

***Bauer and McPhillamy* – Update on admissibility and use of tendency evidence in child sexual assault matters**

Public Defenders Conference 2019

1. The law regarding the admissibility and use of tendency evidence has again “evolved” since the audience at the 2018 conference was updated by His Honour Judge Gartelmann S.C.
2. This paper will review High Court developments in the admissibility of tendency evidence in 2018, with a focus on its use in child sexual assault matters.
3. The relevant statutory provisions are annexed to this paper.
4. A brief summary of what the High Court said in *IMM v The Queen* [2016] HCA 14 and *Hughes v The Queen* [2017] HCA 20 may assist in understanding the reasoning and effect of the decisions in *R v Bauer* [2018] HCA 40 and *McPhillamy v The Queen* [2018] HCA 52

What is significant probative value?

5. The majority of the High Court in ***Hughes v The Queen* [2017] HCA 20** at [40] prescribed the test for significant probative value as:

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

6. The majority in *Hughes* said at [41]:

“...In summary 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 that makes up the offence charged.”

How does tendency evidence have significant probative value in a trial of child sexual assault offences?

7. Again, the majority in *Hughes* provided an explanation of why properly admitted tendency evidence has significant probative value and relevance in the trial of child sexual assault offences, at [40]:

“In the trial of child sexual assault offences, it is common for the complainant’s account to be challenged on the basis that it has been fabricated or that anodyne conduct has been misinterpreted. 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 conduct has been excluded”

8. With reference to the facts in issue and the tendency evidence in *Hughes*, the majority said at [63]:

“The probative value of the evidence of each complainant and of AA, BB and VOD lay in proof of the tendency to act on the sexual attraction to underage girls, notwithstanding the evident risks. The fact that the appellant expressed his sexual interest in underage girls in a variety of ways did not deprive proof of the tendency of its significant probative value”

9. And at [64]:

“The assessment of the significant probative value of the proposed evidence does not conclude by assessing its strength in establishing a tendency. The second matter to consider is that the probative value of the evidence will also depend on the extent to which the tendency makes more likely the elements of the offence charged. This will necessarily involve a comparison between the tendency and the facts in issue. A tendency

expressed at a high level of generality might mean that all the tendency evidence provides significant support for that tendency. But it will also mean that the tendency cannot establish anything more than relevance. In contrast, a tendency expressed at a level of particularity will be more likely to be significant....”

Multiple complainant tendency evidence – was similarity required?

10. The majority in *Hughes* at [39] said in relation to the question of whether “*similarity*” between the tendency evidence and the allegations the subject of the trial was necessary:

“...s.97(1) does not, however, condition the admission of tendency evidence on the court’s assessment of operative features of similarity with the conduct in issue...”

Single complainant tendency evidence – could the unsupported evidence of the complainant have significant probative value without special features?

11. The majority of the High Court in *IMM v The Queen [2016] HCA 14* said in relation to proposed tendency evidence comprised of uncharged allegations by the same complainant at [62]:

“...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. This 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 the complainant’s account of an uncharged incident which gives 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.”

12. This is what we understood the law to be during much of 2017 and 2018, and in the experience of the author, the Crown sought to adduce uncharged acts as context evidence and seek the standard context direction rather than serve a tendency notice and then seek a tendency direction.

13. The High Court spoke with “one voice” in the decision summarised below.

R v Bauer [2018] HCA 40

14. The High Court published its reasons on 12 September 2018. The seven judges published a joint judgment, allowing the appeal by the Crown.

15. Following a trial in the Victorian County Court, Bauer was found guilty by a jury of 18 charges of sexual offences committed against RC between 1988 and 1998.

16. In about 1985, when she was 2 years old, RC and her younger sister TB were placed into foster care with Bauer and his then wife.

