**IN THE HIGH COURT OF AUSTRALIA**

**SYDNEY OFFICE OF THE REGISTRY** **No. S 23 of 2016**

**B E T W E E N:** **ROBERT LINDSAY HUGHES**

Appellant

**and**

**THE QUEEN**

Respondent



# RESPONDENT'S SUBMISSIONS

## Part I: Publication

1. This submission is in a form suitable for publication on the internet.

## Part II: Concise statement of issues

2. Is it necessary in order for tendency evidence to have significant probative value within the meaning of s 97 of the *Evidence Act 1995* (NSW) for the sexual acts committed against more than one child to be sufficiently similar as to reveal 'underlying unity', 'pattern of conduct' or 'modus operandi'.

## Part III: Section 78B of the *Judiciary Act*

3. It is certified that this appeal does not raise a constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903* (Cth). No such notice is required.

## Part IV: Statement of contested material facts

4. 1 The respondent does not contest the appellant's outline of the facts of the offences in the appellant's written submissions ("AWS") [9] – [15], other than the following apparent typographical errors:

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(i) count 10 in relation to EE was an offence under s 61E(2) of the *Crimes Act 1900* (NSW) and not s 60E(2) of the *Crimes Act* (AWS at [12]);

(ii) count 11 in relation to SM occurred when SM was 12 or 13 years of age (as stated in the third sentence, not 16 years of age, as stated in the first sentence) (AWS at [13]).

4. 2 The appellant asserts that there was no indecent exposure involved in the charges involving SH nor an attempt to make SH come into contact with his penis (AWS [24]). The correct position is as described at AWS [10] that those offences involved making SH masturbate him to ejaculation, so there was clearly an indecent exposure and contact with his penis.

4. 3 The appellant also contends that there was an inconsistency in the tendency directions in relation to VOD and BB where different tendencies were specified in relation to each witness (AWS [16]). The tendency directions applied to all of the complainants and the three tendency witnesses. The tendency was described at SU 34 – 35. There was no distinction made as to the application of that tendency to the evidence of those eight witnesses.

4. 4 In relation to VOD, his Honour referred to those directions and stated that he did not intend to repeat them (SU 90.25). Accordingly, the tendency was referred to briefly as "the tendency of the accused to act in a particular way" (SU 90.40). It is true that at one stage his Honour referred to the tendency to act in a particular way "in particular by exposing his naked penis and genitalia" but that was in the context where he had referred to the earlier directions. His Honour had plainly conveyed that the tendency relied on was the tendency already described in the summing up and the written directions.

4. 5 In relation to BB, his Honour did not repeat the full tendency directions and again referred to the tendency briefly as the tendency to act with a particular state of mind, that is, that he had a sexual interest in females under the age of 16 and acted in a particular way (SU 185.60).

4. 6 The appellant refers to some communication between SM and AK after the allegations became publicised in March 2010 (AWS [6]). The offences occurred

between 1984 - 1990. The five complainants each reported the assaults at about that time and well before the media attention began in 2010.

4. 7 JP first complained to her mother in 1985 – 86, several months to a year after the last incident (T247.5). JP made further complaints to her boyfriend when she was 16 (between 1986 – 87) and her best friend (T248.25).

4. 8 SH first complained to her mother and father, when she was seven or eight years old, in 1985 – 86 (T354.25). The allegations were reported to the family paediatrician and to Chatswood Police at that time (T398.15 and T388.45). SH also told a friend and her boyfriend (T354 - 355).

4. 9 AK first complained to her mother the day after she got home from the appellant's house after the last incident in 1987 or 1988 (T482.5).

4. 10 The allegations of sexual assault made by both SH and AK were reported to the Department of Youth and Community Services in 1986 (T447.30 and T448.10). The allegations were also reported to the school the appellant's daughter attended in 1988 (T801.5, 831.40) and to police (T486.33, 624.45). AK also reported the matter to police in Queensland in 1999 or 2000 (T486.45).

4. 11 EE told her then boyfriend in 1989 - 1991 (T717.40, 774.5), and another friend in 1991 (T718.5, 758.10).

4. 12 SM reported the act of indecency immediately after it occurred in 1990 (T845.40).

4. 13 The appellant was also aware of these allegations well before 2010.

4. 14 JP's mother confronted the appellant at her home about JP's disclosures in 1985 - 6. She said the appellant had no reaction (T298.45). He did not deny it and he did not admit it (T299.10).

4. 15 SH's mother raised the issue with the appellant's wife, saying, "Keep your husband away from my kids" to which the appellant's wife replied, "Oh we'll have to get him help" (T399.10). AOD also spoke with the appellant's wife in 1986 about the allegations of abuse against SH to which she replied, "[t]hat's ridiculous, Robert would not do a thing like that" (T1892.5).

