Hughes v The Queen [2017] HCA 20: tendency evidence does not require similarity and what constitutes "significant probative value"

Biography of Author: Harry Venice is a family violence and criminal law Barrister at the Victorian Bar. He has particular expertise in appellate criminal law and is the author of *'Venice Crime'* (1st Ed) which is available at the LIV Bookshop.

Harry publishes case notes and articles on the latest criminal law authorities on his blog, www.venicecrime.com. He also publishes articles on family violence sentencing and family violence intervention orders at www.familyviolencevictoria.com.au

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Snapshot of article: A majority of the High Court has held that tendency evidence does not require similarity and that the admissibility of tendency evidence requires "a consideration of the circumstances of the case". The majority also clarified what constitutes "significant probative value".

Three key points from *Hughes v The Queen* [2017] HCA 20:

i) The majority held that similarity is not a requirement for tendency evidence and that a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value even if the acts which make up the tendency are not similar.

ii) The majority held that the particularity of the tendency and the capacity of its demonstration to be important as to whether the prosecution has discharged its onus of proof will depend upon "a consideration of the circumstances of the case".

iii) The majority held that 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.

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Introduction

In *Hughes v The Queen* [2017] HCA 20 (*Hughes*), the High Court considered the extent to which, if at all, evidence of conduct adduced to prove a tendency is required to display features of similarity with the facts in issue before it can be assessed as having "significant probative value". More specifically, the issue reduced to the question of whether proof that a man of mature years has a sexual interest in female children aged under 16 years (underage girls) and a tendency to act on that interest by engaging in sexual activity with underage girls opportunistically, notwithstanding the risk of detection, is capable of having significant probative value on his trial for a sexual offence involving an underage girl. [1]

The majority (Kiefel CJ, and Bell, Keane and Edelman JJ) in a joint decision held that:

> "The answer is that, in a case in which the complainant's evidence of the conduct the subject of the charge is in issue, proof of that tendency may have that capacity."[2]

The tendency evidence

The tendency alleged in the tendency notice

The accused was charged with 11 counts of sexual offences committed against five underage girls. The prosecution sought to adduce at the trial of each count, evidence of each complainant and a number of other witnesses to prove tendencies identified as "having a sexual interest in female children under 16 years of age" and using "his social and familial relationships … to obtain access to female children under 16 years of age so that he could engage in sexual activities with them".[3] The notice particularised differing forms of sexual conduct with underage girls. One particular of that conduct was its occurrence within the vicinity of another adult.

The tendency evidence witnesses

The complainant witnesses

The complainants were aged between six and 15 years at the date of the offending. The acts charged in each count and the circumstances of their commission varied. They included digital penetration of the vagina of a girl aged 14 or 15 years; procuring a girl aged between six and eight years to masturbate him; indecently rubbing his erect penis against a nine year old girl; encouraging a 15 year old girl to touch his penis; and indecently exposing himself to girls aged nine and 12 or 13 years.[4]

The three "additional witnesses"

The prosecution also sought to adduce tendency evidence from additional witnesses, namely the three "additional witnesses" and the three "workplace tendency witnesses".

The three "additional witnesses" were women who described occasions when they had been at the appellant's home as young girls on which he had either touched them in a sexual way or exposed his penis in their presence.

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[1] *Hughes v The Queen* [2017] HCA 20 at [1].
[2] *Hughes v The Queen* [2017] HCA 20 at [1] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[3] *Hughes v The Queen* [2017] HCA 20 at [3].
[4] *Hughes v The Queen* [2017] HCA 20 at [4].

The three "workplace tendency witnesses"

The three "workplace tendency witnesses" were women who had worked with the appellant and they described occasions, when they were aged in their late teens or early twenties, when the appellant had inappropriately sexually touched them or exposed himself to them.[5]

The admissibility of the tendency evidence at the trial

The trial judge held that the tendency evidence was admissible, with the exception that the evidence of the workplace tendency witnesses was not admissible in support of counts one to 10. However, the evidence of the workplace tendency witnesses was admissible for count 11 because this offence occurred at the appellant's workplace and involved him exposing his penis to the complainant, who was aged 12 or 13 years.[6]

<u>The two grounds of appeal before the High Court</u>

The first ground of appeal was that there was an error in the conclusion that the tendency evidence possessed "significant probative value".