17. The allegations were that:

1 – 1.1.88 - 15.1.89 (Indecent Assault) In loungeroom, Bauer placed RC’s hand on his penis, played a pornographic video and penetrated her vagina digitally;

2 – 1.1.90 – 31.12.92 (Indecent Assault) In bathroom, RC and TB were in bath and Bauer placed RC’s hand on his penis;

3 - 16.1.90 – 31.12.92 (Indecent Assault x 2) In family van, under a blanket, Bauer placed RC’s hand on his penis and rubbed her vagina, with TB and her foster mother in the van at the same time;

4 – 16.1.91 – 15.1.93 (Indecent Assault and Sexual assault of child under 10) Bauer took RC into his bedroom and licked her vagina, whilst placing his penis in her mouth;

5 – 1.1.91 – 31.12.92 (Indecent Assault and Attempted Sexual assault of child under 10) RC sleeping in TB’s bed alone, Bauer touched her vagina and attempted to insert his penis into her vagina

6 – 1.1.91 – 31.12.92 (Indecent Assault) In Bauer's bedroom, RC shown pornographic photos and then put RC's hand on his penis and made her masturbate him until he ejaculated on her stomach.

7 – 16.1.92 – 15.1.93 (Act of indecency with child) In RC's bed, Bauer rubbed her vagina.

8 – 16.1.92 – 15.1.94 (Act of indecency with child) On tractor, Bauer rubbed RC's vagina

9 – 16.1.92 – 15.1.94 (Sexual assault with child x 4) Bauer and RC were alone in his work truck, Bauer digitally penetrated vagina x 2, inserted tongue in vagina and forced his penis into RC's mouth, ejaculating.

10 – 16.1.94 – 15.1.95 (Act of indecency with child) Bauer and RC alone in work truck, Bauer rubbed his penis against her vagina until ejaculation.

11 – 16.1.96 – 15.1.97 (Sexual assault of child under authority) RC had stopped living with Bauer, but returned when 13 years old on one occasion to visit her sister TB, in spare room Bauer digitally penetrated RC's vagina

12 – 15.12.98 – 17.12.98 (Act of indecency with child) RC again visited the home of Bauer to visit her sister, TB, Bauer touched RC's vagina over her clothing and pulled his pants down to show his erect penis.

Uncharged acts

18. RC had provided a statement that outlined a number of uncharged acts also, including :
- Bauer grabbing her breasts and vagina outside of her clothing on a number of occasions;
 - In NSW on holiday, whilst staying with relatives, Bauer digitally penetrated RC's vagina in her bedroom;
 - On a few occasions, Bauer, whilst wearing a condom had made RC suck his penis;
 - On numerous occasions at home, Bauer had played pornographic videos to RC and got to copy what was happening in the videos, including fellatio, digital penetration and cunnilingus;
 - On frequent occasions, when RC was in the bathroom undressed, Bauer would look in through a hole in the door and poke his tongue through the hole

The tendency notice

19. The Crown had provided a notice prior to trial that it intended to adduce:

- (1) Evidence of RC of the acts that had been charged (as outlined above); and
- (2) Evidence of TB of the act in the bathtub (Charge (2) above); and
- (3) Evidence of RC of a number of uncharged acts (outlined above); and
- (4) Evidence of TB of an uncharged act where TB in the middle of the night walked in RC's bedroom at home and saw Bauer on top of RC moving up and down

as tendency evidence, in order to establish that Bauer had a sexual interest in RC and a willingness to act upon it.

Voir dire and ruling by trial judge

20. The proposed tendency evidence was objected to by Bauer and after argument, the trial judge ruled that the evidence was admissible as tendency evidence.

21. In the ruling, the trial judge stated that because all of the acts of which it was proposed to give evidence as tendency evidence were committed against one complainant, it was unnecessary that those acts be of a similar kind or be close in time to each other. However, it was held that if Her Honour was wrong, there were a number of features of commonality.

22. The trial judge ruled that *"...I find that the totality of the tendency evidence proposed to be led from RC is capable of demonstrating an ongoing sexual interest in her, and as such could, if accepted, enhance the probability of the charged acts having occurred. Further, the range of sexual acts and the time over which they are alleged to have been committed is capable of demonstrating a pattern of conduct engaged in by [Bauer] in fulfilling his sexual interest."*

23. Further, the trial judge ruled about the tendency evidence of TB that because there was no real possibility of contamination or collusion, there was significant probative value as it provided independent evidence of [Bauer's] tendency, so it must be of equal if not greater probative effect that that of RC.

