

**Tendency Evidence Post-Hughes**

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**1. Statutory Framework**

1.1 Section 97 of the *Evidence Act 2008* (Vic) ('the *Evidence Act*') provides that:

**The tendency rule**

1. Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless –

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have **significant probative value**.

2. Subsection (1)(a) does not apply if –

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

1.2 In addition, s 101 of the *Evidence Act* overlays a further requirement that, before any tendency evidence is adduced in a criminal proceeding, an assessment must be made that the 'probative value of

the evidence substantially outweighs any prejudicial effect it may have on the accused'.<sup>1</sup>

- 1.3 Section 101 can be contrasted with s 137 where a judge will be required to exclude evidence if the 'probative value [of the evidence] is outweighed by the danger of *unfair* prejudice'.<sup>2</sup>

## 2. Background

- 2.1 By way of brief background, prior to the High Court's judgment in *Hughes v The Queen*,<sup>3</sup> divergent approaches to the admission of tendency evidence had developed between Victoria and New South Wales.
- 2.2 Until recently, the leading case in this state on the issue was *Velkoski v The Queen*.<sup>4</sup> In *Velkoski*, the Court of Appeal was of the view of that the approach that had recently developed in NSW in the cases of *R v Forde*<sup>5</sup> and the *R v PWD*,<sup>6</sup> had lowered the bar for the admission of tendency evidence too far.
- 2.3 In departing from the NSW approach, the Court of Appeal in *Velkoski* held that evidence that is sought to be led as tendency evidence must have particular features of similarity or an underlying unity with the facts in issue in order to have significant probative value:

In order to determine whether the features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal 'underlying unity', a 'pattern of conduct', 'modus operandi', or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely. It is the degree of similarity of the operative features that gives the tendency evidence its relative strength.<sup>7</sup>

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<sup>1</sup> In schedule 2, Part 1, the *Evidence Act 2008* states that the "probative value" of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.'

<sup>2</sup> See discussion of 'unfair prejudice' in *Papakosmos v The Queen* (1999) 196 CLR 297.

<sup>3</sup> *Hughes v The Queen* [2017] HCA 20 ('Hughes').

<sup>4</sup> *Velkoski v The Queen* (2014) 45 VR 680 ('Velkoski').

<sup>5</sup> *R v Forde* (2009) 201 A Crim R 451. See further discussion in *Hughes*, [25]-[26].

<sup>6</sup> *R v PWD* (2010) 205 A Crim R 75. See further discussion in *Hughes*, [27]-[28].

<sup>7</sup> *Velkoski*, 719 [171] (Redlich, Weinberg and Coghlan JJA).

2.4 Following *Velkoski*, the NSW Court of Criminal Appeal granted leave to appeal in *Saoud v The Queen*,<sup>8</sup> where the appellant sought to rely on *Velkoski*. In *Saoud*, the appellant had been convicted of a number of sexual offences against two women who had made independent complaints to police in circumstances where there was no risk of collaboration between the complainants or contamination of the complaints evidence.

2.5 Bastan JA (with Fullerton and R A Hulme JJ agreeing) noted in *Saoud* noted:<sup>9</sup>

‘The apparent point of departure is "as to the degree of similarity in the commission of the offences or the circumstances which surround the commission of the offences that is necessary to support tendency reasoning": at [163]. A line of authority in New South Wales was said to have "emphasised that tendency reasoning is not 'based upon similarities', and evidence of such a character need not be present’.

2.6 In dismissing the appeal, the his Honour noted:<sup>10</sup>

It is neither productive nor appropriate (there being no hint of disagreement in the submissions before the Court) to consider whether in this respect the opinions expressed in *Velkoski* are correct. However, it may be noted that each Court has cited judgments of the other over a number of years without major points of departure being noted.

2.7 An application for Special Leave was filed and an oral hearing was granted.<sup>11</sup> In the course of the argument, Counsel for the applicant asked rhetorically ‘can tendency ever arise when there are only two complainants?’ It was submitted that on the reasoning of the Court of Appeal in *Velkoski*, that it was not.

2.8 In the running of the argument Bell J noted:

In this case, as I rather take it from the Court of Criminal Appeal’s reasons, it is more the engagement of the coincidence rule. It is the fact of both these young women having been employed for short periods, being asked by the accused to come back to do some work for a day or so, being brought into his

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<sup>8</sup> *Saoud v The Queen* (2014) 87 NSWLR 481 (Basten JA, Fullerton and R A Hulme JJ).

<sup>9</sup> *Ibid*, 489 [35].

<sup>10</sup> *Ibid*, 489-90 [37].

<sup>11</sup> *Saoud v The Queen* [2015] HCATrans 178 (Bell and Gordon JJ).

office, the message preceding the sexual advance. It is those matters that seem to be at the heart of the basis for the reception of the evidence. That is as I would read the evidence.