The second ground was that there was an error in the rejection of the approach adopted in *Velkoski v The Queen* (2014) 45 VR 680 (*Velkoski*) to the assessment of whether the tendency evidence possessed "significant probative value". This ground of appeal forced the High Court to formally resolve the divergence between the Court of Appeal of the Supreme Court of Victoria and the Court of Criminal Appeal of New South Wales and the courts of Tasmania and the Australian Capital Territory with respect to the admission of tendency evidence under the Evidence Act.[7]

The Director of Public Prosecutions for Victoria (the DPP) was given leave to intervene to support Public Prosecutions NSW with respect to this second ground of appeal. The majority accepted the DPP's submission, that the approach in *Velkoski* is an unduly restrictive approach to the admission of tendency evidence.

Accordingly, the majority of the High Court held that the tendency evidence adduced at the appellant's trial had significant probative value in relation to proof of each count in the indictment was not attended by error.[8] Therefore, the appeal was dismissed.

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[5] *Hughes v The Queen* [2017] HCA 20 at [5].
[6] *Hughes v The Queen* [2017] HCA 20 at [7] and [8].
[7] *Hughes v The Queen* [2017] HCA 20 at [11].
[8] *Hughes v The Queen* [2017] HCA 20 at [12] per Kiefel CJ, and Bell, Keane and Edelman JJ.

The scheme of the *Evidence Act* covering tendency evidence

Relevance

When considering evidence the starting point is relevance.

Subject to the exclusionary rules of the *Act*[9], evidence that is relevant in a proceeding is admissible in the proceeding.[10]

Evidence is relevant if it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue.[11]

Part 3.6 of *Evidence Act* (the *Act*) governs the admission of evidence of tendency and coincidence.

Tendency Evidence

The provision in respect of tendency is s 97(1) of the *Act*:

> "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."

Coincidence Evidence

The provision in respect of coincidence is s 98(1) of the *Act*:

> "Evidence that 2 or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally 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."

[9] Contained in Pts 3.2 to 3.11 of the *Evidence Act*.
[10] Section 56(1), *Evidence Act*.
[11] Section 55(1), *Evidence Act*.

Definition of "probative value"

The probative value of evidence is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.[12]

How tendency evidence will have significant probative value (*IMM v The Queen* [2016] HCA 14)

Tendency evidence will have significant probative value if it could rationally affect the assessment of the probability of the existence of a fact in issue to a significant extent.[13]

The capacity of tendency evidence to be influential to proof of an issue may differ when applied to the civil burden of proof versus the criminal burden of proof

The capacity of tendency evidence to be influential to proof of an issue on the balance of probability in civil proceedings may differ from the capacity of the same evidence to prove an issue beyond reasonable doubt in criminal proceedings.[14]

The starting point is identifying the tendency and the fact or facts in issue which the tendency evidence is adduced to prove

The starting point in either case requires identifying the tendency and the fact or facts in issue which it is adduced to prove.[15]

The facts in issue in a criminal proceeding are those which establish the elements of the offence.

In criminal proceedings where the prosecution seeks to adduce tendency evidence about the accused, s 101(2) of the Evidence Act imposes a further restriction on admissibility

In criminal proceedings in which the prosecution seeks to adduce tendency evidence about the accused, s 101(2) of the *Act* imposes a further restriction on admissibility: the evidence cannot be used against the accused unless its probative value substantially outweighs any prejudicial effect that it may have on the accused.

The three key risk areas of prejudice that may arise from the admission of tendency evidence

The majority in *Hughes* identified three key risk areas of prejudice that may arise from the admission of tendency evidence: risks arising from tendency reasoning, the additional risk of the jury's emotional response to the tendency evidence and the risk of prejudice caused by the accused having to answer a raft of uncharged conduct stretching back, perhaps, over many years.

Risks arising from tendency reasoning

In relation to the risks arising from tendency reasoning the majority said:

> "The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of

[12] Evidence Act, Dictionary.

[13] As stated in *Hughes v The Queen* [2017] HCA 20 at [16] per Kiefel CJ, and Bell, Keane and Edelman JJ, where the court made the following citation at fn 13: See *IMM v The Queen* (2016) 257 CLR 300 at 314 [46] per French CJ, Kiefel, Bell and Keane JJ.

