

Tendency Evidence in multiple complainant cases of child sexual assault: *the case for a restrictive interpretation and a high threshold of admissibility in criminal trials.*

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The Issue

- Giving logical and appropriate meaning to the word ‘**significant**’ when assessing the **probative value** of tendency evidence under s 97 UEL in relation to facts in issue sought to be proved in criminal trials .
- Divergence between NSW and Victoria interpreting the threshold for s 97(1) (b) admissibility with main point of difference being the degree of similarity required before tendency evidence reaches the ‘significant probative value’ threshold.
- **Lower in NSW** – no need to be ‘closely similar’ (*R v Ford*; *R v PWD*; *RH v R*; *Saoud v R*; *Sokolowskyj v R*; *El-Haddad v R*; *Hughes v R*) **and higher in Victoria** with ‘**some degree of similarity**’ required between the other relevant conduct and the offences charged (*Velkoski v R*; *Rapson v R*; *Bauer (a Pseudonym) v R*) – not ‘striking similarities’.
- *Hughes v The Queen* [2017] HCATrans 016 – heard in High Court 8 February 2017 – appellant contended *Velkoski* approach is correct whereas respondent and intervener (DPP Vic) contended NSW approach is more consistent with statutory language and purpose of s 97.

The arguments for a **high threshold** of admissibility – s 97 exclusionary rule

- **“Significant”** qualifies probative value so must impose a higher admissibility screen than s 55 relevance test.
- **Tendency evidence** – to consider ‘particular’ ways or ‘particular’ states of mind – inherent in definition and consistent with ordinary meaning that there will be identifiable similarities that mark out the tendency in establishing a pattern of behaviour across particular incidents. Inferential reasoning process beyond superficial similarity to high degree of cogency.
- **Legislative intention and Act as a whole** - stricter regulation of tendency evidence evident in multiple use prohibition in s 95 (cf hearsay evidence and operation of s 60) – recognising it is usually constituted by evidence of prior misconduct and bad character.
- No amendment recommended in ALRC102 (2005): ‘ss 97-101 provide the means by which the trial judge can resolve this fundamental conflict’ between permissive and stringent admissibility thresholds. **Schematic approach which must necessarily include s 101.**



The role of section 101

- ‘Any prejudicial effect’ must be **substantially outweighed** by the significant probative value of the tendency evidence.
- Clear legislative recognition in the admissibility scheme of the need to **protect the accused from prejudice and to promote accurate fact finding** – pulling in opposite directions but need a **transparent balancing for a fair and objective comparison**: *R v Ellis* – less stringent than common law *Pfennig* ‘no rational view consistent with innocence’ test although this test may still apply when a very high degree of prejudicial effect is evident.
- Effect on probative value of real risk of concoction/contamination.
- **Nature of tendency evidence in these cases** – viewed as abhorrent and deserving of punishment – is an objective approach possible?
- Are costs of adducing tendency evidence avoided or sufficiently mitigated by **careful directions to jury (or judge-alone trials)**

Role and utility of judicial directions

- **Curative effect of authoritative judicial directions to the jury** about the legitimate use of tendency evidence in the inferential reasoning process?
- Law operates on **assumption that judicial directions are understood and heeded by jurors** – not borne out by available Australian and international jury studies.
- Directions to disregard evidence or make limited use of certain evidence are **less likely to be effective and can be counter-productive** – ALRC102 reference to studies by Tanford; and Lieberman and Arndt.
- Depends on directions – may be contrary to common sense (counterintuitive) and lead to **opposite reaction by jurors – moral prejudice and reasoning prejudice.**
- **Confidence in jury studies** – methodology and research design to ensure the true experience and reality of juror behaviour?
- **Psychological research** – reports by recidivist child sexual assault offenders and nature of tangible similarities as basis to infer or predict similar behaviour in another person?
Extrapolation to individual cases?
- **Can the ‘tendency’ be fairly described in general terms given differing psychological characteristics** from highly deviant motivations to selfish, distorted life theories or desire.
- **Potential use of s 79 (expert opinion) in voir dire process** – what is unusual? What shows a pattern of behaviour that is a reliable predictor of future conduct? Effectively inform or hinder the criminal trial process?

CONCLUSION

- ✓ Adversarial criminal justice system based on fundamental tenets of the presumption of innocence, due process and a fair trial
- ✓ Liberty of the individual and minimising risk of wrongful conviction/miscarriage of justice
- ✓ **Notorious effect of 'bad character' evidence**
- ✓ Limitations of the criminal justice system in dealing with the reality of historical child sexual assault complaints. Where will the pendulum swing?
- ✓ **Ways of accommodating prosecution evidence in a less prejudicial form** – interpreting the scheme of ss 97-101 or legislative change? UK, US and NZ models.

