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Précis Paper

Relationship Evidence and Tendency Evidence in Sexual Assault Cases

A discussion of the fraught dichotomy between relationship and tendency evidence, and the latest High Court developments in this area.

Discussion Includes

- The difference between relationship evidence and tendency evidence
- Policy reasons for lowering the barrier to admissibility of tendency evidence
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Précis Paper

Relationship Evidence and Tendency Evidence in Sexual Assault Cases

In this edition of BenchTV, Professor John Anderson (Associate Professor – University of Newcastle, Newcastle) and Ian Benson (Solicitor – A R Conolly and Company Lawyers, Sydney) discuss the latest developments in the High Court in relation to the admissibility of tendency evidence in sexual assault cases, with a particular focus upon the recent decision in *Hughes v The Queen* [2017] HCA 20.

The difference between relationship evidence and tendency evidence

1. Relationship evidence is about the familial, social, working, emotional relationship that provides context to the relationship between an accused and another person in the context of that particular crime. It is evidence about the complainant's conduct – why the complainant may have behaved in a particular way to contextualize the evidence.

2. Tendency evidence is then about the accused, that they behave in a particular way or have a propensity to behave in a particular way. It is because of that propensity that it is more likely that they committed the offence that they have been charged with.

3. Gordoan J in *Hughes v The Queen* [2017] HCA 20 talks about tendency evidence being an inferential process – it is a foundation for inferring that a person has a tendency to act in a particular way or to have a particular state of mind. It makes it more probable that the accused, because of their tendency to act in that particular way or that had that particular state of mind, when the crime is alleged to have been committed.

4. Context or relationship evidence cannot be used for a tendency purpose. Tendency evidence is prima facie inadmissible as per s 97 of the Uniform Evidence law, unless it has what the Court thinks is significant probative value. Probative value is defined in the Act as the extent to which the evidence can go to prove a fact in issue, directly or indirectly.

5. Gagelar J in *Hughes* questioned what the bar of significance is, and where should it be set in undertaking the evaluation of the extent to which evidence could rationally effect the assessment of the probability of the existence of a fact in issue.

6. Significant probative value is a heightened test of relevance. This test is there as recognition of the dangers in the area of tendency evidence. Tendency evidence requires significant probative value because it carries with it the danger of using someone's past character to judge what they have done on this particular occasion.

7. There is a lot of psychological and social science research that was relied on by the Courts and by the Australian Law Reform Commission (ALRC) to say that if someone has discreditable conduct in their past, this can sway the fact finder to the extent that it is an improper use. They are not judging someone's guilt or innocence on the basis of the evidence before the Court, but on a suspicion or preconception about someone's guilt from their character.

8. If you do get past the s 97 test of significant probative value, s 101 is the extra barrier in criminal cases where the significant probative value has to substantially outweigh any prejudicial effects. You must consider what the prejudice to the defendant is in admitting this evidence against the probative value of the evidence in proof of guilt of the accused's charge.

9. Tendency evidence is arguably always prejudicial, but you must consider whether that prejudice is outweighed by the probative value of it.

10. Originally under common law the test set by ~~the~~ *Pfenning* ~~test~~ was that there must be no other reasonable hypothesis consistent with innocence, which was a very high bar for admissibility. ~~However~~However, this is not the case under the Uniform Evidence Law due to *R v Ellis* (2003) 58 NSWLR 700. Now you must be transparent in balancing probative value and prejudicial effect/s when determining admissibility.

11. It is arguable to say that the Uniform Evidence Acts have made it easier to get tendency evidence in. There has also been other factors at work, particularly in relation to child sexual assault prosecution in relation to the lowering of the bar of the admissibility of tendency evidence.

Policy reasons for lowering the barrier to the admissibility of tendency evidence

12. The policy reasons have really focused around the facilitation of successful child sexual assault prosecutions. Most recently we have seen in the recommendations of the Royal Commission into Institutional Child Sexual Abuse (2017) focus on facilitating prosecutions of these types of crimes by allowing more tendency and coincidence evidence in joint trials, and facilitating joint trials.

13. Once you have joint trials where you have multiple complainants and multiple counts, this is where you often get tendency evidence in these types of cases. If the Court is not going to sever the indictment and order separate trials, then it is much more likely there will be applications for tendency evidence.

14. The policy reasons are all about law enforcement, encouraging reporting and making the process of giving evidence for complainants in these processes less daunting and more user friendly.

15. Another issue has been the low conviction rate and whether allowing this sort of evidence to be more readily admitted will facilitate successful prosecution. There is conflict between the issue that the evidence may be probative of the accused's guilt, but is it fair to have that evidence heard? There are issues of fairness versus facilitating successful prosecutions.

16. The whole criminal justice system is based on the presumption of innocence and as lawyers we have to be vigilant as ~~is~~ it is important ~~to~~ not to undermine fair trials and the other fundamental features of the criminal justice system.