[14] *Hughes v The Queen* [2017] HCA 20 at [16] per Kiefel CJ, and Bell, Keane and Edelman JJ.

[15] *Hughes v The Queen* [2017] HCA 20 at [16] per Kiefel CJ, and Bell, Keane and Edelman JJ.

persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight."[16]

Risk of jury's emotional response to the tendency evidence

In relation to the risk of the jury's emotional response to the tendency evidence, the majority said:

> "In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence."[17]

Risk of prejudice caused by the accused having to answer a raft of uncharged conduct stretching back, perhaps, over many years

The majority also identified that there was also a risk that:

> "[P]rejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years."[18]

What the court must ask itself before allowing the prosecution to adduce tendency evidence

The majority said that before tendency evidence may be adduced by the prosecution in a criminal proceeding, the court must ask itself two questions:

> "[Firstly] whether the evidence has significant probative value and …
>
> [Secondly], if it does, the court must next ask whether that value substantially outweighs any prejudicial effect the evidence may have on the accused."[19]

The appeal in *Hughes* concerned the answer to the first question: whether the evidence has significant probative value.

[16] *Hughes v The Queen* [2017] HCA 20 at [17] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[17] *Hughes v The Queen* [2017] HCA 20 at [17] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[18] *Hughes v The Queen* [2017] HCA 20 at [17] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[19] *Hughes v The Queen* [2017] HCA 20 at [18] per Kiefel CJ, and Bell, Keane and Edelman JJ.

Ground two – a requirement of similarity

The second ground of appeal in *Hughes* argued that the Court of Criminal Appeal erred by declining to follow *Velkoski* and by holding that an "underlying unity" or "pattern of conduct" need not be established before tendency evidence is held to have significant probative value.[20]

The *Evidence Act* does not expressly require tendency evidence to have "similarity"

The majority noted the following about "similarity":

> "The legislative history of Pt 3.6 of the *Evidence Act* as enacted is traced in Spigelman CJ's judgment in *R v Ellis*[21]. It suffices to observe that among the differences between the ALRC's draft [recommendation] and s 97, as enacted, is the omission of any requirement of similarity."[22]

Leading up to the decision in *Hughes*, New South Wales and Victoria had conflicting positions regarding whether tendency evidence was required to have "similarity". In New South Wales the authorities stated that similarity was not required. In Victoria, as a result of the decision of *Velkoski v The Queen* (2014) 45 VR 680 (*Velkoski*), the position of the Victorian Court of Appeal was that for tendency evidence to be admissible it was required to have similarity.

Before resolving the conflicting stances of the New South Wales Court of Criminal Appeal and the Victorian Supreme Court of Appeal, the majority briefly stated the key authorities from New South Wales and Victoria respectively.[23]

The New South Wales Court of Criminal Appeal position prior to *Hughes*

In *Velkoski*, the Victorian Supreme Court of Appeal said that the recent New South Wales approach was said to be exemplified by the decisions in *R v Ford* (2009) 201 A Crim R 451 (*R v Ford*) and *R v PWD* (2010) 205 A Crim R 75 (*R v PWD*).[24]

***R v Ford* (2009) 201 A Crim R 451**

In *R v Ford*, the accused was charged with sexual intercourse without consent and the prosecution sought to lead evidence of indecent assaults, committed by the accused against two other complainants, as evidence of the accused's tendency to sexually and indecently assault women who had fallen asleep at his home after drinking alcohol.[25] The trial judge rejected the tendency, holding that the differences in the nature of the sexual conduct on each occasion deprived the evidence of significant probative value.[26]

In *Hughes*, the majority succinctly summarised *R v Ford* as follows:

> "Campbell JA, giving the leading judgment in the Court of Criminal Appeal, rejected the need for tendency evidence to prove a tendency to commit acts closely similar to the acts constituting the charged offence. His Honour observed that all "that a tendency need be, to