In reply, Counsel for the applicant accepted that there was a coincidence basis for the admission of the evidence.

- 2.9 The application for Special Leave was refused on the basis that it was not a 'suitable vehicle in which to consider the suggested differing approaches of the New South Wales Court of Criminal Appeal and the Victorian Court of Appeal in relation to the admission of tendency evidence'.

### 3. *Hughes v The Queen* (2015) 93 NSWLR 474

- 3.1 In *Hughes*, the appellant, Robert Hughes, was arraigned in the NSW District Court on an 11-count indictment relating to sexual offences against five girls under 16 years of age.
- 3.2 In proof of the charges, the Crown proposed to lead the evidence of the complainant and other witness to 'prove tendencies identified as "having sexual interest in female children under 16 years of age" and using "his social and familial relationships...to obtain access to female children under the age of 16 years of age so that he could engage in sexual activities with them."<sup>12</sup> An important particular of the conduct was its occurrence within the vicinity of another adult.
- 3.3 The prosecution also sought to adduce tendency evidence from additional witnesses who gave evidence of a history of sexually inappropriate behaviour with young girls in what might be described as 'risky' situations such as the workplace.<sup>13</sup>
- 3.4 Following his conviction, Hughes appealed to the NSW Court of Criminal Appeal. Counsel appearing for Hughes relied on *Velkoski* and submitted that tendency evidence must possess 'sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that gently increases the likelihood of the occurrence of that conduct'.<sup>14</sup>
- 3.5 The Court of Criminal Appeal (Beazley P, Schmidt and Button JJ) held, consistent with the Court's earlier decision in *Saoud*, that the position

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<sup>12</sup> *Hughes*, [3].

<sup>13</sup> *Hughes*, [5].

<sup>14</sup> See *Velkoski*, 682, [3], referred to in *Hughes*, [10].

espoused in *Velkoski* was not the law in NSW and that s 97 of the *Evidence Act* did not ‘require that there be an “underlying unity”, a “pattern of conduct”, or the like. That is the language of the common law relating to similar fact evidence’.<sup>15</sup>

#### 4. *Hughes v The Queen* [2017] HCA 20

4.1 Following the dismissal of the appeal, the appellant sought – and was granted – special leave on two grounds. The second of those grounds dealt with the divergence of opinion between Victoria on the one hand and NSW, Tasmania and the ACT on the other.

4.2 The majority (Kiefel CJ, Bell, Keane and Edelman JJ) held that the Court of Appeal in *Velkoski* had put a gloss on the language of the statute that did not explain its inherent meaning. They went on to say:<sup>16</sup>

‘The circumstance that the text of s 97(1)(b) does not include reference to similarity or to the concepts of “underlying unity”, “pattern of conduct” or “modus operandi” is a clear indication that s 97(1)(b) is not to be applied as if it had been expressed in those terms. The omission of these familiar common law concepts is eloquent of the intention that evidence which may be significantly probative for the purposes of s 97(1)(b) should not be limited to evidence exhibiting the features so described.’

4.3 At [37] the Majority observed:

The *Velkoski* analysis proceeds upon the assumption that, regardless of the fact in issue, the probative value of tendency evidence lies in the degree of similarity of “operative features” of the acts that prove the tendency. It is an analysis that treats tendency evidence as if it were confined to a tendency to perform a particular act. Depending upon the issues in the trial, however, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it. *Velkoski* is illustrative.

4.4 The Majority then went on to recite the facts involved in *Velkoski* demonstrating their point and noting:

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<sup>15</sup> *Hughes v The Queen* (2015) 93 NSWLR 474, 517 [188].

<sup>16</sup> *Hughes*, [34].

There was no reason to find that the accused was more likely to act on his sexual interest in young children by soliciting one of the complainants to touch his penis than he was to sexually molest the complainant at the day-care centre in another way. Given that the issue was the occurrence of the offence, proof of the tendencies which the prosecution identified had significant probative value.<sup>17</sup>

4.5 A key discrepancy between the Majority's approach and the Court in *Velkoski* was that 'the probative value of tendency evidence will vary depending upon the issue that it is adduced to prove':<sup>18</sup>

- i) Where it is adduced to prove the identity of the offender for a known offence, the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence, and
- ii) Different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence.

4.6 The Majority reasoned at [40] that where the Defence suggest that prosecution witnesses have fabricated their allegations, proof that the accused has a tendency to engage in the conduct alleged is likely to be influential in determining whether the prosecution has excluded the possibility that the witnesses have fabricated their accounts or been mistaken:<sup>19</sup>

Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded. The particularity of the tendency and the capacity of its demonstration to be important to the rational assessment of whether the prosecution has discharged its onus of proof will depend upon a consideration of the circumstances of the case.<sup>20</sup>

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<sup>17</sup> *Hughes*, [38].