17. There are significant tensions between upholding the foundations of the Australian criminal justice system and what is seen by some as favouring the defendant in that the prosecution must prove their case beyond reasonable doubt. The policy reasons have been driven by, particularly in relation to child sexual assault prosecutions, a strong voice in the victims lobby.

Room for reform?

18. We need to continually be vigilant in striking a balance between a fair trial for the accused and being able to successfully facilitate prosecutions and working with vulnerable witnesses.

19. John Anderson argues that we should potentially be looking at having an exclusionary rule for relationship or context evidence. He suggests that perhaps similar barriers should be presented in the area of relationship evidence as are presented for tendency evidence.

20. There is a question about the blurring of relationship and tendency evidence. ~~In~~ South Australia, which is not a member of the Uniform Evidence legislation, has s 34P which presumptively makes all evidence of discreditable conduct inadmissible, which includes some forms of relationship evidence. This does require a transparent judicial balancing process of prejudice against probative value.

21. Relationship evidence under the Uniform Evidence Law is not subject to s 97 or s 101 – it is subject to the relevance test, and then potentially s 137 exclusionary provisions. John Anderson believes there should be a more burdensome admissibility threshold for relationship evidence.

22. Relationship evidence is often used to go to the credibility of the complainant in sexual assault cases, e.g. why they did not complain, why this behavior went on, etc. If charges were

looked at in isolation, there would be an issue as tothe why the complainant did not complain or attempt to stop the conduct. However, this failure to complain or do anything about the behaviour is understandable when put into the context of the abusive relationship that exists between the perpetrator and the victim.

23. Bringing in expert evidence in this area is another potential reform that is arguably striking a better balance between the ~~defence~~ prosecution and the accused. You may then avoid some of this discreditable conduct and adducing of evidence of uncharged acts more readily if you can produce evidence from a psychologist to say that this type of behavior is understandable in that particular context.

24. Section 79(2) and 108C of the Uniform Evidence Law allow us to remove the operation of the opinion rule or the credibility rule specifically in relation to people with specialized knowledge of child development and behaviour as an exception to those rules. The problem is that they are probably not being used in the way that they should be, however *MA v The Queen* [2013] VSCA 20 shows that these provisions should be used to establish this framework.

25. Prosecutors may be concerned that the defence is going to bring contrary expert evidence in that regard, but the expert evidence is really designed to show that this is an alternative explanation for specific behavior to try to dispel misconceptions. The expert evidence is not saying that the particular complainant should be believed, but just that psychological research exists relating to the issue of non-reporting.

26. The use of expert evidence is an area that does exist already under the Uniform Evidence law with the potential to be used more readily. The case law shows that expert evidence is validly setting up a behavioural framework against which the alleged abuse should be assessed and understood.

27. The other thing to consider is how the judge is going to direct the jury. Setting standard directions has been a big recommendation by the Royal Commission into Institutional Responses to Child Abuse (2017). There are difficulties in relation to judicial directions and whether or not they are effective in relation to whether or not jurors comprehend them, and how complex they have become.

28. Priest JA in *Murdoch v The Queen* [2013] suggests that relationship evidence should be treated as tendency evidence. He highlights that there is potential for what is characterized as relationship evidence by the prosecution to in fact be tendency evidence.

29. In *Qualtieri v The Queen* (2006 171 A Crim R 463, 494 Howie J stated that relationship evidence looks at the behaviour of the complainant, while tendency evidence looks at the behaviour of the accused. The danger is that in criminal trials, it can be very hard to draw that distinction.

Hughes v The Queen [2017] HCA 20

30. Hughes went on trial for 11 counts of sexual and indecent assault on young females aged from 6 to 15 years. Some of the complainants were in his social/familial network, and some were in his working environment.

31. Hughes is probably best known as the star of the television comedy 'Hey Dad!..'. Some of the allegations related to what happened on the sets or in the dressing room of those shows, but most related to his familial and social networks.

32. There was a series of different instances – allegations of digital penetration, procuring girls to masturbate him, indecently rubbing his erect penis on girls, and indecent exposure. There was also evidence of uncharged acts from additional witnesses – 3 work environment witnesses and 3 other family relationship witnesses who spoke about Hughes touching them in a sexual way, rubbing against them in a sexual way, or exposing himself to them.

33. It is important to note that the above fact summary groups these incidents fairly conveniently, but potentially not precisely accurately.

34. There were differences in the conduct and differences in the circumstances, and the issue before the High Court was whether they were sufficiently similar, and what is the bar that must be reached in relation to significant probative value for similarity before you can put all of that evidence together to prove one charge, then another, and so on.

35. The judgments in the High Court still say we must look at the facts of each count separately and determine admissibility and cross-admissibility of tendency evidence very carefully by looking at the factual situations. The danger there is in seeking too readily to synthesize and summarise different forms of sexual conduct, different relationships, different circumstances and different victims.