[20] *Hughes v The Queen* [2017] HCA 20 at [19] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[21] *Hughes v The Queen* [2017] HCA 20, fn 24: (2003) 58 NSWLR 700 at 714-715 [65]-[68].
[22] *Hughes v The Queen* [2017] HCA 20 at [23] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[23] *Hughes v The Queen* [2017] HCA 20 at [24] to [31] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[24] *Velkoski v The Queen* (2014) 45 VR 680 at 713 [142], citing *R v PWD* (2010) 205 A Crim R 75.
[25] *Hughes v The Queen* [2017] HCA 20 at [25] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[26] *R v Ford* (2009) 201 A Crim R 451 at 456-458 [6]-[16], 461-465 [28]-[31].

fall within the chapeau to s 97(1), is 'a tendency to act in a particular way'"[27]. His Honour concluded: "[a]ll that is necessary is that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged"[28]. Evidence that on three occasions the accused had sexually assaulted an intoxicated woman who had fallen asleep at his home demonstrated a tendency to act in a particular way. Proof of that tendency was found to have significant probative value in the context of the issues in the trial[29]."[30]

***R v PWD* (2010) 205 A Crim R 75**

The majority succinctly summarised the key facts in *PWD* as follows: there were 10 counts charging the accused with sexual offences against four boys joined in the same indictment; the complainants were boarders at a school of which the accused was the principal; the prosecution sought to adduce the evidence of each complainant and of two further witnesses at the trial of each count; this evidence was adduced to prove the accused's tendency to be sexually interested in young male students and to use his position of authority to engage in sexual activity with them; the sexual conduct and the circumstances in which the conduct occurred varied.[31] The trial judge considered these differences deprived the tendency evidence of significant probative value and ordered separate trials.[32]

In *PWD*, the New South Wales Court of Criminal Appeal allowed the appeal.

The majority in *Hughes* summarised what the court held in *PWD* as follows:

> "[T[he Court … followed *Ford* and held that the admissibility of tendency evidence does not depend upon the evidence exhibiting "striking similarities, or even closely similar behaviour"[33]. The tendency which the Court of Criminal Appeal identified the evidence to be capable of proving was the accused's sexual attraction to young male students and tendency to act on that attraction by engaging in various sexual acts with boarders who were vulnerable because they were homesick or otherwise unable to adjust to the normal pattern of school life[34]. Given that the occurrence of the offences was in issue, proof of the tendency had significant probative value, including by excluding that the accused's relationship with each student was an innocent one[35]."[36]

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[27] *Hughes v The Queen* [2017] HCA 20, fn 31: *R v Ford* (2009) 201 A Crim R 451 at 466 [38].
[28] *Hughes v The Queen* [2017] HCA 20, fn 32: *R v Ford* (2009) 201 A Crim R 451 at 485 [25].
[29] *Hughes v The Queen* [2017] HCA 20, fn 33: *R v Ford* (2009) 201 A Crim R 451 at 485 [126]-[127].
[30] *Hughes v The Queen* [2017] HCA 20 at [26] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[31] *Hughes v The Queen* [2017] HCA 20 at [27] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[32] *R v PWD* (2010) 205 A Crim R 75 at 77-78 [2]-[6].
[33] *Hughes v The Queen* [2017] HCA 20, fn 35: *R v PWD* (2010) 205 A Crim R 75 at 91 [79].
[34] *Hughes v The Queen* [2017] HCA 20, fn 36: *R v PWD* (2010) 205 A Crim R 75 at 92 [87].
[35] *Hughes v The Queen* [2017] HCA 20, fn 37: *R v PWD* (2010) 205 A Crim R 75 at 92 [88].
[36] *Hughes v The Queen* [2017] HCA 20 at [28] per Kiefel CJ, and Bell, Keane and Edelman JJ.

The Victorian Supreme Court of Appeal position prior to *Hughes*

The Victorian Supreme Court of Appeal disagreed with the New South Wales approach embodied by *R v Ford* and *PWD*.