4. 16 The appellant and his wife denied that they were informed of the allegations at that time. The appellant's wife gave evidence that all she knew about any allegations relating to SH was from a friend and neighbour who told her that SH claimed to have seen a penis at the appellant's house. That was the extent of it and there was no allegation of sexual assault (T1742.10). The applicant also said the allegation had something to do with seeing a penis at his house (T1482.1). The appellant explained to police at the time that SH may have seen a picture of a penis in a sex education book while at his house. The matter was taken no further (T1483.10). He denied that JP's mother ever confronted him about sexually assaulting JP (T1476.23).

4. 17 The appellant's wife acknowledged that SH's mother had been a very good friend of hers and that they ceased all contact soon after the allegations were disclosed but she said that had nothing to do with any conduct of the appellant. She said SH's mother made sexual advances to her while on a boating holiday, "stroking me and caressing me" (T1778.23) which she was not comfortable with so she decided "to pull back on the relationship" and not see them so frequently (T1779.10).

## PART V: Applicable legislative provisions

5. The appellant's list of legislative provisions is accepted. In addition, the respondent refers to s 29 of the *Criminal Procedure Act* 1986 (NSW).

## PART VI: Statement of Argument

### Fact in issue

6. 1 The fact in issue was whether each of the individual offences occurred. There was direct evidence of the sexual acts and that it was the appellant who had committed those acts. There was also complaint evidence of each of the complainants supporting their accounts. In this context, the tendency evidence was adduced to support the accounts of each of the complainants[1].

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[1] ***IMM v R*** [2016] HCA 14; (2016) 330 ALR 382 at [62].

6. 2 The appellant contends that his sexual attraction to young girls and his willingness to act on that attraction did not significantly support the girls' accounts because he committed different acts with each of the eight girls.

6. 3 The tendency evidence in the present case is said to be inadmissible because the acts were different and thus the charges should have been tried separately, as in ***Velkoski***,[2] where 16 charges against three children were separated so that only seven of those charges were held by the Victorian Court of Appeal to be cross-admissible (AWS [27], [74] – [78]). It was held that those charges were cross-admissible because they involved the same act, namely encouraging the children to touch the appellant's penis (***Velkoski*** [181]). Because the other nine charges involved different sexual acts, they "did not possess any distinctive or similar feature" necessary for admission (***Velkoski*** [184]).[3]

6. 4 The appellant contends that in order for evidence of acts against multiple complainants to have "significant probative value" under s 97, the acts must reveal an 'underlying unity', 'pattern of conduct' or 'modus operandi': "It is the degree of similarity of the operative features that gives the tendency evidence its relative strength" (***Velkoski*** [174]) (AWS [27], [48], [63] - [66]). For the reasons outlined below, it is submitted that this construction of s 97 is not correct.

**The *Evidence Act***

6. 5 In contrast to the position at common law, which often elided the concepts of "propensity evidence" and "similar fact" evidence,[4] the *Evidence Act* makes

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[2] ***Velkoski v R*** [2014] VSCA 121; (2014) 45 VR 680.

[3] Presumably, on a joint trial, the new jury would thus be presented with a false account that the only acts committed against the three children were that the offender encouraged them to touch his penis. That compartmentalisation was only avoided in the first trial because the defence consented to all the evidence being admitted (***Velkoski*** [186] – [187]). However, without such a concession, any act not sufficiently distinctive and similar is said to be inadmissible.

[4] N. Williams, J. Anderson, J. Marychurch and J. Roy, *Uniform Evidence in Australia* (2015), at Pt 3.6-5).

separate provision for the admission of tendency evidence and coincidence evidence and clearly provides for the admissibility of both forms of evidence.[5]

6. 6 Furthermore, in contrast to the position at common law, the Act also provides for the separate assessment of probative value and prejudicial effect. Section 97 addresses only the probative value of the evidence. The assessment of the prejudicial effect of the evidence and whether the probative value substantially outweighs that prejudicial effect are to be assessed at the s 101 stage.

6. 7 The structure of s 97 mirrors Lord Herschell's "canonical statement"[6] concerning the admissibility of similar fact evidence in ***Makin v Attorney General for New South Wales***,[7] which began with a statement of general exclusion followed by limited exceptions. Professor Hoffman described the *Makin* formulation as a "lucid antithesis". However, being an antithesis, there was an unavoidable tension between the stated principles. As Professor Hoffman pointed out, the formulation was "wrong" as a general rule of exclusion because there were many instances of propensity evidence and when, after ***Boardman***, admission came to depend on the degree of probative value, the presumption of exclusion was overturned[8].

