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Précis Paper

The admissibility of tendency evidence

A discussion of the recent High Court decision of *R v Bauer* [2018] HCA 40.

Discussion Includes

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Précis Paper

The admissibility of tendency evidence

1. In this edition of BenchTV, Gabriel Wendler (Barrister – Seven Windeyer Chambers, Sydney) and Stephen Odgers (Barrister – Forbes Chambers, Sydney) discuss the recent High Court decision of *R v Bauer* [2018] HCA 40.

Trial judge's decision

1. The decision of *R v Bauer* [2018] HCA 40 ("*Bauer*") was hand down by the High Court on 12 September, 2018.
2. The decision is of significance to areas involving the law of evidence and in particular, tendency evidence.
3. The decision was a full court of the High Court unanimous prosecution appeal which set aside the judgement orders of the Victorian Court of Appeal which had allowed an appeal arising from a county court trial involving Mr Bauer who had been charged with 18 historical sex offences.
4. During the course of the trial, the trial judge was required to make a number of evidence rulings in relation to the introduction of tendency evidence as well as evidence of uncharged acts.
5. The trial judge ruled in favour of the issues concerning tendency evidence and uncharged acts.
6. The case also concerned an issue relating to the evidence of complaint and the application of section 66 of the *Evidence Act* 1995 (NSW) ('section 66') as well as a further issue in relation to the introduction of the complainant's previous evidence from a previous trial.
7. The issue in relation to the introduction of the complainant's previous evidence from a previous trial concerned special provisions in Victorian legislation that permitted an interest of justice test whereby the evidence of the complainant in a previous trial, which was recorded, was able to be admitted in a subsequent trial as the evidence in chief of the complainant.
8. There was significant controversy over that procedural aspect as the trial judge permitted the recording of the complainant's evidence into the trial.
9. The trial judge also ruled that the tendency evidence that was sought to be introduced was admissible, probative and relevant to the issues of the trial.
10. The section 66 issue was resolved against the respondent and the evidence of complaint was introduced in the respondent's trial.
11. In the four categories of rulings made in the trial, all four rulings of the trial judge were challenged in the Victorian Court of Appeal where they were successful in all counts, with the appeal being allowed.

12. As a result, the Director of Public Prosecutions in Victoria sought special leave to appeal which was granted and all four of the issues that were agitated in the Court of Appeal came on for further agitation in the High Court.
13. All four categories amounted to grounds of appeal and were upheld in the High Court.

Historical position in relation to tendency evidence

14. When the High Court came to resolve this matter, there had been a number of decisions of the court in relation to the treatment of tendency evidence and the reception of uncharged acts.
15. These decisions included the High Court decisions of *Hughes v The Queen* [2017] HCA 20 and *IMM v The Queen* [2016] HCA 14.
16. Prior to 1995, the type of evidence now known as tendency evidence was a matter for common law.
17. The *Evidence Act 1995* (NSW) approaches the evidence a different way from the common law.
18. Section 97 of the *Evidence Act 1995* (NSW) requires tendency evidence to have significant probative value.
19. Section 98 of the *Evidence Act 1995* (NSW) requires coincidence evidence to have significant probative value.
20. Section 101(2) of the *Evidence Act 1995* (NSW) provides that neither tendency evidence nor coincidence evidence adduced by the prosecution against a defendant is admissible unless the probative value of the evidence substantially outweighs the prejudicial effect it might have on the defendant.
21. The High Court case of *IMM v The Queen* [2016] HCA 14 dealt with the test of significant probative value and looked at what is involved in assessing probative value.
22. One of the questions that arose in this case and again in *Bauer* was where evidence of an alleged sexual act is adduced by the prosecution to try to show a tendency to commit an offence charged, does it bear relevantly on its probative value that the evidence comes from the complainant whose credibility is the central issue?
23. In the decision of *IMM v The Queen* [2016] HCA 14, there was a clear split on how to approach the assessment of probative value and the majority of the court held that in assessing probative value, a judge is required to assume that the evidence will be accepted and assume it is both credible and reliable.
24. The tendency evidence that was being focused upon was evidence from the complainant that something had happened, an uncharged act to show a tendency to commit the crimes charged.
25. The majority proceeded to hold that the evidence from the complainant of the uncharged act lacked significant probative value because it came from the complainant.