The authority for the Victorian approach was *Velkoski v The Queen* (2014) 45 VR 680 (*Velkoski*)

Velkoski v The Queen (2014) 45 VR 680

In *Velkoski*, the Victorian Supreme Court (Redlich, Weinberg and Coghlan JJA) held that the common law concepts of "underlying unity", "pattern of conduct" and "modus operandi" continue to inform the assessment of whether evidence is capable of supporting tendency reasoning.[37] The conclusion was linked to the view that the object of s 97(1)(b) is to protect against the risk of an unfair trial and requiring significant probative value to be assessed by the criterion of similarity of operative features was said to protect against this risk.[38]

In *Velkoski* the Court was critical of cases in which the prosecution adduced tendency evidence to establish "the offender's interest in particular victims and his willingness to act upon that interest" because such evidence discloses only "rank propensity". The Court said that once the jury is satisfied that the acts relied upon as tendency have been committed, any resort to proof of the offender's state of mind to support tendency reasoning is impermissible and highly prejudicial.[39]

The majority in *Hughes* disagreed with the approach of the Victorian Supreme Court of Appeal

The majority in *Hughes* disagreed with the approach of the Victorian Supreme Court of Appeal in *Velkoski* and each of those disagreements is explored below.

The abovementioned statements made in *Velkoski* do not stand with the scheme of Pt 3.6 of the *Act*

The majority held that the abovementioned statements made in *Velkoski* do not stand with the scheme of Pt 3.6 of the *Act*:

> "These statements, couched in the language of the common law, do not stand with the scheme of Pt 3.6. They are apt to overlook that s 97 applies to civil and criminal proceedings. In criminal proceedings, the risk that the admission of tendency evidence may work unfairness to the accused is addressed by s 101(2)."[40]

Section 97(1) of the *Act* expressly provides for the admission of a person's tendency to have a particular state of mind

In further disagreement with *Velkoski*, the majority said that s 97(1) of the *Act* expressly provides for the admission of a person's tendency to have a particular state of mind:

> "Moreover, s 97(1) in terms provides for the admission of evidence of a person's tendency to have a particular state of mind. An adult's sexual interest in young children is a particular state of mind. On the trial of a sexual offence against a young child, proof of that particular state of mind may have the capacity to have significant probative value."[41]

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[37] *Velkoski v The Queen* (2014) 45 VR 680 at 692-693 [67], 698 [82].
[38] *Velkoski v The Queen* (2014) 45 VR 680 at 717 [164].
[39] *Velkoski v The Queen* (2014) 45 VR 680 at 720 [173(f)].
[40] *Hughes v The Queen* [2017] HCA 20 at [32] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[41] *Hughes v The Queen* [2017] HCA 20 at [32] per Kiefel CJ, and Bell, Keane and Edelman JJ.

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"

In *Velkoski* the Court said that:

> "To remove any requirement of similarity or commonality of features does not … give effect to what is inherent in the notion of 'significant probative value.' If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible."[42]

The majority held that this reasoning glosses the language of s 97(1)(b) of the *Act*. The majority emphasised that the *Act* does not explain the "inherent" meaning of 'significant probative value' and that:

> "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."[43]

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.

The majority said that:

> "[The *Velkoski*] analysis … 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."[44]

In other words, a tendency to act in a particular way may be stated with enough particularity that it has significant probative value even if the acts which create the tendency are not similar.

The probative value of tendency evidence will vary depending upon the issue that it is adduced to prove: tendency evidence adduced to prove identity will usually involve similar conduct, but different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence.

The majority explained that:

> "Commonly, evidence of a person's conduct adduced to prove a tendency to act in a particular way will bear similarity to the conduct in issue. Section 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. The probative value of tendency evidence will vary depending upon the issue that it is adduced to prove. In criminal proceedings 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

[42] *Hughes v The Queen* [2017] HCA 20 at [33] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[43] *Hughes v The Queen* [2017] HCA 20 at [34] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[44] *Hughes v The Queen* [2017] HCA 20 at [37] per Kiefel CJ, and Bell, Keane and Edelman JJ.

and the offence. Different considerations may inform the probative value of tendency evidence where the fact in issue is the occurrence of the offence."[45]

The particularity of the tendency and the capacity of its demonstration to be important as to whether the prosecution has discharged its onus of proof will depend upon "a consideration of the circumstances of the case".

The majority held that 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:

> "In the trial of child sexual offences, it is common for the complainant's account to be challenged on the basis that it has been fabricated or that anodyne conduct[46] 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 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."[47]

It should be noted that in *Saoud v The Queen* [2014] NSWCCA 136, Basten JA (with Fulerton and Hulme JJ agreeing) said:

> "Evidence of conduct having that effect will almost inevitably require degrees of similarity, although the nature of the similarities will depend very much on the circumstances of the case."