6. 8 The presumption of exclusion at common law was not because propensity evidence lacked probative force but because of fundamental policy considerations[9] concerning the erosion of the presumption of innocence[10] and the danger of unfair prejudice to the accused. The rule of exclusion "undermined"[11] the ordinary rule that relevant evidence was admissible.

6. 9 Common law concerns about the prejudicial effect of tendency evidence cannot be imported into the opening statement of exclusion in s 97 because s 97 does

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[5] In ***Perry v R*** (1982) 150 CLR 580 it was said that evidence relevant only because of propensity reasoning was inadmissible.
[6] L H Hoffman *Similar Facts after Boardman* (1975) 91 Law Quarterly Review 193 at 195. There was extended reference to Hoffman's article in the judgment of Gibbs CJ in ***Sutton v The Queen*** (1983-84) 152 CLR 528 at 534.
[7] [1894] AC 57.
[8] L H Hoffman *Similar Facts after Boardman* (1975) 91 Law Quarterly Review 193 at 197.
[9] ***Perry v The Queen*** (1982) 150 CLR 580 at 585; *Cross on Evidence*, 10th Aust ed (2015) at 715 [21020].
[10] ***Perry v The Queen*** (1982) 150 CLR 580 at 585, 593 -5; ***Sutton v The Queen*** (1983-84) 152 CLR 528 at 545, 557 – 8, 562.
[11] *Cross on Evidence*, 10th Aust ed (2015) at 715 [21020].

not address the prejudicial effect of tendency evidence.[12] The prejudicial effect of the evidence is addressed in the separate threshold to admission in s 101. The *Makin* formulation was designed to prohibit propensity reasoning in other than residuary or exceptional categories, generally confined to cases where the evidence was "relevant in some other than the prohibited way"[13], "otherwise than via propensity"[14]. In contrast, the object of s 97 is to permit and provide for tendency reasoning. The conditions of admission are notice and significant probative value.

6. 10 The Australian Law Reform Commission regarded the combined operation of ss 97 and 101 as expressing "a general rule" that evidence relevant merely to show propensity was not admissible, yet where the evidence was relevant "because" it showed a tendency or propensity, "it should be admitted and used for that purpose"[15].

6. 11 The combined effect of ss 97 and 101 is that the probative value of propensity evidence must be sufficiently high to overcome the prejudicial effect. Together the two provisions impose a high threshold of admission. However, the separate assessment of probative value in s 97 and of prejudicial effect in s 101 should not be elided. The assessment of tendency evidence at the s 97 stage does not import considerations of prejudicial effect. It does not require that the degree of probative value be such as to outweigh the prejudicial effect[16].

6. 12 Contrary to the appellant's submission, s 97 does not "inherently invoke" similarity (AWS [62]). Coincidence reasoning under s 98 addresses similarities between events and the improbability of such events occurring coincidentally.

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[12] It might be more correct to say that s 97 indirectly reflects those concerns by making the threshold of admissibility greater than mere relevance. The higher standard of "significant" probative value obviously reflects concerns about the prejudicial effect of such evidence but s 97 does not in terms address prejudicial effect.

[13] ***Sutton v The Queen*** (1983-84) 152 CLR 528 at 533; ***Perry v The Queen*** (1982) 150 CLR 580 at 585. ***Perry*** and ***Sutton*** were the then very recent High Court authorities which were discussed in the Australian Law Reform Commission Reports.

[14] ***Perry v The Queen*** (1982) 150 CLR 580 at 586.

[15] Australian Law Reform Commission, *Evidence*, Report No (38), (1987) at 100 - 101 [176].

[16] In ***Velkoski*** at [164] the Court of Appeal stated that "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". That may be true of the combined operation of ss 97 and 101 but it appears to elide the separate assessments by transposing considerations of prejudicial effect into the assessment of probative value at the s 97 stage.

Reflecting the logic inherent within such reasoning, s 98 requires the court to have regard to "any similarities in the events or the circumstances in which they occurred". In contrast, tendency reasoning under s 97 addresses the degree to which a particular tendency or a particular state of mind affects the likelihood of the existence of the fact in issue. Reflecting this fundamental difference in the nature of the inferential task, the text of s 97 makes no reference to similarity.

6. 13 The degree to which a particular tendency or state of mind affects a person's actions will largely depend on the psychological impact of the propensity on the person's behaviour; the strength of the urge, the willingness to act on it and the person's desire and capacity to resist it. Situational factors are also likely to be important. The distinctiveness of the acts committed does not necessarily indicate likelihood to act on any particular occasion.