24. After these rulings, but apparently prior to the trial proper beginning, the High Court published its decision in *IMM v The Queen [2016] HCA 14*, and the effect of this ruling was again argued before the trial judge, in particular the statement of the majority of High Court in *IMM* at [62] that:

“ ... 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.”

25. The trial judge then made a third ruling on the admissibility of the tendency evidence, taking into account the decision in *IMM*, and Her Honour contrasted the tendency evidence in *IMM* (evidence of one uncharged act and charged acts given by the complainant alone) with the tendency evidence in *Bauer*, where the source of some of the tendency evidence (both charged and uncharged) came from a source other than the complainant, RC. The trial judge affirmed her earlier rulings and the tendency evidence was adduced at trial.

26. *Bauer* was interviewed by police in 2000, where he denied the allegations. The defence case at trial was that the allegations did not occur. *Bauer* did not give evidence and was found guilty by the jury of 18 charges.

The appeal(s)

27. *Bauer* appealed his convictions to the Victorian Court of Appeal, on four grounds, one of which was that the trial judge erred in admitting evidence of the charged acts and uncharged acts pursuant to *s.97 Evidence Act 2008 (Vic)*.

28. The Court of Appeal held that the proper approach to the admissibility of tendency evidence had since been significantly qualified by the High Court’s statement in *IMM* as to the limited probative value of a complainant’s evidence of an uncharged act in proof of charged acts and by the majority’s reasoning in *Hughes* regarding particular features of the offending in that case.

29. The Court of Appeal found that RC's evidence did not have any special features (as in *Hughes*), thus lacking significant probative value in proof of charged sexual acts, and so was inadmissible. The Court of Appeal also reached the same conclusion, for the same reasons, about TB's evidence.

30. All grounds were upheld. The Court of Appeal quashed the convictions and ordered a new trial. The Crown sought special leave, which was granted and appealed to the High Court.

The High Court's reasons

31. In a statement that might please many practitioners in the Uniform Evidence Law jurisdictions, the High Court conceded at [47] that:

"...previous decisions of this Court have left unclear when and if a complainant's evidence of uncharged sexual and other acts is admissible as tendency evidence in proof of charged sexual offences..... The admissibility of tendency evidence in single complainant sexual offences cases should be as straightforward as possible consistent with the need to ensure that the accused receives a fair trial. With that objective, the Court has resolved to put aside differences of opinion and speak with one voice on the subject."

32. The Court went on to roll back some of the requirements for tendency evidence it had laid down in *IMM* and *Hughes* at [48]:

"Henceforth, it should be understood that a complainant's evidence of an accused's uncharged acts in relation to him or her (including acts which, although not themselves necessarily criminal offences, are probative of the existence of the accused having had a sexual interest in the complainant on which the complainant has acted) may be admissible as tendency evidence in proof of sexual offences which the accused is alleged to have committed against that complainant whether or not the uncharged acts have about them some special feature of the kind

mentioned in IMM or exhibit a special, particular or unusual feature of the kind described in Hughes.”

33. And at [49]:

“... it has long been the law that a complainant’s evidence of charged and uncharged sexual acts may be of significant probative value in the proof of other charged sexual acts. Taken in combination with other evidence, it may establish the existence of a sexual attraction of the accused to the complainant and a willingness to act on it which assists to eliminate doubts that might otherwise attend the complainant’s evidence of the charged acts...”

Explanation of probability reasoning

34. The High Court went on to discuss what we in NSW might know as context, relationship or background evidence. Stating that *“there can be little doubt about its probative force”* in showing a sexual interest of the accused in the complainant and that where such evidence shows that the accused has acted on this sexual interest, the tendency may be taken as confirmed. This then allows “tendency reasoning” to occur as *“...it may be concluded that the accused is prepared to act upon the tendency to an extent that it may be inferred that the accused will continue to do so. The evidence may then render more probable the commission of the offences charged.”*

35. The High Court went on at [50]-[52] to endorse the reasoning of the High Court in *HML v The Queen [2008] HCA 16*:

“...HML stands in effect as a pronouncement of the “very high probative value” of such evidence [uncharged acts described by a complainant] for the purposes of s.97 of the Evidence Act”

Reasoning of plurality of High Court in IMM is limited to the facts in that case

36. The High Court embraced the analysis by the trial judge at [55], that the reasoning of the plurality in *IMM* was limited to the case there under consideration: one which involved an uncharged act relevantly remote in time and of a significantly different order of gravity from the charged offending and ought be distinguished from the facts in *Bauer*, where what was described was a succession of uncharged sexual acts, generally of the same kind as the charged acts and interspersed between the charged acts during the period of offending.