This passage, where Basten JA espoused six principles regarding tendency and coincidence evidence, uses the term "circumstances of the case" and the majority in *Hughes* cited it regarding another issue in *Hughes*. It surely was influential in the majority's conclusion to use the term "the circumstances of the case" and on this issue generally as well.

The test posed by s 97(1)(b) is as stated in *R v Ford* but with one additional qualification

The majority held that the test posed by s 97(1)(b) is as stated in *R v Ford*:

> "The test posed by s 97(1)(b) is as stated in *Ford*[48]: "the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged"."[49]

The majority provided one qualification to this test:

> "The only qualification to this is that 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 charged. Of course, where there are multiple counts on an indictment, it is necessary to consider each count

[45] *Hughes v The Queen* [2017] HCA 20 at [39] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[46] Author's note: anodyne means inoffensive or unremarkable.
[47] *Hughes v The Queen* [2017] HCA 20 at [40] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[48] *Hughes v The Queen* [2017] HCA 20, fn 53: (2009) 201 A Crim R 451 at 485 [125].
[49] *Hughes v The Queen* [2017] HCA 20 at [40] per Kiefel CJ, and Bell, Keane and Edelman JJ.

separately to assess whether the tendency evidence which is sought to be adduced in relation to that count is admissible."[50]

The assessment of whether evidence has significant probative value in relation to each count involves consideration of two related but separate matters: the first matter is the extent to which the evidence supports the tendency and the second matter is the extent to which the tendency makes more likely the facts making up the charged offence

The majority said that there are two separate matters to consider when assessing whether evidence has significant probative value, noting that when the question involves whether the offence was committed, then both of the matters must be considered:

> "The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters. The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters. By seeing that there are two matters involved it is easier to appreciate the dangers in focusing on single labels such as "underlying unity", "pattern of conduct" or "modus operandi"."[51]

Two matters that are likely to result in a high degree of probative value

The majority identified two matters that are likely to result in a high degree of probative value:

> "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."[52]

The first matter that is likely to result in a high degree of probative value is where the evidence, by itself or together with other evidence, strongly supports proof of a tendency

Regarding the first matter the majority said:

> "The first matter, involving the extent to which the evidence supports a tendency, does not require that the evidence be considered "by itself". In the words of s 97(1), the evidence of either "conduct" or "a tendency" can be used to determine the tendency relied upon by "having regard to other evidence adduced or to be adduced". In other words, evidence of a tendency might be weak by itself but its probative value can be assessed together with other evidence."[53]

The majority illustrated this by reference to the appellant's submission that there was a "world of difference" between the evidence of EE relating to incidents in a park and a driveway and the evidence of SH relating to incidents in a darkened bedroom. The majority said:

> "One problem with this comparison is that it ignores the fact that … [t]his evidence … reinforced the other tendency evidence [relating to several counts and several tendency evidence witnesses, including the complainants]. When considered together, all the tendency

[50] *Hughes v The Queen* [2017] HCA 20 at [40] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[51] *Hughes v The Queen* [2017] HCA 20 at [41] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[52] *Hughes v The Queen* [2017] HCA 20 at [41] and [61] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[53] *Hughes v The Queen* [2017] HCA 20 at [61] per Kiefel CJ, and Bell, Keane and Edelman JJ.

evidence provided strong support to show the appellant's tendency to engage opportunistically in sexual activity with underage girls despite a high risk of detection."[54]

The majority concluded:

> "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."[55]

The second matter that is likely to result in a high degree of probative value is where the tendency strongly supports the proof of a fact that makes up the offence charged

The majority emphasised that the assessment of the significant probative value of the proposed evidence does not conclude by assessing its strength in establishing a tendency.[56]

The majority explained how to approach the second matter, emphasising that a tendency expressed at a level of particularity will be more likely to be significant:

> "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. The Court of Criminal Appeal did not err in finding that the tendency evidence of each of the complainants and AA, BB and VOD met the condition imposed by s 97(1)(b) in relation to each count in the indictment."[57]

The majority used the case of *Hughes* as an example to demonstrate how high probative value can exist where the tendency strongly supports the proof of a fact that makes up the offence charged:

> "It was the defence case on each count that the complainant had fabricated her account. That the tendency evidence did more than prove a disposition to commit crimes of the kind in question, and was actually of significant value as proof of his guilt of the offences charged, can be illustrated by hypothesising separate trials in respect of each complainant with the only evidence against the appellant being the evidence of the complainant. In each such case, the jury would be presented with a prosecution case inviting it to conclude beyond reasonable doubt that the appellant had engaged in behaviour towards the complainant which involved predatory sexual activity pursued by taking opportunistic advantage of a social or family or work occasion in circumstances in which the appellant courted a real risk of discovery by other adults."[58]

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[54] *Hughes v The Queen* [2017] HCA 20 at [62] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[55] *Hughes v The Queen* [2017] HCA 20 at [63] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[56] *Hughes v The Queen* [2017] HCA 20 at [64] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[57] *Hughes v The Queen* [2017] HCA 20 at [64] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[58] *Hughes v The Queen* [2017] HCA 20 at [58] per Kiefel CJ, and Bell, Keane and Edelman JJ.

Reasonable minds might reach different conclusions regarding what constitutes significant probative value

The majority said that:

> "Unlike the common law which preceded s 97(1)(b), the statutory words do not permit a restrictive approach to whether probative value is significant. However, the open-textured nature of an enquiry into whether "the court thinks" that the probative value of the evidence is "significant" means that it is inevitable that reasonable minds might reach different conclusions. This means that in marginal cases it might be difficult to know whether an appellate court might take a different view of the significance of the tendency evidence from a trial judge… In any event, the open-textured, evaluative task remains one for the court to undertake by application of the same well-known principles of logic and human experience as are used in an assessment of whether evidence is relevant [under s 55]."[59]

There may be risks for the prosecution when adducing tendency evidence where witnesses give evidence that departs from what they were expected to give

The majority in *Hughes* emphasised that tendency evidence is admitted based on the evidence that witnesses are expected to give. If a prosecution witness gives evidence that materially differs from the evidence that the witness was expected to give, the witness may end up giving evidence that would not support admissible tendency evidence. This may result in the admission of "tendency evidence which was borderline" or wrongfully admitted at trial.[60] If a conviction gained in that circumstance is successfully appealed, this could result in a wrongful conviction and an order for a new trial.

The majority explained this in detail and suggested that prosecutors should perhaps conservatively consider what tendency evidence to rely upon at trial:

> "There may also be other risks for the prosecution. The admissibility of the tendency evidence is assessed based upon the evidence that witnesses are expected to give. In this case, the evidence given by the witnesses did not differ materially from their anticipated evidence. But in cases where the admissibility of tendency evidence is borderline, there may be risks if the actual evidence does not accord with the evidence as anticipated. Again, this could have consequences for any conviction. One intermediate appellate court has recently observed that the potential consequence of a new trial in cases where a conviction is overturned due to the wrongful admission of tendency evidence which was borderline should be a matter taken into account by the prosecution in assessing, perhaps conservatively, what tendency evidence it will rely upon[61]."[62]

[59] *Hughes v The Queen* [2017] HCA 20 at [42] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[60] *Hughes v The Queen* [2017] HCA 20 at [42] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[61] *Hughes v The Queen* [2017] HCA 20, fn 54: *DKA v The State of Western Australia* [2017] WASCA 44 at [69].
[62] *Hughes v The Queen* [2017] HCA 20 at [42] per Kiefel CJ, and Bell, Keane and Edelman JJ.

Ground one - whether there was an error in the conclusion that the tendency evidence possessed "significant probative value"

The first ground of appeal was that there was an error in the conclusion that the tendency evidence possessed "significant probative value".

The details of the tendency evidence given by all of the witnesses are too voluminous to reproduce here but are contained in *Hughes* at [44] to [54].

The majority's conclusion as to whether the tendency evidence possessed "significant probative value"

The appellant's submission: how can one act (exposing his penis to a 9 year old child swimming between his legs) make it more probable that the appellant committed another dissimilar act (encouraging a 15 year old girl to touch his penis as they kissed in her family driveway)?