6. 14 Distinctiveness, 'underlying unity', 'pattern of conduct' or 'modus operandi' may be important to distinguish one offender from another, of which ***Sutton*** is a typical example. The similarities in the circumstances of each of the three rapes had to be sufficiently distinctive to establish that all of the offences were committed by the one person. Once it was established that the one person committed all three sets of offences, evidence of guilt on one offence could be used in proof of all charges[17]. But, where there is no question as to identification and the evidence is not adduced for the purpose of distinguishing the offender, the presence or absence of distinctiveness or a 'pattern of conduct' do not necessarily retain the same relevance for all issues.

6. 15 The distinctiveness of particular acts may also be significant in establishing the unlikelihood of coincidence, which is a separate reasoning process from tendency reasoning. In the ***Velkoski*** example, there is no reason to presume that the tendency to encourage children to touch his penis was a tendency more likely to be acted on than the tendency to sexually assault children in variety of

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[17] ***Sutton v The Queen*** (1983-84) 152 CLR 528 at 552.

ways. In other words, there is no reason to presume that the narrower the sexual repertoire the more likely it is to be repeated on any particular occasion.

6. 16 In reality, ***Velkoski*** proceeded on a false premise. The true tendency was to sexually assault children at the day care centre in a variety of ways. That evidence was excluded and only evidence that the appellant encouraged children to touch his penis was permitted to be adduced. The new jury would presumably be presented with evidence of that false tendency and directed that they may use it to reason to guilt.

6. 17 Distinctiveness and similarity may have particular relevance to some tendencies but in relation to human sexual behaviour it is artificial to expect that the same or very similar sexual acts will be repeated on every occasion with different complainants, or even the same complainant[18]. The reported cases demonstrate that sexual behaviour usually comprises a variety of acts. The present case, and ***Velkoski***, are typical examples.

6. 18 The joinder of counts is also governed by s 29 of the *Criminal Procedure Act* 1986 which allows offences of the same or similar character to be heard together. The trial judge has a discretion to separate the counts if the evidence of the offences against each complainant ware not cross-admissible[19] (Judgment on Admissibility of Tendency Evidence 14/2/14 p 55).

6. 19 The further error in making distinctiveness or 'pattern of conduct' the determinative criterion of probative value is that it conflates two separate concepts in s 97, namely particularity and significant probative value.

**Particularity**

6. 20 Section 97 applies to evidence of a tendency to act in a particular way or have a particular state of mind. Although the Act does not define what is meant by "particular", the context and text of the provision clearly indicates that the

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[18] ***IMM v R*** [2016] HCA 14; (2016) 330 ALR 382 at [178], per Gageler J.
[19] ***Sutton v The Queen*** (1983-84) 152 CLR 528 at 531, 544: ***Mac v R*** [2014] NSWCCA 24 at [20] – [33].

distinction is between evidence of general character or disposition and evidence of a more particular propensity or state of mind.

6. 21 Particularity and significant probative value should not be conflated. Contrary to the appellant's submission (AWS Statement of Issues IV, at [64], [77]), s 97 does not equate particularity and probative value such that the degree of particularity determines the degree of probative value.

6. 22 Wigmore argued that there is just as much probative force in reasoning from evidence of bad character that a person is likely to have committed an offence as there is in reasoning from evidence of good character that a person is therefore unlikely to have committed an offence. The law has long allowed reasoning from good character but has artificially restricted reasoning from bad character[20]. The distinction is not based on probative value but "reasons of policy and humanity"[21]. On the other hand, the Australian Law Reform Commission considered that general bad character is of little value as a predictive tool of human behaviour[22].

6. 23 The limitations of general character evidence were illustrated in ***R v Rowton*** by Wiles J who commented that if evidence of general bad character were allowed, the prosecution could, on a trial for murder, adduce evidence that the accused had robbed an orchard as a boy, and so on, throughout his whole life[23].

6. 24 A sexual attraction to children with a willingness to act on that attraction is plainly more pertinent to charges of sexual offences against children, than stealing an apple is to a charge of murder. On a trial for sexual offences against children, a sexual attraction to children and a willingness to act on that attraction constitutes a sufficiently particular tendency or state of mind. It is clearly distinguishable from, and more specific than, evidence of general character.

6. 25 In ***Velkoski*** the Court of Appeal held that sexual conduct between a parent and child, or teacher and pupil, are "not so uncommon" and "some other features of

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[20] **Wigmore**, *Evidence in Trials at Common Law*, Chadbourn rev (1979), vol 2, §57 at 1180 - 1.
[21] ***R v Rowton*** (1865) 169 E.R. 1497 at 1506.
[22] Australian Law Reform Commission, *Evidence*, Volume 1, Report No (26) Interim, (1985) at 45 [797].
[23] ***R v Rowton*** (1865) 169 E.R. 1497 at 1506.

similarity must be present" for the evidence to be admissible as tendency evidence (at [168]). It is not clear on what basis the Court of Appeal determined that sexual conduct between a parent and child is "not so uncommon". In ***R v Hanson***[24], it was accepted that child sexual abuse is "a comparatively clear example" of "unusual behaviour"[25].