Clarifies the reasoning in *Hughes* and *IMM*

37. The High Court at [57] summarised the effect of the reasoning in *Hughes* and *IMM* as follows:

“The conclusion of the majority in Hughes that particular features of the offending imbued the subject tendency evidence with significant probative value reflect the process of probability reasoning that applies to cases where an accused is charged with a number of sexual offences committed against a multiplicity of complainants.the reference in IMM to “special features” of a complainant’s account of an uncharged act should be understood as limited to a process of reasoning which sometimes applies in cases where an accused is charged with multiple sexual offences against a single complainant and it is sought to adduce evidence from the complainant of a single relatively remote and innocuous uncharged act as support for his or her evidence of the charged acts...”

Lays down a pre-condition of admissibility in multiple complainant cases:
Some common feature of or about the offending which links the two together

38. The High Court at [58] :

“In a multiple complainant sexual offences case, where a question arises as to whether evidence that the accused has committed a sexual offence against one complainant is significantly probative of the accused having committed a sexual offence against another complainant, the logic of

probability reasoning dictates that, for evidence of the offending against one complainant to be significantly probative of the offending against the other, there must ordinarily be some feature of or about the offending which links the two together. More specifically, absent such a feature of or about the offending, evidence that an accused has committed a sexual offence against the first complainant proves no more about the alleged offence against the second complainant than that the accused has committed a sexual offence against the first complainant. And the mere fact that an accused has committed an offence against one complainant is ordinarily not significantly probative of the accused having committed an offence against another complainant. If, however, there is some common feature of or about the offending, it may demonstrate a tendency to act in a particular way proof of which increases the likelihood that the account of the offence under consideration is true.”

But in single complainant cases: Now no need for there to be a special feature of the offending

39. The High Court at [60] contrasted this with a single complainant sexual offences case, stating that in such a case:

“...where a question arises as to whether evidence that the accused has committed one sexual offence against the complainant is significantly probative of the accused having committed another sexual offence against that complainant, there is ordinarily no need of a particular feature of the offending to render evidence of one offence significantly probative of the other...”

40. The High Court reasoned that such evidence has ‘significant probative value’ because:

“... Where one person is sexually attracted to another and has sought to fulfil that attraction by committing a sexual act with him or her, it is the more likely that the person will continue to seek to fulfil the attraction by

committing further sexual acts with the other person as the occasion presents.”

How an appeal court ought approach the question of ‘significant probative value’

41. The High Court stated at [61] that there can only ever be one correct answer (as to whether tendency evidence is of significant probative value) but that it is a question about which reasonable minds may sometimes differ.
42. Thus, on any appeal, it is for the appeal court to decide whether the evidence is of significant probative value, rather than deciding whether it was open to the trial judge to conclude that it was.

How the High Court decided the appeal in Bauer

43. The High Court decided at [61] that as there was only one complainant (RC) and all acts were alleged to have been committed against her, none of the acts being separated in point of time or of great difference in nature and gravity from the others, there was no need of any special feature in order to “....render the evidence of one charge cross-admissible in proof of the other charges, or to render the evidence of uncharged acts admissible in proof of the charged acts.”
44. The reasoning being “....the very high probative value and thus admissibility of the evidence of each charged and uncharged act rested on the logic that, where a person is sexually attracted to another and has acted upon that attraction by engaging in sexual acts with him or her, the person is the more likely to seek to continue to give effect to the attraction by engaging in further sexual acts with the other person as the opportunity presents. The trial judge was correct to hold that RC’s evidence met the s.97(1)(b) test of significant probative value on that basis.”

s.101(2) Evidence Act: “Prejudicial effect” means same as similar expressions found in ss.135 and 137 Evidence Act 1995

45. The High Court opined at [73] that:

“...despite textual differences between the expressions “prejudicial effect” in s.101, “unfairly prejudicial” in s.135 and “unfair prejudice” in s.137, each conveys essentially the same idea of harm to the interests of the accused by reason of a risk that the jury will use the evidence improperly in some unfair way”

What is the standard of proof for uncharged acts in NSW? Not beyond reasonable doubt

46. The High Court later, at [86], stated specifically in relation to New South Wales:

“..Contrary to the practice which has operated for some time in New South Wales, trial judges in that State should not ordinarily direct a jury that, before they may act on evidence of uncharged act, they must be satisfied of the proof of the uncharged acts beyond reasonable doubt...”