26. In *Bauer*, the court has unanimously overruled the approach in *IMM v The Queen* [2016] HCA 14 and come to the view that whether the complaint comes from the complainant or not is irrelevant. *Bauer* has held that uncharged acts relating to the complainant will be significantly probative and will almost invariably be admitted.
27. Another case of significance is *Hughes v The Queen* [2017] HCA 20 ("*Hughes*")
28. This case looked at tendency evidence which comes from alleged acts, whether charged or uncharged involving people other than a particular complainant.
29. *Hughes* was a multiple complainant case and the question was whether one could use evidence of sexual acts, charged or uncharged, in respect of one complainant to show a relevant tendency in respect of another complainant.
30. The question which arises from these cases is whether there is any practical difference in the legal test to be applied depending on whether the tendency evidence comes from the complainant or from someone else.
31. As aforementioned, in *Bauer* the High Court has made it clear that where the previous sexual interest, that is the tendency evidence and then the acting on the sexual interest relates to the complainant, it will have significant probative value and almost invariably be admissible.
32. In a case where the tendency relates to someone else, in *Bauer* the High Court made it clear that they are not disputing the correctness of *Hughes.*
33. *Hughes* makes it clear that the mere fact that a person has engaged in child sexual abuse in respect of one person, will not be admissible, and will not satisfy the tests in sections 97 nor 101 of the *Evidence Act 1995* (NSW) in relation to another person.
34. *Hughes* however, was decided upon its particular facts and the significant fact in *Hughes* which gave the evidence significant probative value was the unusual fact that the evidence showed that Hughes was prepared to engage in conduct with a very high risk of detection.

<u>Jury instruction in relation to tendency evidence</u>

35. An important question in relation to the introduction of tendency evidence is how a judge should direct a jury in relation to the evidence.
36. The reason is that there is a concern about the jury cutting down the proof beyond reasonable doubt requirement by relying on tendency evidence .
37. In NSW, until Bauer, the general approach has been in all cases where tendency evidence is admitted, a jury should be told that they should not rely upon on it unless the uncharged act is proved beyond reasonable doubt and the tendency is proved beyond a reasonable doubt.
38. In *Bauer,* the High Court overturned this position and held that there is no general obligation to give such a direction to a jury with the qualification that if there is a significant possibility that the jury will regard proof of the uncharged act as indispensable to proof of guilt of a charged offence, then a direction would be appropriate.

39. The authorities up until Bauer have shown that the courts have taken a narrow view of what is indispensable, and generally prescribed that it is a fact, without which a conviction cannot be made and tendency evidence would never meet that test.

40. *Bauer* shows that the High Court is recognising that there can be circumstances in which certain facts might be regarded by a jury as indispensable to them, themselves being satisfied beyond reasonable doubt of guilt.

Concoction, contamination and collusion of evidence

41. Until *Bauer* there has been a long term controversy over whether evidence showing a risk that two complainants have jointly concocted their allegations are matters that a trial judge can take into account when determining the admissibility of tendency or coincidence evidence.

42. Prior to the *Evidence Act 1995* (NSW), the High Court held in *Hoch v The Queen* (1988)165 CLR 292 that if there was a possibility of joint concoction, contamination of evidence or collusion, that the mere possibility would render the similar fact evidence inadmissible.

43. *Bauer* makes it pretty clear that when dealing with tendency evidence, the court will not take those kinds of risks into account unless the risk is so significant that no rational jury would place any weight on the evidence because of the risk of collusion or contamination.

44. Therefore, in accordance with *Bauer,* the judge is to disregard the risk of contamination or collusion in applying the tests under the *Evidence Act 1995* (NSW).

45. The question is in *Bauer*, were the judges talking generally about evidence or were they limiting their discussion to tendency evidence?

46. As the case was about tendency evidence, it is likely that it is the latter.

47. This decision is in line with *IMM v The Queen* [2016] HCA 14 where the majority held that in assessing probative value, a jury is required to assume the evidence is credible and reliable.

48. If this is done when assessing tendency evidence, that is evidence of conduct relied on to show a tendency, it is difficult to understand how one could properly take into account possibilities of collusion or contamination given the assumption that you are required to assume the evidence is credible and reliable.

49. Therefore, absent extreme situations, tendency evidence will not be inadmissible because of the possibilities of concoction and collusion.

50. Coincidence evidence is different due to the fact that section 98 of the *Evidence Act* 1995 (NSW) refers to events, not about evidence of conduct.

51. When you have two complainants making very similar allegations, the logic of why the evidence has probative value is that it is improbable that two people would independently make very similar allegations against an accused unless the allegations were true.

52. This is coincidence evidence and the event is the making of the allegation.

53. The requirement is that one has to assume that the evidence is credible and reliable as it relates to the allegation and it does not require any assumptions about the content of the allegation.

54. In assessing the probative value of coincidence evidence, judges should be regarded as free to take into account evidence showing collusion or contamination as it will inevitably impact on the probative value of the evidence. The High Court is yet to rule on this point.