6. 26 Indeed, the conclusion of the Court of Appeal in ***Velkoski*** that sexual conduct between a parent and child or teacher is "not so uncommon" and that "some other features of similarity must be present" appears to invoke the argument rejected by the House of Lords in ***DPP v P*** that "some feature of similarity" beyond "the pederast's or incestuous father's stock in trade" was required[26]. The House of Lords held in ***DPP v P*** that features beyond the pederast's stock in trade were not essential in all cases. They may be critical to the issue of identity for the purpose of distinguishing the offender from other possible offenders, but such requirements cannot be transposed to other situations where different issues arise[27].

6. 27 For the purposes of distinguishing between general character and a tendency to act in a particular way or have a particular state of mind, sexual attraction to children and a willingness to act on that attraction is a particular tendency within the meaning of s 97. Whether or not such a tendency has significant probative value in an individual case is a separate issue and to be determined in light of the other evidence in the case and the intended use of the evidence.

**Probative value**

6. 28 Probative value is defined in the Dictionary to the *Evidence Act* as "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue". The addition of the word "significant" produces a definition of "significant probative value" as meaning that "the

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[24] [2005] 2 Cr App 21.
[25] See similarly ***Phipson on Evidence*** (2015 supplement) [19-31] (which refers to the "judicial view ... that paedophilic activities and attitudes are both persistent and exceptionally unusual").
[26] ***DPP v P*** (1991) 2 AC 447 at 461B.
[27] ***DPP v P*** (1991) 2 AC 447 at 462E.

evidence could rationally affect the assessment of the probability of the existence of a fact in issue" to a significant extent.

6. 29 The assessment of whether evidence is "significantly" probative is an assessment that requires a blend of logic, experience and common sense[28].

6. 30 Most importantly, the probative value of tendency evidence depends on the use for which the evidence is adduced in the particular circumstances of the case[29]. In *Cross on Evidence*, it is said that the probative force of the evidence "needs to be particularly strong" where there is no direct evidence of the commission of the act constituting the offence, whereas, it "need not be so strong" where there is direct evidence of the charged act[30].

6. 31 That is, where there is no, or insufficient, evidence to prove the acts or the identity of the offender, and tendency evidence is sought to be admitted to establish those facts, the inferential requirements will be greater than in circumstances where there is direct evidence to establish the facts and the tendency evidence is adduced for the purpose of corroborating that direct evidence. For this reason, s 97 requires the court to consider whether 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" (emphasis added).

6. 32 That is not to suggest that the degree of probative force is dependent on the issue to which the evidence relates, such that evidence to prove the charged act requires greater probative force than evidence adduced to prove other facts in issue. The need for greater probative force arises because the absence of other evidence on the issue leaves the inferential burden to be borne by the tendency evidence alone.

6. 33 For example, in ***Ball***, there was no direct evidence that intercourse occurred on the specified dates so the evidence of "guilty passion" had to establish that

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[28] ***DPP v Boardman*** [1974] 1 WLR 678 at 690 - 691.
[29] ***The Queen v Pfennig*** [1995] HCA 7; (1995) 182 CLR 461 at 485; ***IMM v R*** [2016] HCA 14; (2016) 330 ALR 382 at [62], [103].
[30] *Cross on Evidence*, 10th Aust ed (2015) at 749 [21170].

intercourse occurred "on or between the dates charged"[31]. Had there been direct evidence from the sister or brother that intercourse occurred at those times, it would not have been necessary for the tendency evidence to establish those acts. In that context, the "guilty passion" evidence would clearly have been admissible to support the direct account.

6. 34 Similarly, in ***Martin v Osborne***,[32] in the absence of direct evidence that Osborne was conducting an unlicensed bus service on the specified day, the pattern of conduct over the preceding two days had to be capable of proving that he was carrying passengers for reward. Had there been direct evidence from a passenger that a fare was charged, the probative force of the pattern of conduct would lie in its capacity to support the passenger's account and would be plainly admissible on that basis.

6. 35 In each case, the features of the similar fact evidence would be the same, but the inferential task, and the capacity of the evidence to fulfil that task, would have changed because of the additional evidence in the case.

6. 36 Wigmore points out that evidence which may seem insignificant in itself may be crucial, depending on the other evidence in the case: "[f]irst, a piece of evidence, seemingly insignificant in itself because of its slight probative value, may be very significant in the light of other evidence adduced in the case. Other evidence may establish a fact in issue to some degree of probability that closely approaches but does not yet meet the standard of probability required by law, and a single piece of evidence, of slight probative value in and of itself, may be sufficient to tip the balance in the proponent's favour."[33]

6. 37 Justice Brennan made the same point in ***Sutton*** using the metaphor of a mosaic to show that a piece of similar fact evidence, apparently insignificant in isolation, may assume considerable importance in the context of the other evidence[34].