Jury directions in single complainant sexual offences cases

47. The High Court stated at [86]:

(1) Where evidence of uncharged acts as evidence of the accused having a sexual interest in the complainant and a tendency to act upon it is admitted;

“...the trial judge should direct the jury that the Crown argues that the evidence establishes that the accused had a sexual interest in the

complainant and a tendency to act upon it which the Crown contends makes it more likely that the accused committed the charged offence or offences.”

(2) Where the evidence of uncharged sexual acts for a “context” type purpose

“...the trial judge should further direct the jury that the Crown contends that the evidence serves also to put the charged offence or offences in context and identify the manner or respect that the Crown contends that it does so. The trial judge should stress that the evidence of uncharged acts has been admitted for those purposes and, if the jury are persuaded by it, that it is open to the jury to use the evidence in those ways, although no other. The trial judge should further stress that it is not enough, however, to convict the accused that the jury may be satisfied of the commission of the uncharged acts or that they establish that the accused had a sexual interest in the complainant on which the accused had acted in the past; it remains that the jury cannot find the accused guilty of any charged offence unless upon their consideration of all of the evidence relevant to the charge they are satisfied of the accused’s guilt of that offence beyond reasonable doubt...”

McPhillamy v The Queen [2018] HCA 52

48. The High Court refined the law further in relation to multiple complainant tendency evidence in this decision, publishing its reasons on 8 November 2018.

49. McPhillamy was employed at St Stanislaus’ College, Bathurst, as an assistant housemaster.

50. In 2015, in the District Court of NSW, McPhillamy stood trial for six counts of various sexual offending against “A”, preferred under ss.61O(1) x 2, s.61M(1)x 2 and s.66C(2) x 2, which were alleged to have occurred on two separate occasions between 1 November 1995 and 31 March 1996.

51. The offending was said to have occurred in the public toilets of the Cathedral at a time when "A" was an 11 year old altar boy under the supervision of McPhillamy, who was an acolyte.
52. McPhillamy was alleged to have masturbated in front of "A" and ejaculated, encouraged "A" to masturbate and touched "A"'s penis to show him how to masturbate in the public toilet before the service commenced.
53. A few weeks later, again McPhillamy masturbated in front of "A", encouraged "A" to masturbate and touched "A"'s penis, then performing oral sex on "A" before finally requiring "A" to perform oral sex on him, all in the public toilets before mass in the Cathedral.
54. "A" did not report these allegations to anyone until April 2010. At that time, "A" complained to the Professional Standards Office of the Catholic Church making allegations against McPhillamy similar to the above, but with an additional allegation that he had been anally penetrated on the second occasion.
55. The Professional Standards Office referred "A"'s complaint to the police, which resulted in "A" making a police statement in November 2012, making the allegations outlined above, but volunteering that his earlier allegation of anal penetration was false.
56. McPhillamy made an ERISP, where he denied "A"'s allegations, but did not give evidence.

The tendency evidence

57. The Crown adduced as tendency evidence, evidence of McPhillamy's sexual misconduct against "B" and "C". The tendency evidence of "B" and "C" related to sexual acts which had occurred in or about 1985 (10 years before the offending alleged by "A") and was unchallenged at trial.

58. “B” and “C” both gave evidence that when aged about 13 in 1985, they were boarders at St Stanislaus’ College and McPhillamy was an assistant housemaster.

59. “B” said that he went to McPhillamy’s bedroom when he was homesick and upset, resulting in McPhillamy cuddling him and rubbing his genitals. On another occasion, McPhillamy approached “B”, when “B” was naked and tried to separate his buttocks. This stopped when “B” yelled at him.