55. In the future, lawyers and judges will have to look very carefully at whether or not the evidence really is tendency evidence or in fact, it is truly being relied on as coincidence evidence.

56. Lawyers need to be vigilant to ensure that it is clear what the reasoning is that the prosecutor is relying on and to then appropriately characterise it as tendency evidence, coincidence evidence or neither so that the appropriate tests can be applied.

Application of section 66 of the *Evidence Act 1995 (NSW)*

57. The issue of the application of section 66 of the Evidence Act 1995 (NSW) came about in the context of the complainant relaying to a friend circumstances of sexual contact. The argument in relation to the complaint was that it was too vague or cryptic and not fresh.

58. The High Court upheld the ground of appeal and set aside the decision by the Victorian Court of Appeal.

59. Section 66 is an exception to the hearsay rule which allows into evidence previous statements made by a witness who is available to testify, so long as when the representation was made, the events about which the representation was made was fresh in the memory of the person at the time.

60. Prior to some amendments to the *Evidence Act 1995* (NSW) in 1998, the High Court had taken a strict view about what that meant so that if was years afterwards, it would never satisfy the test.

61. The provision was then amended however the test remained unchanged to remain as the 'fresh in the memory' test. However, it specifically required the court to take into account the nature of the event itself as a relevant factor in determining whether the test was satisfied.

62. This was interpreted to mean that where the event was in relation to highly traumatic or emotive events, they will be remembered, more vividly and accurately for longer. This led to a number of decisions in NSW and Victoria where representations made many years after the event still satisfied the fresh in memory test

63. The High Court in *Bauer* has agreed that a representation made years if not many years after the event can be, depending on the circumstances, fresh in the memory and overturned the decision of the Court of Appeal.

64. The Court of Appeal held ruled that the evidence did not meet the test because the complainant had not testified and therefore the judge was not satisfied in the circumstances.

65. The High Court held that the complainant did not need to testify because she was giving an account of a series of sexual assaults by the same person over a number of years and it was, in the circumstances open to the judge to find it was fresh in the memory

66. The Courts have never articulated what fresh in the memory means and in *Bauer* the judges appear to equate 'freshness' with 'vividness'

McPhillamy v The Queen [2018] HCA 52

67. *McPhillamy v The Queen [2018]* HCA 52 involved a case where the relevant tendency evidence was evidence that the accused had committed child sexual abuse 10 years earlier in respect of two other boys.

68. The judge allowed the evidence and the Court of Criminal Appeal held that it was correctly admitted as it was significantly probative and the probative value outweighed its prejudicial effect.

69. The Appeal was brought on these grounds and argued that the evidence did not have significant probative value because of the 10 year time gap and the different circumstances of the offences and it was argued that the 101 test was not satisfied

70. The court unanimously allowed the appeal, however has not yet provided its reasons.

71. *Bauer* stands for the proposition that where the tendency evidence relates to the complainant then almost invariably, the evidence will be admissible.

72. *Hughes* and *McPhillamy v The Queen [2018] HCA* stand for the proposition that merely showing tendencies of a similar kind in relation to other people, by itself, will not be enough to be admissible.

BIOGRAPHY

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Mr Wendler was admitted to the NSW Bar in 1988 having previously been admitted in South Australia in 1982. He has an Australia wide criminal law practice both trial and appellate. He also appeared internationally in major criminal trials in New Zealand and Fiji. Historically, he has appeared in numerous High Court appeals that have impacted on the common law of Australia. He is a member of the NSW Legal Aid complex appellate and trial panels. He is a past member of the NSW Criminal Law Committee.

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Stephen was called to the NSW bar in 1989 and appointed Senior Counsel in 2000. He is the chair of the Criminal Law Committee, NSW Bar Association. He is a member of the National Criminal La Liaison Committee, Law Council of Australia and Adjunct Professor of Law at the University of Sydney. He is also the General Editor of the Criminal Law Journal. He is the author of Australian Criminal Law Justice (5th Edition 2014 with Mark Findlay and Stanley Yeo), Principles of Federal Criminal Law (3rd Edition 2015) and Uniform Evidence Law (11th Edition 2014).

BIBLIOGRAPHY

Focus Case

R v Bauer [2018] HCA 40

Cases

- *Hughes v The Queen* [2017] HCA 20
- *IMM v The Queen* [2016] HCA 14
- *Hoch v The Queen* [1988] 165 CLR 292
- *Graham v The Queen* [1998] 195 CLR 606
- *McPhillamy v The Queen* [2018] HCA 52

Legislation

Evidence Act 1995 (NSW)