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[31] ***R v Ball*** [1911] AC 47 at 71. Proof of that fact also relied heavily on the fact that they lived together and slept in the same bed.
[32] ***Martin v Osborne*** (1936) 55 CLR 367.
[33] **Wigmore,** *Evidence in Trials at Common Law*, Chadbourn rev (1979), vol 2, § 37.4 at 1033; ***IMM v R*** [2016] HCA 14; (2016) 330 ALR 382 at [45].
[34] ***Sutton v The Queen*** (1983-84) 152 CLR 528 at 550.

6. 38 Thus probative value is not a quality which inheres in evidence. It is not conferred by virtue of particular features, such as similarity or distinctiveness; it varies according to context and use.

6. 39 This is a fundamental error in the ***Velkoski*** approach. It proceeds on the assumption that probative value lies in the "features of the acts relied upon" (at [171]): "[i] t is the degree of similarity of the operative features that gives the tendency evidence its relative strength" (at [171]). On this view, similarity confers probative force and dissimilarity diminishes probative force (AWS [27], [48](ii)). Thus, to assess probative value, it is "necessary" to identify "the strength of the features of the acts relied upon" (***Velkoski*** [166]) (AWS [47]) and "apposite and desirable" to assess whether those features reveal 'underlying unity', a 'pattern of conduct', 'modus operandi' or 'such similarity' as to make the occurrence of the charged acts more likely (***Velkoski*** [171]).

6. 40 Such general formulae cannot be determinative for all contexts and purposes. The determination of probative value requires an individual assessment based on the circumstances of the particular case. Even common law cases concerning the admission of similar fact evidence accepted that "[i]n the almost infinite variety of cases where similar fact evidence is offered in proof of a fact in issue, it is not possible to enunciate a formula which, attributing particular weight to each of the factors which might give probative force to the evidence, determines its admissibility"[35]. Evidence which may have little probative force for one purpose may be critical for another.

6. 41 The assessment to be performed under s 97 requires that the court identify the fact in issue and how the evidence is probative of that fact when taken together with the other evidence. That is an individual assessment, which is why the probative value of tendency evidence does not necessarily depend on 'similarity' or 'pattern of conduct', or 'underlying unity'; it lies in the capacity of the evidence to advance or refute the issue to which it is directed in the context of the other evidence in the case[36].

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[35] ***Perry v The Queen*** (1982) 150 CLR 580 at 610.
[36] ***Sutton v The Queen*** (1983-84) 152 CLR 528 at 549; ***R v Handy*** [2002] 2 SCR 908 [76]; (2002) 164 CCC(3d) 481 at 501 [69]-[80].

6. 42 This is not to say that 'similarity' or 'pattern of conduct' or 'underlying unity' are of no relevance, or to be "removed[37]" or "put to one side"[38], only that they are not the exclusive or determinative criteria of probative value (CCA [182] – [183]). Distinctiveness may be of "practical assistance"[39] but it is "not the only indication" of probative force[40].

6. 43 Indeed, other factors such as the number of occurrences; the proximity in time between the acts; the number of persons making allegations; and whether there are any intervening events (such as whether the propensity may have been resolved by treatment) may be relevant to the assessment of probative value, depending on the context and use and the purpose for which the evidence is tendered[41].

6. 44 It is also necessary to consider the particular tendency alleged in an assessment of whether tendency evidence is "significantly probative". As outlined above, similarity may be relevant to some tendencies or states of mind, but not in respect of others. Sexual attraction, whether to a particular person or to a particular class of persons (such as children), is a kind of tendency that will not necessarily manifest itself in the same place and manner on each occasion. Rather, "sexual attraction [may be] fulfilled or sought to be fulfilled on different occasions by different sexual acts of different kinds"[42].

6. 45 Another difficulty with the focus on the features of the acts is that it fails to have regard to the tendency to have a particular state of mind for which s 97 expressly provides. The sexual attraction to children and the willingness to act on that attraction constitutes a particular state of mind. Offences against children are more likely to be committed by people with that particular state of mind.

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[37] ***Velkoski v R*** [2014] VSCA 121; (2014) 45 VR 680 at [164].
[38] ***Velkoski v R*** [2014] VSCA 121; (2014) 45 VR 680 at [120].
[39] ***Sutton v The Queen*** (1983-84) 152 CLR 528 at 535.
[40] ***Sutton v The Queen*** (1983-84) 152 CLR 528 at 549.
[41] ***R v Handy*** [2002] 2 SCR 908; (2002) 164 CCC(3d) 481 at [76]; ***R v Hanson*** [2005] 2 Cr App R 21; s. 43(3) of the *Evidence Act* 2006 (NZ).
[42] ***IMM v R*** [2016] HCA 14; (2016) 330 ALR 382 at [178], per Gageler J.