36. There was an issue as to whether or not the Crown had, at trial, particularized a tendency with sufficient similarities to say it was of significant probative value and was admissible. The defence were challenginged on the basis that the differences between the conduct were such to make it inadmissible, i.e. that it was not significant.

37. The issue in this High Court was whether the trial judge admitted too much tendency evidence – did he lower the bar of significant probative value to allow too much of a generalized tendency? The Court was determining what is significant probative value, and how does the common law help inform the statutory provision?

Key takeaways from *Hughes v The Queen* [2017] HCA 20

38. The *Hughes* case had a 4:3 majority so there is scope for using the dissenting judgments as obiter in later decisions.

39. The majority position in the High Court is that tendency in that particular case was sufficiently particularised to be of significant probative value. However, at the same time there is a message about looking at the individual facts of the case, and how the tendency is characterized by the prosecution.

40. Before significant probative value is considered, the prosecution has to give notice of tendency evidence where they have to, in their notice, particularise what the tendency is. That is something that practitioners need to look at very closely – how does the prosecution characterize the tendency?

41. The evidence in *Hughes* disclosed the defendant's sexual interest in underage girls and tendency to engage in sexual activity with them opportunistically as the occasion presented in social and familial settings, and the work environment.

42. Nettle J in his judgment is very critical of the particularization of the tendency in this particular case of being significant probative value because he says there has to be a logically significant connection between the accused's exploitation at various opportunities, and you have to show a logically significant degree of similarity. Nettle J talks much more than the majority does about syllogistic reasoning and how you actually determine a tendency from more operative features of similarity.

43. Significant probative value does depend on the circumstances of the case. You must look very closely at the way the relevant tendency is defined by the prosecution, and where it has significant particularity.

44. In determining significant particularity you must look at the extent to which the evidence supports the tendency as specified, and the extent to which the tendency makes more likely the facts making up the charged offence. Similarity in conduct and circumstances, the nature of the relationship or unusual features, and an underlying unity may be part of a tendency formulation, but will not be determinative operative features, according to the majority of the High Court.

45. There is likely to be a high degree of probative value where the evidence by itself or together with other evidence, strongly supports proof of a tendency, and the tendency strongly supports the proof of a fact that makes up the offence charged.

46. There is disagreement in the High Court about how the common law is used to guide the interpretation of s 97 of the Uniform Evidence Law. The majority position is that there is no requirement of similarity in s 97 explicitly.

47. In this case it was held to be particular enough that he had this sexual attraction to underage girls, that he was prepared to act on it when opportunity was presented, and that he would do so in social, familial or work environments.

48. In sexual assault cases where issues of tendency evidence come up most often, you do have to look at the individual acts, the individual circumstances and the nature of the relationship. The recommendations are that we should not be setting the bar too high for this type of evidence, however this must be balanced with maintaining fairness to the accused.

49. Nettle J's judgment in this case talks about the Australian Law Reform Commission's research into the Uniform Evidence Law. The ALRC reviewed the Uniform Evidence Law in 2005, and did not change s 97. The early interpretations of s 97 were very much guided by the common law. Nettle J's judgment is lengthy, but it takes a very traditional and strict approach to tendency evidence.

50. Nettle J's overall point is that there is no justification for lowering the bar, as no other Australian decision has gone so far in lowering the bar for admissibility. His view is that assuming it remains essential for our criminal justice system that it is better that 10 guilty persons escape, rather than one innocent person suffer and be convicted, there is no justification in principle or in statutory interpretation for lowering the bar.

51. There is danger that we could move more readily towards potentially allowing evidence in that shows mere propensity, which has always been the forbidden reasoning. The majority in *Hughes* does say that we still have to look at the degree of particularity in ~~and~~ the tendency, but they are not as stringent operative features as we have seen in the past in relation to similarity.

52. The majority in this case did not approve of the terms of modus operandi underlying unity pattern of conduct in the way that we are familiar with in the common law. They have set a lower bar, but at the same time they do not take away the need for looking at the particularity of the tendency.

53. Recently the High Court has granted leave to appeal in *Bauer (a Pseudonym) v The Queen (No 2)* [2017] VSCA 176.This will be a case to watch to see how the High Court deals with tendency evidence after the decision in *Hughes*..

BIOGRAPHY

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Professor John Anderson worked in legal practice as a criminal prosecutor with ODPP (NSW) for approximately eight years before becoming an academic. He worked as a Lecturer in Law at University of Newcastle from 1998 specialising in Criminal Law, Evidence and Advocacy. Thereafter he was promoted to Senior Lecturer in 2005 and promoted to Associate Professor in 2010. John has a strong interest in sentencing in the criminal justice system, various aspects of evidence law, legal education and the synergy between academic learning and practical legal training. He has published several books on evidence law, including his latest work *Uniform Evidence in Australia*, 2nd edn 2018, which he co-authored with Neil Williams SC, Judith Marychurch and Julia Roy.

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