<sup>18</sup> *Hughes*, [39].

<sup>19</sup> See also *Thrussell (a Pseudonym) v R* [2017] VSCA 386, [53] (Maxwell P, Santamaria JA and Beale AJA).

<sup>20</sup> *Hughes*, [40].

- 4.7 In *Hughes* the particular tendency had some particularity and was expressed thus:

The appellant was a person with a tendency to engage in sexually predatory conduct with underage girls as and when an opportunity presented itself in order to obtain fleeting gratification, notwithstanding the high risk of detection.

In this case the tendency evidence showed that the unusual interactions which the appellant was alleged to have pursued involved courting a substantial risk of discovery by friends, family members, workmates or even casual passers by. This level of disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience. The evidence might not be described as involving a pattern of conduct or *modus operandi* – for the reason that each alleged offence involved a high degree of opportunism; but to accept that that is so is not to accept that the evidence does no more than prove a disposition to commit crimes of the kind in question.<sup>21</sup>

- 4.8 The Majority held that in the circumstances of the case where the issue was whether an offence had been committed at all, the evidence had significant probative value.
- 4.9 The test to be applied in respect of s 97(1)(b) was the test that had been espoused in *R v Ford*,<sup>22</sup> that:<sup>23</sup>

‘The disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the charged offence.’

Adding only that:<sup>24</sup>

‘...it is not necessary that the disputed evidence has this effect *by itself*. It is sufficient if the disputed evidence together with other evidence makes significantly more likely any facts making up the elements of the offence charge.’

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<sup>21</sup> *Hughes*, [56]-[57].

<sup>22</sup> *R v Ford* (2009) 201 A Crim R 451.

<sup>23</sup> *Ibid*, 485 [125].

<sup>24</sup> *Hughes*, [40].



- 4.10 The assessment of whether evidence has significant probative value is a two-step exercise involving consideration of interrelated but separate matters:
- i) the extent to which the evidence supports the tendency, and
  - ii) the extent to which the tendency makes more likely the facts making up the charged offence.
- 4.11 There is likely to be a high degree of probative value where i) the evidence by itself or together with other evidence strongly supports proof of a tendency and ii) the tendency strongly supports the proof of a fact which makes up the offence charged.<sup>25</sup>

## 5. *Bauer (a pseudonym) v The Queen (No 2)* [2017] VSCA 176

- 5.1 Following the High Court's judgment in *Hughes*, the Court of Appeal gave judgment in *Bauer (a pseudonym) v The Queen (No 2)*.<sup>26</sup>
- 5.2 In *Bauer (No 2)*, the appellant was appealing against convictions sustained in the County Court of Victoria, following a re-trial. In the second trial, tendency evidence was adduced from the complainant – over the objections of trial counsel.
- 5.3 The Court of Appeal distilled from *Hughes* the following:<sup>27</sup>

first, the probative value of tendency evidence will vary depending upon the issue that it is adduced to prove;

secondly, the particularity of the tendency, and its capacity to affect the rational assessment of whether the prosecution case is proved, will depend upon a consideration of the circumstances of the case;

thirdly, the admissibility of tendency evidence does not depend on the assessment of any operative features of similarity with the conduct in issue;

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<sup>25</sup> *Hughes*, [41].

<sup>26</sup> *Bauer (a pseudonym) v The Queen (No 2)* [2017] VSCA 176 (Priest, Beach and Kyrou JJA) ('*Bauer (No 2)*').

<sup>27</sup> *Bauer (No 2)*, [61].



fourthly, although there are dangers in focusing on labels such as ‘underlying unity’, ‘pattern of conduct’ or ‘modus operandi’, nonetheless conduct of the kind embraced by those labels may have significant probative value;

fifthly, however, significant probative value may be demonstrated in other ways;

sixthly, tendency evidence is likely to possess 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; and

seventhly, in the circumstances of [*Hughes*], it was the appellant’s attraction to underage girls and his willingness brazenly to act on it with a disinhibited disregard of the evident risks of discovery when committing the offence in question, that imbued the evidence with significant probative value.

- 5.4 In *Bauer (No 2)* the Court referred to the High Court’s recent decision in *IMM v The Queen*,<sup>28</sup> where the Majority commented on instances where the only evidence to demonstrate a tendency came from the complainant. Their Honours (French CJ, Kiefel, Bell and Keane JJ) held:<sup>29</sup>

In cases where there is evidence from a source independent of the complainant, the requisite degree of probative value is more likely to be met. That is not to say that a complainant’s unsupported evidence can never meet that test. It is possible that there may be some special features of a complainant’s account of an uncharged incident which give it significant probative value. But without more, it is difficult to see how a complainant’s evidence of conduct of a sexual kind from an occasion other than the charged acts can be regarded as having the requisite degree of probative value.

