

TL v The King [2022] HCA 35

[Peter Botros](#), Barrister

A unanimous decision of the High Court on the ‘close similarity’ requirement for tendency evidence in criminal matters.

Issue

1. In criminal matters, tendency or coincidence evidence can only be adduced by the Crown where the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused. In *Hughes v The Queen* the High Court held that, where the issue is identity, “*the probative value of tendency evidence will almost certainly depend upon close similarity between the conduct evidencing the tendency and the offence*” [emphasis added].¹
2. In *TL v The King*², the High Court revisited the “close similarity” requirement and concluded that it was not necessary in every case in order to meet the threshold of significant probative value.

Facts

3. TL was charged with the murder of his two and a half year old stepdaughter. She died from blunt force trauma to the abdomen. Only three people had the opportunity to inflict the injury – the victim’s mother, her 14 year old nephew and TL. The evidence was that, on the day of her death:
 - 3.1 Prior to going to bed, the victim was not suffering the injury. The mother put the victim to bed and was alone with the victim for at least a few minutes. This was said to be the only opportunity for the mother to inflict the injury.
 - 3.2 The mother and TL had a conversation outside about dinner while the nephew was inside the house. This was said to be the only opportunity for the nephew to inflict the injury.

¹ 263 CLR 338 at [39].

² [2022] HCA 35.

- 3.3 The mother and the nephew left to collect dinner, leaving TL home alone with the victim. Upon their return, all three sat to have dinner. When the mother got up to wash her hands and check on the victim, TL went to the victim's bedroom and brought her out, at which point she had become limp and grey. She died in hospital that day.
4. In police interviews and at trial, TL said that the victim had woken up twice while the mother and nephew were out. On the first occasion he heard her cry and trying to open the door. He checked on her and found her looking like she needed to vomit. On the second occasion, he checked on her and she was making an unusual panting sound. The medical evidence was that it was highly unlikely the victim would have been capable of getting out of bed and playing with the doorknob if she had sustained the injury at that time.

Consideration

Ground of appeal

5. The Crown sought to adduce evidence that TL had a tendency to "*deliberately inflict physical harm on [the victim]*". The evidence sought to be led was:
 - 5.1 Evidence that 10 days before her death, TL had deliberately placed the victim in scalding hot water which resulted in first and third degree burns.
 - 5.2 Evidence that the victim had complained to others that TL had punched her and hurt her neck.
6. The trial judge admitted the evidence, and in doing so, described the tendency as a tendency to behave toward the victim in an "*inappropriately physical and violent fashion*".
7. TL's appeal to the High Court was on the ground that the trial judge erred in admitting the tendency evidence. Specifically, TL argued that the evidence of the burns did not bear sufficient similarity to the blunt force trauma alleged in the murder charge. This argument was previously rejected by the NSWCCA.³

³ *TL v The Queen* [2020] NSWCCA 265.

Reasoning

8. The High Court restated the key principles established in *Hughes*:⁴
 - 8.1 There is no general rule that demands or requires close similarity between the conduct evidencing the tendency and the offence.
 - 8.2 Similarity is relevant to, but not determinative of, probative value.
 - 8.3 Other things being equal, evidence of a more generally expressed tendency is less likely to satisfy the threshold of "significant probative value".
9. Regarding the observation in *Hughes* that there was a general requirement for close similarity in cases where identity was in issue, the High Court stated that this ought to be understood as referring to a situation where "*there is little or no other evidence of identity apart from the tendency evidence, and the identity of the perpetrator is "at large"*".⁵
10. Regarding the present case, the Court noted that the tendency identified in the tendency notice (i.e. a tendency to deliberately inflict physical harm) had been reformulated by the trial judge to incorporate elements of *violent conduct inflicting serious physical harm*. Absent those additional elements, the Court considered that it was unlikely that the tendency could have sufficient probative value. While there was no complaint of the reformulation in this case, the Court noted that such reformulations should not occur without formal amendment to the tendency notice.
11. Considering the evidence as a whole, the Court concluded that the case against TL was a strong one. There were a limited number of other people who could have inflicted the injury on the victim and, other than TL, each had a limited opportunity to do so. The identity of the perpetrator was therefore not "at large". The Court stated, "*In the face of this important evidence, it could not be assumed that "close similarity" between the conduct evidencing the tendency and the offence was required to meet the threshold of significant probative value.*"⁶
12. Ultimately the Court concluded that the tendency evidence was sufficiently striking that it was capable of being important to the jury's assessment of whether TL was the

⁴ *TL v The King* at [29].

⁵ *TL v The King* at [30].

⁶ *TL v The King* at [30].

one who inflicted the injury upon the victim. The following features were relevant to the Court's assessment:

- 12.1 The tendency to act violently was directed at a single person – the victim.
- 12.2 The tendency was in relation to a small child, which is abnormal and therefore unlikely to be shared by others.
- 12.3 The burn incident was close in time to the charged offence.
13. Having regard to all the evidence in the case, this was a case in which the threshold of significant probative value could be met without the need for close similarity between the tendency and the offence.
14. The Court also rejected TL's submission that to have sufficient probative value, the tendency needed to identify TL from the other potential perpetrators of the offence.

Key points

15. There is no general rule that requires close similarity between the conduct evidencing the tendency and the offence.
16. Where there is other evidence supporting identity, the tendency evidence may reach the necessary threshold of probative value without bearing a close similarity to the offence.
17. Tendencies ought to be sufficiently particularised in tendency notices and should not be reformulated without formal amendment.



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Peter is an experienced advocate practicing primarily in criminal and quasi-criminal matters. He also appears in administrative and employment matters.

Peter prosecutes and defends all crime types, ranging from white collar crimes to sexual offences. He appears in all courts and tribunals, including jury trials and on appeal. He is regularly briefed to provide written advice on large and complex matters.

Peter also has experience with the interpretation and application of several novel aspects of Commonwealth law including, international extradition, proceeds of crime, niche regulations and national security matters. He holds a federal security clearance.

Before coming to the bar, Peter was a Senior Federal Prosecutor with the Commonwealth DPP where he regularly appeared in summary and superior courts across Australia.

Previously, Peter was a solicitor with the South East Community Legal Service where he practiced in employment law, family law and criminal defence. He regularly advised on employment contracts and termination rights, and has appeared before the full bench of the Fair Work Commission on appeal.

Peter read with Robert T Barry.

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