The appellant conceded that certain evidence was cross-admissible as tendency evidence but he was critical of how at trial and on the previous appeal, the judicial officers failed to articulate how the remaining tendency evidence gained its significant probative force. Specifically, the appellant asked how satisfaction that he exposed his penis to a nine year old child swimming between his legs makes it more probable that he encouraged EE, a 15 year old girl, to put her hand over his penis as they kissed in the driveway of her family home (in circumstances where EE was fearful that they would be seen).[63]

The majority's response to the appellant's submission: the appellant's focus on the dissimilarity in the acts ignores the tendency that they were adduced to prove

The majority said:

> "The focus of the appellant's submission on the dissimilarity in the acts and the circumstances in which they occurred ignores the tendency that they were adduced to prove. The particular stated in the tendency notice, that the conduct occurred in the vicinity of another adult, served to highlight the appellant's willingness to act on his sexual interest in underage girls despite the evident danger of detection… The evidence as a whole was capable of proving that 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."[64]

When a mature adult engages in sexual conduct with underage girls, significant probative value may be demonstrated in other ways than simply a "pattern of conduct" or a "modus operandi"

The majority noted that it is "unusual" for a mature adult to have an inclination to engage in sexual conduct with underage girls and to have a willingness to act upon that inclination.[65] The majority also noted that often evidence of such an inclination will include evidence of grooming of potential victims so as to reveal a "pattern of conduct" or a "modus operandi" (which would make the evidence admissible under common law).[66] However, the majority held that when a mature adult engages in sexual conduct with underage girls, significant probative value may be demonstrated in other ways than simply a "pattern of conduct" or a "modus operandi":

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[63] *Hughes v The Queen* [2017] HCA 20 at [55] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[64] *Hughes v The Queen* [2017] HCA 20 at [56] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[65] *Hughes v The Queen* [2017] HCA 20 at [57] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[66] *Hughes v The Queen* [2017] HCA 20 at [57] per Kiefel CJ, and Bell, Keane and Edelman JJ.

> "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."[67]

Proof of a tendency to engage in sexual activity with underage girls opportunistically, notwithstanding the evident risk, is capable removing a doubt which the brazenness of such conduct might otherwise have raised.

The majority demonstrated this by using the example of the tendency evidence in *Hughes* where the appellant, while at dinner at JP's family home, left the dinner table, went to JP's bedroom and sexually assaulted JP while the appellant's daughter was sleeping in the same bed as JP. The majority noted that JP's evidence "might have seemed inherently unlikely" and the jury might have been disinclined to accept JP's evidence as satisfying it, beyond a reasonable doubt, that the appellant had engaged in conduct which was so much at odds with the jury's experience of the probabilities of ordinary human behaviour.[68]

However, the majority held:

> "Proof of the appellant's tendency to engage in sexual activity with underage girls opportunistically, notwithstanding the evident risk, was capable of removing a doubt which the brazenness of the appellant's conduct might otherwise have raised."[69]

The court emphasised that the force of the tendency evidence being significantly probative of the accused's guilt in *Hughes* was that the complaint of his misconduct: "should not be rejected as unworthy of belief because it appeared improbable having regard to ordinary human experience".[70]

This ties in with the majority's points that when a mature adult engages in sexual conduct with underage girls, significant probative value may be demonstrated in other ways than simply a "pattern of conduct" or a "modus operandi".[71] The majority demonstrated that the tendency evidence against the appellant in *Hughes* had significant probative value by emphasising how his tendency was "unusual";[72] contrary to "ordinary" human experience and behaviour;[73] and that his level of disinhibited disregard of the risk of discovery by other adults was "even more unusual" as a matter of ordinary human.[74]

Order made

The majority dismissed the appeal on both grounds.

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[67] *Hughes v The Queen* [2017] HCA 20 at [57] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[68] *Hughes v The Queen* [2017] HCA 20 at [59] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[69] *Hughes v The Queen* [2017] HCA 20 at [59] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[70] *Hughes v The Queen* [2017] HCA 20 at [60] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[71] *Hughes v The Queen* [2017] HCA 20 at [57] per Kiefel CJ, and Bell, Keane and Edelman JJ
[72] *Hughes v The Queen* [2017] HCA 20 at [57] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[73] *Hughes v The Queen* [2017] HCA 20 at [59] per Kiefel CJ, and Bell, Keane and Edelman JJ.
[74] *Hughes v The Queen* [2017] HCA 20 at [57] per Kiefel CJ, and Bell, Keane and Edelman JJ.