- 5.5 In *Bauer (No2)*, the Court – mindful of the judgement in *IMM* – noted that:<sup>30</sup>

the evidence of the relevant tendency – that the applicant had ‘a sexual interest in his foster daughter [RC] and ‘a willingness

<sup>28</sup> *IMM v The Queen* (2016) 257 CLR 300.

<sup>29</sup> *Ibid*, 317–18 [60]–[64].

<sup>30</sup> *Bauer (No 2)*, [63].

to act on that sexual interest in respect of [RC]' – flowed principally from a single source, RC.

And, in allowing the appeal against conviction (in respect of the tendency evidence) went on to note that they were:<sup>31</sup>

'...unattracted to the view that tendency evidence may be said to possess significant probative value when its sole source is a single complainant.'

The Court went on to say:<sup>32</sup>

'...without any *special feature*, in light of *IMM* and *Hughes*, RC's evidence going to tendency could not be considered to possess significant probative value.'

5.6 The Director of Public Prosecutions has appealed the decision in *Bauer (No 2)*, and on 15 December 2017, the High Court granted Special Leave.<sup>33</sup>

5.7 Of the four grounds of appeal where Special Leave was granted, ground 2 deals with the admission of tendency evidence. More specifically the Director has posed the question:

What is the correct approach to the admission of tendency evidence in a single complainant sexual offence case where the prosecution seeks to prove the relevant tendency from both the complainant and a source independent of the complainant?

Importantly, does the independent source also require some "special feature" before such evidence can attain "significant probative value" for purposes of section 97 of the *Evidence Act 2008 (Vic)*?

## 6. Effect of Hughes and where to from here?

6.1 So what then is the effect of *Hughes* on the admissibility of tendency evidence?

6.2 The situation in Victoria has changed significantly, particularly in relation to cases involving multiple complainants.

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<sup>31</sup> Ibid, [64].

<sup>32</sup> Ibid [81].

<sup>33</sup> *R v Bauer (No 2)* [2017] HCATrans 269.

- 6.3 Prior to *Hughes*, in this jurisdiction, it was not permissible to speak in general terms about a sexual interest in multiple complainants or a class of complainant. The focus was on the nature of the accused's conduct rather than the accused's state of mind.
- 6.4 In such cases Victorian jurisprudence regarded state of mind evidence such as a sexual interest in young children as being no more than 'rank propensity' evidence. What was required to clear the hurdle of s 97 was the 'underlying unity' or 'pattern of conduct' borrowed from the common law authorities.
- 6.5 This approach was rejected in *Hughes*. No longer will the prosecution be required to demonstrate that there is an "underlying unity", "pattern of conduct" or "modus operandi" in the conduct said to form the basis of the tendency.
- 6.6 The High Court noted that s 97 explicitly provides for tendency evidence to prove a state of mind. In cases involving charges of sexual offending against young children, proof of that state of mind may have significant probative value.<sup>34</sup>
- 6.7 The test of significant probative value should still be viewed as a high one however.
- 6.8 In *Bauer (No 2)* the Court of Appeal considered the particular tendency evidence in *Hughes* and observed that:
- ...it made probable that which would otherwise be regarded as improbable; that is, engaging in sexual conduct in circumstances in which the appellant ran a real risk of discovery by other adults. Had that singular feature been absent, it may be inferred that the evidence would not have been considered to possess the requisite degree' of significant probative value.<sup>35</sup>
- 6.9 In *Hughes* the majority acknowledged that the assessment of whether evidence has significant probative value is an 'open-textured' enquiry involving the evaluation of evidence, and reasonable minds might reach different conclusions. The majority recommended caution for the prosecution where the probative value of the evidence lies at the margins of significance.<sup>36</sup>

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<sup>34</sup> *Hughes*, [32].

<sup>35</sup> *Bauer (No 2)*, [62].

<sup>36</sup> *Hughes*, [42].

- 6.10 The Court also emphasised the important role section 101 plays in criminal matters in moderating the admission of tendency evidence. It may well be that s 101 takes on a greater role in addressing the concerns as to 'rank propensity' in this jurisdiction, where evidence of sexual attraction to children is relied upon – See for example *Henderson (a Pseudonym) v The Queen*<sup>37</sup> where the Court of Appeal allowed an interlocutory appeal setting aside the Crown's tendency notice.
- 6.11 This area is still developing, and the next instalment will be the High Court's treatment of the decision in *Bauer (No 2)*.

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<sup>37</sup> [2017] VSCA 237, [56]-[59] (Beach, Ferguson and Coghlan JJA).