60. “C” said that once when homesick and upset he went to McPhillamy’s bedroom, resulting in McPhillamy massaging his shoulders and back, and later touching “C”’s genitals. One another occasion, McPhillamy massaged “C”, with “C” falling asleep in McPhillamy’s bedroom and when he awoke, McPhillamy was kneeling beside him with his head near “C”’s groin.

The tendency notice and voir dire

61. A tendency notice had been served by the Crown and McPhillamy objected to the admission of the evidence. Following a voir dire, the trial judge ruled that the evidence of “B” and “C” was admissible, although no reasons were given.

The Notice stated:

The tendency sought to be proved is [McPhillamy’s] tendency to act in a particular way, namely:

- (a) Was sexually interested in male children in their early teenage years;
- (b) Obtain employment or perform duties in occupations or roles where he had close contact with and supervised such children;
- (c) Befriended male children under his direct supervision;
- (d) Discussed matters involving sexual acts with male children including touching their genitals, masturbating them;
- (e) Discussed matters involving sexual acts with male children including touching their genitals, masturbating them;
- (f) Performed or attempted to perform oral intercourse with male children under his direct care and supervision.

And that:

In the view of the lawyer with the current conduct of the matter, the tendency evidence ought to be adduced bears upon the facts in issue in this prosecution, including the following facts in issue:

- That the [complainant's] allegations of sexual conduct by the accused towards him when he was an adolescent

The directions on the use of tendency

62. The trial judge said to the jury at the time that the tendency evidence was given and in the course of the summing up:

“The Crown will argue that the evidence of those two witnesses demonstrate that [McPhillamy] had a tendency to act in a particular way, that is, by his conduct demonstrate a sexual interest in male children in their early teenage years who were under his supervision.....”

“If you find that [McPhillamy] had a sexual interest in male children in their early teenage years, who were under his supervision, and that he had such an interest in “A”, it may indicate that the particular allegations are true”

63. These directions were not the subject of complaint in the appellate courts.

64. The Crown, in its closing address said of the evidence of “B” and “C”:

“The Crown says the evidence that you heard from “B” and “C” and “A” shows that [McPhillamy] had a sexual attraction or interest in young teenage males. He acted on it in his dealings with “B” and with “C” when he was alone with them. The Crown says he acted on it with “A” too, just like “A” told you.....”B” and “C” were never challenged as to the truth of what they said. The Crown says you have every reason to accept them as honest, reliable witnesses who told the truth about what [McPhillamy]

did to them, and that you should act on their evidence when you are assessing the reliability of the complainant, “A” and what he had to say.”

65. McPhillamy was found guilty of all six counts on the indictment and appealed his convictions.

66. The appeal was dismissed, the reasons being published in **McPhillamy v The Queen [2017] NSWCCA 130**. Meagher JA, dissenting, did not consider that the tendency evidence of “B” and “C” met the threshold test of significant probative value.

67. It was in this context that a five judge bench of the High Court came to decide these issues.

The reasoning of the High Court

68. McPhillamy argued in the High Court that the analysis of Meagher JA was correct at [22]:

“... submitting that the evidence of “B” and “C” did not strongly support the existence of the asserted tendency in 1995-6, nor did the asserted tendency – to act on his sexual interest in young teenage boys under his supervision – strongly support proof of a fact in issue”.

69. The High Court at [26] confirmed the analysis of the High Court in *Hughes* at [41] that:

“...assessment of the probative value of tendency evidence requires the court to determine the extent to which the evidence is capable of proving the tendency. Assuming the evidence has the capacity to do so, the court must then assess the extent to which proof of the tendency increases the likelihood of the commission of the offence.”

70. At [27] the High Court said:

“Proof of [McPhillamy’s] sexual interest in young teenage boys may meet the basal test of relevance, but it is not capable of meeting the requirement of significant probative value for admission as tendency evidence. Generally, it is the tendency to act on the sexual interest that gives tendency evidence in sexual cases its probative value.....”