6. 46 In ***Velkoski*** it was held that "such a state of mind discloses only rank propensity", and is "impermissible, highly prejudicial and unnecessary"[43]. It is not clear whether the Court of Appeal was referring to sexual interest in "particular victims" or to a sexual interest in children generally. The facts of ***Velkoski*** involved three children. The Court held that referring to state of mind "divert[s] the jury from focusing on the extent to which the similar features of the previous acts render the occurrence of the offence charged more likely",[44] which suggests that the exclusive focus is to be on the acts and reference to the state of mind is of no additional value and is impermissible. Such an approach is inconsistent with the express textual recognition of the relevance of "state of mind" in s 97 of the *Evidence Act*.

**The present case**

6. 47 In the present case, there was direct evidence sufficient to establish the offences. The tendency evidence was not required to have the capacity to prove the alleged acts nor to prove that those acts were committed by the appellant. Features such as distinctiveness (which may be necessary to establish identity), or evidence of system or conduct (which may be essential to prove that the act occurred), were not required. The probative force of the evidence lay in its capacity to provide significant support for the accounts of the complainants. As the trial judge directed "[t]hat is, if you were satisfied that the accused did have the particular tendency argued by the Crown, then that may lend support to the evidence of the complainant[s] who are the subject of specific charges on the indictment" (SU 37.15).

6. 48 The only issue in contention for each count on the indictment was whether the complainants were truthful in their accounts of the appellant's conduct towards them as children. The appellant contended that each allegation was a fabrication and that the prosecution witnesses could not be believed.[45] It was not suggested that the complainants had consented to the appellant's conduct

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[43] ***Velkoski v R*** [2014] VSCA 121; (2014) 45 VR 680 at [173].
[44] ***Velkoski v R*** [2014] VSCA 121; (2014) 45 VR 680 at [173].
[45] CCA judgment at [102].

(cf ***Phillips***),[46] nor, given the ages of the complainants at the time of the alleged conduct, could such a suggestion have been made.

6. 49 If accepted, the tendency evidence in the present case was capable of demonstrating that the appellant was sexually attracted to female children under the age of 16 years and that he was prepared to act on that attraction. In this sense, the tendency evidence was relevant both to the applicant's state of mind and his conduct.

6. 50 The assessment of the probative value of the evidence is a question of logic, common sense and experience. The tendency in question, that of a sexual attraction to female children, is a tendency which is both unusual and persistent. The tendency to act on that attraction is also the kind of tendency which may be expected to manifest itself in different ways and in different places. As the Court of Criminal Appeal ("CCA") found:

> "... the conduct alleged was sexual in nature, directed towards young females, on occasions that presented themselves to the applicant. Underlying the similarity was that the conduct was, in effect, referable to the circumstances as they presented to the applicant. In short, the conduct occurred opportunistically, as and when young female persons were in the applicant's company."[47]

6. 51 The tendency evidence had significant probative value. It included the evidence of the five complainants and three tendency witnesses (VOD, AA and BB), each of whom gave evidence, independent of the others (they had each independently complained as children),[48] that the appellant had acted upon his sexual attraction to them when they were children. At all times, the appellant was a mature adult.

6. 52 The tendency evidence was plainly capable of providing significant support for the evidence of the complainants. For example, JP said the appellant came into her bedroom one night after a dinner party. The appellant's daughter was asleep next to her in a single bed and her parents and the other adults were in the house. The appellant rubbed the inside of her vagina and clitoris (T238.30).

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[46] ***Phillips v The Queen*** [2006] HCA 4; (2006) 225 CLR 303.
[47] CCA judgment at [199].
[48] CCA judgment at [41].

The appellant said nothing (T239.7) but licked her cheek as he left (T239.17) (count 1). JP said that a similar incident occurred a month or two later, again after a dinner party at her house (T243.30) (count 2).

6. 53 Viewed in isolation, JP's account might be viewed with caution. The appellant had known JP and her family for years and picked a particularly inopportune moment to commit this sexual assault. The risk was enormous and exacerbated by the fact that he made no attempt to enjoin her to secrecy.

6. 54 In SH's case the sexual assault also took place during a sleepover. SH said the appellant came into his daughter's bedroom and made SH masturbate him to ejaculation and rubbed the semen on her vagina (T 350.15) (counts 3 – 6). His daughter was asleep in the adjoining bed and his wife was in another room.

