IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S23 of 2016

BETWEEN: **ROBERT LINDSAY HUGHES**
Applicant
and
THE QUEEN
Respondent

APPELLANT'S REPLY

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PART I: It is certified that these submissions are in a form suitable for publication on the Internet.

PART II: REPLY TO THE RESPONDENT'S ARGUMENT

I. The appellant does not submit that the tendency evidence could not have significant probative value merely because the sexual acts against each complainant were different: RWS 6.2-6.3. The appellant contends that the inferential reasoning process engaged by tendency evidence, except in very rare cases, will involve operative similarity if it is to have significant probative value.

20 II. The appellant's submissions do not import common law concerns of prejudice into the interpretation of s.97 or elide the distinction between ss.97 and 101: RWS 6.8-6.9. The high evidentiary threshold articulated in the appellant's submissions derives from the terms of s.97 as it operates within the context of the *Evidence Act 1995* (NSW) (**the Act**). That threshold is consistent with the requirements of common law.

III. The respondent's submissions essentially advocate for the admission of pure propensity evidence. This is contrary to the terms and intent of s.97 and, if accepted, would deprive the protections afforded by the tendency provisions in the Act of all force and meaning.

IV. The factual analysis of probative value undertaken by the respondent at 6.52-6.59 was
30 not undertaken by the trial judge or by the Court of Criminal Appeal (**CCA**). The analysis notably fails to identify any operative similarity, or other feature of the evidence, between a number of counts that could support a process of inferential reasoning.

I. Sexual acts and operative similarity

1. The respondent mischaracterizes the appellant's argument as the tendency evidence "is said to be inadmissible because the acts were different and thus the charges should have been tried separately": RWS 6.3. The appellant's complaint is the lack of operative similarity not just the presence of dissimilarity. The dissimilarity of the acts was mentioned in the context of a number of important dissimilarities between counts including differences
40 in:

- the ages of the complainants (6-15);
- the location of the offences;
- the nature of the relationships between the appellant and the complainants;
- the manner and context in which the offending took place; and
- the spectrum of the character of the offending, ie ranging from covert and surreptitious to overtly exhibitionist.

Filed on behalf of the Applicant
Greg Walsh & Co
18 Letitia Street
OATLEY NSW 2223

Telephone: 9570 6511
Fax: 02 9570 6599
Ref: Greg Walsh

2. The trial judge and the CCA accepted that similarity was relevant to the assessment of probative value and accepted that similarity was not present in either act or circumstance between the counts. The differences were described as "obvious on their face": CCA [198]. The appellant submits that, where evidence does not gain force from similarity in fact or circumstance, some other feature or features must be present to give the evidence the significant probative value required for admission. In response the respondent asserts that s.97 does not inherently invoke similarity and notes that the text of s.97 makes no reference to similarity: RWS 6.12.

3. Similarity is intrinsically connected to an assessment of the probative value of tendency evidence because tendency evidence employs an inferential process of reasoning. Underlying that reasoning is an assumption that human behavioural traits are predictable and consistent. Tendency reasoning suggests that a person is more likely to behave in a particular way because of evidence that they have behaved in a similar way in the past. The Australian Law Reform Commission was aware of empirical evidence suggesting such assumptions are in fact of dubious reliability and highly dependent on situational consistency: RWS 6.22, ALRC [26] at 45 [796].

4. The probative value of tendency evidence lies in how persuasively it can be asserted that a person is likely to behave in a consistent fashion. Usually the argument depends upon an assumption that a behavioural trait will recur if some similarity in features, facts or circumstances activates the tendency. The similarity must be relevant or "operative". It may matter little, for example, if it is raining on every occasion upon which a certain act took place. It is very rare that a tendency argument could persuasively advance the notion of behavioural consistency without any reference to similarity whether it be in physical acts, circumstances of the conduct or the nature of offending. There are numerous judicial statements to this effect. In *Saoud v The Queen* (2014) 87 NSWLR 481 at [44] Basten JA stated tendency evidence "*almost inevitably require*[s] *degrees of similarity*". In *BP v The Queen* Hodgson JA observed "*generally, the closer and more particular the similarities, the more likely it is that the evidence will have significant probative value*" [2010] NSWCCA 303 at [108]. The statement in *Velkoski v R* [2014] VSCA 121 that "[i]*t is the degree of similarity of the operative features that gives the tendency evidence its relevant strength*" is consistent with these observations and reflects the well-known nature of tendency reasoning. The statement becomes controversial only in the absence of any apparent similarity in tendency evidence, like that adduced in the present case.