Tendency is weak as no evidence that acted on tendency in the intervening ten years

71. At [30] the Court reasoned as to why the evidence did not pass the threshold test under s.97(1)(b):

“...It may be accepted that the evidence that the appellant had acted on his sexual interest in young teenage boys on the occasions with “B” and “C” is relevant to proof that he committed the offences alleged by “A”, but it is not admissible as tendency evidence unless it is capable of significantly bearing on proof of that fact. In the absence of evidence that [McPhillamy] had acted on his sexual interest in young teenage boys under his supervision in the decade following the incidents at the College, the inference that at the dates of the offences he possessed the tendency is weak.”

Pre-condition for admissibility in cases which involve multiple complainants: “Some feature” which links the tendency evidence and conduct in issue

72. The High Court then appears to have laid down a pre-condition for admissibility in cases of sexual misconduct where the tendency evidence involves persons other than the complainant at [31], stating:

“...it will usually be necessary to identify some feature of the other sexual misconduct and the alleged offending which serves to link the two together...”

73. The link that the Crown sought to make was that all of the boys were under the supervision of McPhillamy. The High Court at [31] rejected this link, comparing and contrasting the type of supervision exercised by McPhillamy in 1985 as an assistant housemaster to boys who were vulnerable and homesick in his own bedroom with the supervision exercised by McPhillamy in 1995 as an acolyte and “A” as an altar boy in a public toilet.

Relevance, yes. Significant probative value, no.

74. Finally, the High Court at [32] decided that the tendency evidence did not meet the threshold requirement of *s.97(1)(b) Evidence Act 1995* because:

“B”s and “C”s evidence established no more than that a decade before the subject events [McPhillamy] had sexually offended against each of them. Proof of that offending was not capable of affecting the assessment of the likelihood that [McPhillamy] committed the offences against “A” to a significant extent. It rose no higher in effect than to insinuate that, because [McPhillamy] had sexually offended against “B” and “C” ten years before, in different circumstances, and without any other evidence other than “A”s allegations that he had offended again, he was the kind of person who was more likely to have committed the offences that “A” alleged.”

Contamination and Concoction – except in the rarest of cases, is now an assessment left to the jury

75. Before the decision in *Bauer*, it was unclear in NSW as to whether the possibility of concoction or contamination may be taken into account in the assessment of whether tendency evidence had significant probative value.

76. Now, the High Court in *Bauer* at [69] has stated:

“...Unless the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence, the determination of probative value excludes consideration of credibility and reliability. Subject to that exception, the risk of contamination, concoction of collusion goes only to the credibility and reliability of evidence and, therefore is an assessment which must be left to the jury...”

DPP v RDT [2018] NSWCCA 293

77. As at March 2019, *RDT* appears to be the only Court of Criminal Appeal decision to have considered the admissibility of tendency evidence after the decisions in *Bauer* and *McPhillamy*.

78. RDT was an accused in a trial involving three counts of sexual intercourse with a child under 10 (*s.66A Crimes Act*) and one count involving an act of indecency with a child under 10.

79. The child was his daughter, aged between 3-5 years at the time of the alleged offending.

The tendency alleged

80. A tendency notice was served by the Crown. It alleged that RDT had a sexual interest in pre-pubescent children, including pre-school age children and that he had a tendency to act upon that interest by sexually or indecently assaulting very young children, including those with whom he has a close familial relationship and procuring or attempting to procure children of a very young age for the purpose of sexual activity in circumstances where he does not have direct access to a child of the desired age.

81. The offence period was particularised as being between 2006 and 2008.

82. The tendency evidence related to conduct in 2015. This 2015 conduct involved an interest in gaining access to toddlers in nappies and pre-pubescent girls for sexual activity and the sending of a photograph of a young girl aged between 2-4 years in underwear with a caption “*Heres my ideal age though*”.
83. RDT was arrested in 2015 and participated in an ERISP where he admitted that he had a sexual interest in young children for some 20 years. It was this photograph and contents of the ERISP which the Crown sought to adduce as tendency evidence.
84. The Crown submitted that the tendency evidence “would provide powerful support for what might otherwise seem to be implausible allegations that a man of mature years would interfere sexually with his own child under the age of five years.”
85. The trial judge rejected the application by the Crown to adduce tendency evidence on 12 September 2018 (after the High Court had indicated its orders in *McPhillamy* but before the reasons were published).
86. The trial judge rejected the evidence on three bases, s.55 (Relevance), s.97 (Significant probative value) and s.101(2) (prejudicial effect).
87. The Crown appealed from that ruling pursuant to *s.5F(3A) Criminal Appeal Act 1912* and the appeal was heard on 5 October 2018, also prior to the publication of reasons in *McPhillamy*.
88. The appeal was allowed, setting aside the ruling of the trial judge and ordering that parts of the tendency evidence sought to be adduced is admitted.