6. 55 Viewed in isolation, SH's account may have been viewed with caution. The appellant committed an opportunistic assault not knowing how SH would react. His wife was in the house, his daughter asleep nearby and he made no attempt to enjoin SH to secrecy.

6. 56 BB said that the appellant touched her breast under her clothes and played with her nipple while she was using the computer at a family celebration at his house (T1403.25). VOD said that while she was at sleepovers at the appellant's house, the appellant came into the bedroom at night and walked around the house naked (T412.40). MOD said that during a visit to her house, the appellant was with her in the pool and kept swimming up to her and touching her breasts and vagina (T1345.30). Again, each of these occasions, viewed in isolation, may have been viewed with caution.

6. 57 The fact that the appellant had a sexual attraction to female children and was willing to act opportunistically on that attraction was plainly very significant in assessing the individual accounts. The fact that the appellant did not repeat the same or similar act on every occasion and with every complainant did not deprive the evidence of probative value in the circumstances of this case (CCA [198] – [199]).

6. 58 The evidence of the remaining tendency witnesses (the wardrobe assistants, LJ, CS and VR) was only relevant to the charge in respect of SM. Contrary to the appellant's submissions, the CCA correctly found that the trial judge directed the jury both orally and in writing that the evidence of the three wardrobe assistants related to the charge in respect of SM. It was clear that their evidence could not be used for the charges relating to the other four complainants (CCA [233] – [234]).

6. 59 The admission of tendency evidence depends on the probative value being sufficient to substantially outweigh the clear prejudicial effect. As the appellant points out, that is a high threshold, which must be established under s 101. The degree of probative value prescribed by s 97 does not require that it be of a degree sufficient to substantially outweigh the prejudicial effect. That is an additional requirement and is to be assessed separately under s 101. In the present case, the trial judge concluded that the evidence satisfied that threshold (Judgment on Admissibility of Tendency Evidence 14/2/14 at p 55).

6. 60 There were strong directions given about the use of the tendency evidence, strong directions about the presumption of innocence (SU 11), a *Murray*[49] direction that where the charge depends on the evidence of a single witness that evidence should be approached with "particular caution" (SU 29), that each offence must be considered separately (SU 30, 32), and a warning not to use the tendency evidence to conclude that the appellant was of bad character and must have committed the offences (SU 37).

6. 61 The Royal Commission into Institutional Responses to Child Sexual Abuse Consultation Paper noted that jury reasoning research commissioned by the Commission indicated that juries are able to comply with such directions and do not engage in impermissible reasoning in joint trials involving multiple complainants[50]. The present case exemplified those findings. On 7 April 2014, the jury returned verdicts to counts 1 – 9, but indicated they were unable to

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[49] ***R v Murray*** (1987) 11 NSWLR 12.

[50] The Royal Commission into Institutional Responses to Child Sexual Abuse *Consultation Paper, Criminal Justice* September 2016: Chapter 10.4 Concerns of unfair prejudice. The key findings of the jury reasoning research are at page 419, [10.5.4].

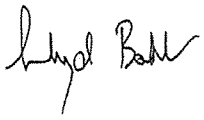
agree on counts 10 and 11 involving EE and SM. The jury note stated they had "carefully and dutifully" considered the evidence of "each indictment" (CCA [76]), indicating that the jury assessed each charge individually. Verdicts were taken on the first nine charges and the jury were directed to resume their deliberations. The following day, the jury returned a verdict on count 11 but stated they were unable to agree on count 10.

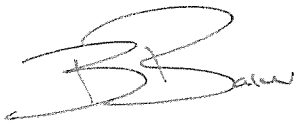
6. 62 As the CCA observed, this course of events demonstrated that the jury had complied with the directions concerning the tendency evidence (CCA [76] – [82]). They had considered the individual allegations separately and had not used the appellant's willingness to act on his attraction to female children to reason automatically or too readily to guilt.

**PART VIII: Time Estimate**

It is estimated that oral argument will take 1 hour.

**Dated**: 28 October 2016





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# Criminal Procedure Act 1986 No 209

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## 29 When more than one offence may be heard at the same time

(1) A court may hear and determine together proceedings related to 2 or more offences alleged to have been committed by the same accused person in any of the following circumstances:

(a) the accused person and the prosecutor consent,

(b) the offences arise out of the same set of circumstances,

(c) the offences form or are part of a series of offences of the same or a similar character.

(2) A court may hear and determine together proceedings related to offences alleged to have been committed by 2 or more accused persons in any of the following circumstances:

(a) the accused persons and the prosecutor consent,

(b) the offences arise out of the same set of circumstances,

(c) the offences form or are part of a series of offences of the same or a similar character.

(3) Proceedings related to 2 or more offences or 2 or more accused persons may not be heard together if the court is of the opinion that the matters ought to be heard and determined separately in the interests of justice.