5. The respondent asserts the true question underlying admissibility pursuant to s.97 is not the extent of similarity but how the tendency evidence affects the likelihood of the existence of a fact in issue (in this case guilt of the charged acts): RWS 6.12. This inquiry is superficially consistent with the terms of the provision but elides the question of *how* the tendency evidence can make the occurrence of a fact in issue more likely. There remains the need for some foundation for the inferential process. The respondent finds that foundation in propensity reasoning.

6. At the core of the respondent's submissions is the contention that sexual attraction towards girls under 16 is a sufficiently distinct and uncommon aspect of sexual behaviour that evidence of such a tendency will significantly increase the likelihood the person with the state of mind would commit a child sexual offence: RWS 6.24-6.27. This submission ignores the vast spectrum and variety of sexual offences which can be committed against children. They include sexual offences between parent and child, between siblings, between

teachers and students and between teenagers of very similar ages. Offences can range from manipulation of very young and vulnerable children who may not have an appreciation of the conduct in question to offences against teenagers who are willing to engage in sexual activity but unable to lawfully consent.

7. Proof of one such act in this broad spectrum would not necessarily have sufficient force to demonstrate tendency to act "in a *particular* way" or have a "*particular* state of mind" let alone have significant probative value in determining whether another very distinct, and different, act in the broad spectrum occurred. Evidence that an adult consensually kissed a 15 year old girl and encouraged her to touch his penis cannot be described with the necessary specificity to assist in determining if such a "state of mind" or "way of acting" cogently increases the likelihood, to a significant degree, that he digitally penetrated the vagina of a 6-8 year old girl in entirely different circumstances.

8. Thus it is critical in offences of this nature to identify with particularity not just the state of mind but also a tendency to act on that state of mind in particular ways: AWS 63-65. It cannot be said that any attraction and any action towards any child is sufficient to vest any evidence on the spectrum of child sexual offences with significant probative value. It is the nature, quality and particularity in the act or circumstances that normally vests the evidence with significance. That is how one phenomenon can be said to bear upon another. The respondent fails to demonstrate how that connection can be drawn in the absence of similarity, pattern, modus operandi or underlying unity. The respondent's submission at 6.21 that "particularity and probative value should not be conflated" fails to appreciate the intrinsic nature in which they must be connected if inferential reasoning is to be properly employed to assess probative value.

9. The respondent's reliance on the "express textual recognition" of the relevance of state of mind in s.97 takes the expression out of context: RWS 6.45-6.46. The admission threshold posed by s.97 is a requirement that the "particular state of mind" have "significant probative value". The words "particular", "tendency" and "significant probative value" all have work to do. The particular state of mind must make the occurrence of alleged facts in issue (in this case the charged acts) more likely. As the state of mind becomes more general, the logical connection between one act and another dims and the probative value diminishes accordingly. The decision of the CCA in the present case sits uncomfortably alongside other CCA authority drawing a direct connection between the generality of a tendency and its probative value: see AWS 63 - 66.

II. The *Evidence Act 1995* (NSW) and the common law

10. The respondent suggests the appellant relies on the importation of common law concepts into the interpretation of the Act and states that it is only the combined effect of ss.97 and 101 which impose a high threshold of admission to ensure a fair trial: RWS 6.8-6.11 This submission ignores how one of the principle concerns of the common law, lack of cogency, is reflected in, and addressed by, the terms of s.97. The requirement that tendency evidence must transcend mere relevance and possess significant probative value stems from the legislature's recognition of the dangers of impermissible reasoning. It imposes a high evidentiary threshold at the initial stage of assessment to address the risk that fact finders may place undue weight on arguments which depend upon reasoning from behavioural tendencies. Professor Ligertwood suggests that s.97 reflects a legislative presumption that the reasoning underlying tendency evidence is *always* inherently suspect: AWS 55.

11. This is why the appellant respectfully endorses the statement that common law cases are "*especially apt to illuminate its legal meaning*", *El-Haddad v R* [2015] NSWCCA 10 at [66] per Leeming JA: AWS 67-73. Common law decisions are not a distraction from the statutory expression but illustrate an established pathway for demonstrating how evidence based on inferential reasoning can reach the high threshold imposed by both common law and statute. The cases are of guidance because the same inferential reasoning process underlies tendency evidence and similar fact evidence, *ACCC v CC (NSW) Pty Ltd (No 8)* [1999] FCA 954; (1999) 92 FCR 375, 401 [101].

12. The terms of s.97 are stringent on their face. The provision:

- creates, with s.95, a default presumption against the use of all tendency evidence;
- applies to all criminal and civil proceedings;
- is not limited to trial by jury but also applies to proceedings by judge alone;
- requires that the probative value of the evidence transcend relevance;
- requires that the evidence have "significant probative value"
- requires that the significant probative value threshold be reached irrespective of the prejudicial effect of the actual evidence; and
- requires the moving party to articulate the particular tendency and the evidence said to support the tendency well in advance of the trial. (AWS 53-57).