Reasoning for finding that proposed evidence had significant probative value

89. At [34] Basten JA (with whom Johnson J and RA Hulme J agreed) distinguished the facts in *McPhillamy* from those of RDT as follows:

“... *First, there is a qualitative difference between a man having a sexual interest in teenage boys, examples of which are replete throughout*

recorded history, and a mature male having an interest in female toddlers in nappies. Secondly, the temporal connection was supplied by the accused's admission in the course of the record of interview that he had had such an interest "on and off for years", by which he meant "Oh, 10, 15 years. 20 years."..... Thirdly, in his evidence on the voir dire in the present matter, [RDT] accepted that he had made the relevant admissions to police. Fourthly, the 2015 offending involved more than merely uncharged allegations; charges had been laid and the accused had entered guilty pleas...."

90. Basten JA went on to state at [36]:

" The reasoning in particular cases will depend upon the nature of the alleged offending and the nature of the tendency evidence. Where the underlying propensity is accepted by the accused as operating over an extended period, its probative value is likely to be significant, even if the occasions upon which he acted upon the propensity were few and far between...."

91. And at [40] – [41]:

[40]" There are a number of reasons for concluding that the tendency evidence proffered by the Crown has significant probative value. First, the issue is whether the accused in fact committed acts on his own daughter between the ages of three and five years involving digital penetration of her genitals for his own sexual gratification. Ordinary human experience suggests that such conduct is most unusual and far more unusual than conduct involving a homosexual interest in teenage boys or a heterosexual interest in girls over 10 years. Evidence which demonstrated that [RDT] had such a proclivity, namely deriving sexual gratification from activity with very young children, would provide powerful support for the evidence of the complainant."

[41]"... Whilst it is true that there was a gap of some eight years between the alleged conduct with the complainant and the conduct which occurred

in 2015, [RDT's] own admission to having had such a sexual interest over that period renders the temporal gap largely immaterial.”

92. The Court of Criminal Appeal appear to have taken into account the reliability of the tendency evidence (in this case admissions and convictions of RDT) in its assessment that the tendency evidence had significant probative value.

93. However, at [46], Basten JA (in considering the evidence of RDT on the voir dire that he did not intend to commit an actual assault upon the child) stated:

“...to the extent that it cast doubt on the reliability of the tendency evidence, it is not a factor properly taken into account in assessing admissibility.”

Conclusions

94. The High Court told us as practitioners in *Bauer* that:

- (i) The admissibility of tendency evidence in single complainant sexual offences cases should be as straightforward as possible consistent with the need to ensure that the accused receives a fair trial; and
- (ii) Whilst there can only ever be one correct answer as to whether tendency evidence is of *significant probative value* it is a question about which reasonable minds may sometimes differ.

95. The approach of Court of Criminal Appeal in *RDT* indicates that the admissibility of tendency evidence may not be as straightforward as the High Court had hoped.

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Legislation and Regulations

97 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.

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

99 Requirements for notices

Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

Evidence Regulation 2015

5 Notice of tendency evidence

(1) A notice given under section 97 (1) (a) of the Act (a **notice of tendency evidence**) must be given in accordance with the requirements of this clause.

(2) A notice of tendency evidence must state:

(a) the substance of the evidence to which the notice relates, and

(b) if that evidence consists of, or includes, evidence of the conduct of a person, particulars of:

(i) the date, time, place and circumstances at or in which the conduct occurred, and

(ii) the name of each person who saw, heard or otherwise perceived the conduct, and

(iii) in a civil proceeding—the address of each person so named, so far as it is known to the notifying party.

(3) On the application of a party in a criminal proceeding, the court may make an order directing a notifying party to disclose the address of any person named by that party in a notice of tendency evidence who saw, heard or otherwise perceived conduct or events referred to in the notice.

(4) The direction may be given on such terms as the court thinks fit.

