) 35 Monash University Law Review 821

[68] See, for example, *R v Best* [1998] 4 VR 603; *R v Papamitrou* (2004) 7 VR 373

However, here the process of inferential reasoning is still quite strong – if A has committed a particular sexual act upon V, then it is likely that he has committed other sexual acts upon V on subsequent occasions due to his proven sexual interest in V and willingness to act on that interest.

- **Example 3** – V alleges that A has sexually penetrated her vagina on 3 separate occasions with his fingers. Upon arrest, V is found in possession of pornography including images of digital penetration of female children by male adults. The prosecution files a tendency notice alleging that A has a tendency to have a particular state of mind, namely a sexual interest in female children engaged in penetrative activity. A denies the offending.

  It is unlikely that such tendency evidence would be admitted under the decision in *Hughes* and most certainly would not be admitted under *Velkoski*. However, it would be admitted as bad character evidence in England.

  The process of reasoning to preclude admission is borne out of propensity – the possession of the photographs merely demonstrates that A is the type of person who would commit the relevant crimes against V. But as demonstrated in *R v D & Ors*, the evidence should be admitted on the basis that it demonstrates that A has a particular state of mind, namely a sexual interest in the digital penetration of female children. Thus, the process of inferential reasoning is somewhat different – it is not being used to prove that he has acted on that interest, but rather that he has that interest – and that is relevant to the probability of V making a false allegation against a person who has such an interest (an interest which is highly unusual in itself).

- **Example 4** – V1 (14 year old daughter) alleges that A has sexually penetrated her vagina and fondled her breasts over a 12 month period in 2010. After she leaves the family home, V2 (8 year old son) alleges that A has engaged in mutual acts of oral sex and masturbation over a 12 month period in 2014. The prosecution files a tendency notice alleging that A has a tendency to act in a particular way and have a particular state of mind, namely a sexual interest and a willingness to act on that interest in respect of his biological children. A denies the offending.

  In short, such tendency evidence would not be admitted the decision in *Velkoski* and it is questionable whether it would be admitted under the decision in *Hughes*.

  However, the Intervener submits that the evidence should be admitted as the tendency in question is "highly unusual" in that it involves a sexual attraction to biological children – in this regard, the observation in *Velkoski* that sexual conduct between parent and child is not uncommon is untenable (put simply, the comparator used is wrong – it is not other sexual offending which provides the correct reference point but rather ordinary standards of human behaviour in the community). The difference in acts or time should not preclude the admission of such evidence – the acts are dissimilar because the genders of the victims are different; and the temporal difference is easily explicable on the basis that A seeks to maintain a sexual relationship with only 1 child at a time.

  Furthermore, absent collusion or the like, a separate strand of reasoning is also available to be deployed – namely, the improbability of multiple complainants providing false accounts as to incestuous offences.

5.80 The law should recognise that offenders often commit a variety of sexual acts and that the reception of tendency (or propensity) evidence should not be restricted to those situations in

which there is a close similarity of conduct – to do so imports a degree of unreality into the law. As Lord Mackay observed in *DPP v P*:[69]

> [W]here the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of … a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle.

5.81 In *DPP v P*, his Lordship spoke of a "sufficient connection" between the circumstances under examination – and, importantly that this relationship may take many forms. This expression is of course similar to "sufficient nexus" or "specific connexion", expressions which found favour in this Court's judgment in *Phillips v The Queen* (see para 5.11 above).

5.82 Furthermore, the use to which tendency evidence is being deployed is it is often lost in sexual offences cases – such cases invariably do not involve an issue as to identity but rather as to the occurrence of an act (or acts). Thus, whilst resort to "striking similarity" (or such epithets) are entirely appropriate in respect of an identity case, it is hardly necessary for such a high threshold in respect of proof of an occurrence of an act (where the primary proof as to occurrence is being led from a complainant and the tendency evidence is only led for the purposes of support or corroboration).

5.83 Finally, as Annie Cossins points out in her journal article, juries are more likely to embrace impermissible propensity reasoning when there are greater similarities between the proposed tendency evidence and the charged offences:[70]

> Although restricting the admissibility of tendency and coincidence evidence is based on preventing the desirable goal of impermissible reasoning by juries, arguments that justify excluding those types of evidence do not withstanding scrutiny. For example, it is assumed that juries *will not* engage in impermissible propensity reasoning when the evidence has sufficient similarity to justify its admission, but *will* do so where the dissimilarities are more marked. Logically, juries would be more likely to engage in impermissible propensity reasoning where there are *greater* similarities in the evidence of multiple complaints about a defendant's sexual conduct. [emphasis by author]

16. Conclusion

5.84 The Intervener submits that the approach adopted in New South Wales (such as in *Ford* and *PWD*) is more consistent with the statutory language and purpose of section 97 of the uniform evidence legislation than the approach adopted in Victoria (such as in *Velkoski*).

Part VI: Estimate of time for presentation of oral argument

6.1 The Intervener estimates oral argument not to exceed 1 hour.

Dated: ~~4 November 2016~~ 3 January 2017

Nanette Rogers SC – Senior Crown Prosecutor
Senior Counsel for the Intervener

Brett Sonnet – Crown Prosecutor
Junior Counsel for the Intervener

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[69] [1991] 2 AC 447, at 462

[70] See A Cossins, *The Behaviour of Serial Child Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials* (2011) 35 Monash University Law Review 821, at 860