13. The contention that the object of s.97 is to "permit and provide for" tendency evidence if certain conditions are met (RWS 6.9) diminishes the significance of these textual features, particularly in the context of the statutory structure: see AWS 53-58. The differences between the tests imposed by common law and statute do not support any submission that pure propensity evidence is admissible in the statutory regime.

III. Advocating for propensity evidence

14. The respondent is asserting that tendency evidence demonstrating an attraction to girls under the age of sixteen and a willingness to act on that attraction is sufficient to meet the threshold imposed by s.97. In other words, the respondent is advocating for the admission of propensity evidence, a disposition to commit a "*crime of a particular kind*", *Sutton v R* (1984) 152 CLR 528, per Gibbs CJ at [5]. It is accepted that the submissions are confined to s.97 of the Act and, at least in criminal trials, s.101 can operate to exclude the evidence. However, if the respondent is correct, to succeed in a challenge to its admission, the evidence of unlawful sexual disposition would need to demonstrate some special prejudicial quality, beyond the prejudice inherent in the admission of all evidence of sexual misconduct. How an accused might demonstrate incurable prejudice in such cases is a matter of ongoing controversy, see *BC v R* [2015] NSWCCA 327. The ultimate effect of the respondent's submissions is a practical presumption in favour of joint trials of all allegations of sexual misconduct towards underage people and the cross-admissibility of all evidence alleging an accused acting on an unlawful sexual interest. This is a radical submission, contrary to common law experience and the clear legislative intention underlying the Act: AWS 57-58.

IV. Application to the present case

15. The respondent's factual analysis at 6.52 to 6.58 is precisely the kind of individualised assessment of probative value the appellant advocates. It examines, albeit to a limited extent, how the tendency evidence advanced specific trial issues. This process was not undertaken at all by the trial judge or by the CCA. The evidence was admitted after a compendious analysis of all counts, uncharged acts and the evidence of tendency witnesses.

16. It is true that there were features of each complainant's account which might, in isolation, be "viewed with caution": RWS 6.53, 6.55, 6.56. Implicitly the respondent acknowledges that the tendency evidence ameliorated that caution. The question remains whether that was legitimate, or whether the use of propensity reasoning illegitimately bolstered the case.

17. The analysis of JP's and SH's evidence refers to features of operative similarity between the counts: a bedroom; the occasion of a sleepover; the presence of adults nearby; and the level of risk. These features may not be determinative but could properly be considered in assessing the probative value of the evidence under the approach advocated by the Victorian Court of Appeal[1]. But the respondent omits any mention of the significant age discrepancy between the complainants. SH was said to be 6-8 and JP was 14-15.

18. At RWS 6.65 the respondent relies on similarities between the evidence of BB, VOD and MOD to undermine any suggestion that the accounts were unlikely or implausible. Again the analysis omits features of difference. For example, VOD did not even assert that she was touched in a sexual manner. The prejudicial effect of this evidence is obvious but the probative value is tenuous.

19. The analysis is notable for other omissions. There is no reference to the relevance of the evidence of EE, the 15 year old complainant who engaged in limited consensual sexual activities in her driveway and a public park. The respondent does not articulate how her evidence could significantly advance the probability that the appellant assaulted AK, another complainant aged 9 who is not mentioned by the respondent. The same is true of SH and of SM. The absence of any similarity, unifying feature, pattern or commonality inhibits the analysis, resulting in reliance only the generalised tendency to engage in child sexual offences with girls in a variety of circumstances: RWS 6.57. The problem works in the opposite direction as well. The evidence of SH, AK and SM does not significantly impact upon the likelihood of the assault upon EE.

20. SM raises particular issues. The offence against her was very different in nature and occurred in a very different context. Her account was supported by tendency evidence from three adult women. The jury were directed that their evidence was relevant only to SM's count but were not given any direction forbidding any reliance on the tendency witnesses for the remaining counts. In any event, the evidence of SM was cross-admissible to all the other counts despite the lack of similarity. Accordingly, the evidence of the three adult women was able to bolster the prosecution case by strengthening the evidence of SM[2].

Dated: 11 November 2016

Phillip Boulten
Forbes Chambers
P: (02) 9390 7777 F: (02) 8988 8568
r.coliero@forbeschambers.com.au

Kirsten Edwards
Forbes Chambers

[1] See, for example, *Luke Page (a pseudonym) v The Queen* [2015] VSCA 357
[2] The evidence relating to SM raised particular issues under s.101 which are outside the grant of leave.