

# REASONING ABOUT TENDENCY: WHAT DOES *HUGHES v THE QUEEN* REALLY TELL US?

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*Patterns of illicit sexual misconduct by celebrities and institutional carers have been the subject of constant publicity in recent times. These episodes have often led to calls for reform of the law relating to the admission of prior conduct and convictions as evidence of criminal offences. The case of the Hey Dad..! star, Robert Hughes, triggered a High Court appeal on the subject aimed at resolving legal controversies in this area, but the High Court's decision was regarded as insufficient by the recently completed Royal Commission Into Institutional Responses to Child Sexual Abuse, which recommended its own reform. This article argues that the problems lie in factual reasoning rather than legal rule-making. It explores the factual reasoning underlying decisions of admissibility of tendency evidence to try to shed light on issues of probative value not only under the Uniform Evidence Acts but under any legislative or common law regime.*

## I INTRODUCTION

It seems that the issue of the admissibility of prior convictions and offensive conduct is rarely out of the news. In recent times, celebrities on three continents have been the subject of charges in which patterns of offensive sexual behaviour were alleged — Rolf Harris in the United Kingdom, Bill Cosby and Harvey Weinstein in the United States, and Robert Hughes, the *Hey Dad..!* star, in Australia.<sup>1</sup> Due to its importance in child sexual assault cases, prior conduct evidence has also been a focus of attention for the Royal Commission into

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1 'Rolf Harris Found Guilty of 12 Counts of Indecent Assault against Four Girls by London Jury', *ABC News* (online, 1 July 2014) <[www.abc.net.au/news/2014-07-01/rolf-harris-guilty-of-indecently-assaulting-four-girls/5542644](http://www.abc.net.au/news/2014-07-01/rolf-harris-guilty-of-indecently-assaulting-four-girls/5542644)>; Ronan Farrow, 'From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories', *The New Yorker* (online, 10 October 2017) <[www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories](http://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories)>; 'Hey Dad! Star Robert Hughes Loses High Court Fight against Child Sex Convictions', *ABC News* (online, 14 June 2017) <[www.abc.net.au/news/2017-06-14/robert-hughes-hey-dad-loses-challenge-over-sex-convictions/8616520](http://www.abc.net.au/news/2017-06-14/robert-hughes-hey-dad-loses-challenge-over-sex-convictions/8616520)>.

Institutional Responses to Child Sexual Abuse ('Royal Commission').<sup>2</sup> The law in this area has been a regular target of criticism yet the path to reform is unclear. Trenchant critics do not always agree on a solution.<sup>3</sup> While the High Court of Australia ('HCA') has recently stated its position with respect to the *Uniform Evidence Acts* in *Hughes v The Queen* ('*Hughes*'),<sup>4</sup> the Royal Commission found that position inadequate and recommended a more liberal approach based on the law of England and Wales.<sup>5</sup>

The *Uniform Evidence Acts*, now applying in the Commonwealth, three States and three Territories,<sup>6</sup> were themselves regarded as a reform in the direction of more leniency towards admission, but their interpretation has been the subject of controversy. Section 97(1), the relevant provision relating to tendency evidence, reads as follows:

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.<sup>7</sup>

It lays down a threshold of 'significant probative value' for prima facie admissibility. Section 98(1) of the *Uniform Evidence Acts* provides the same threshold for admissibility of coincidence evidence. Overarching these provisions is an exclusory provision, s 101, which requires that in criminal trials, prosecution

2 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, 2017) ('*Royal Commission: Criminal Justice Report*'); *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report Recommendations, 2017) ('*Royal Commission: Final Report*').

3 David Hamer, 'Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious' (2007) 30(3) *University of New South Wales Law Journal* 609; Jeremy Gans, 'Similar Facts after *Phillips*' (2006) 30(4) *Criminal Law Journal* 224, 227; Annie Cossins, 'Similar Facts and Consent in Sexual Assault Cases: Filling in the Gap Left by the High Court in *Phillips*' (2011) 37(2) *Monash University Law Review* 47, 72; Mirko Bagaric and Kumar Amarasekara, 'The Prejudice against Similar Fact Evidence' (2001) 5(2) *International Journal of Evidence and Proof* 71; Mirko Bagaric, 'Think Twice before Adopting the Child Abuse Royal Commission's Plan on Similar Fact Evidence', *The Australian* (Canberra, 18 August 2017) ('Think Twice').

4 (2017) 344 ALR 187 ('*Hughes* (HCA)').

5 *Royal Commission: Criminal Justice Report* (n 2) pts III–VI, 640, 664–5; *Royal Commission: Final Report* (n 2) 105–6.

6 *Evidence Act 1995* (Cth) ('*Evidence Act* (Cth)'); *Evidence Act 2011* (ACT) ('*Evidence Act* (ACT)'); *Evidence Act 1995* (NSW) ('*Evidence Act* (NSW)'); *Evidence Act 2004* (Norfolk Island) ('*Evidence Act* (Norfolk Island)'); *Evidence (National Uniform Legislation) Act 2011* (NT) ('*Evidence Act* (NT)'); *Evidence Act 2001* (Tas) ('*Evidence Act* (Tas)'); *Evidence Act 2008* (Vic) ('*Evidence Act* (Vic)').

7 *Evidence Act* (Cth) (n 6) s 97(1). See also *Evidence Act* (ACT) (n 6) s 97(1); *Evidence Act* (NSW) (n 6) s 97(1); *Evidence Act* (Norfolk Island) (n 6) s 97(1); *Evidence Act* (NT) (n 6) s 97(1); *Evidence Act* (Tas) (n 6) s 97(1); *Evidence Act* (Vic) (n 6) s 97(1).

tendency or coincidence evidence satisfying this threshold will nevertheless be inadmissible unless its probative value ‘substantially outweighs’<sup>8</sup> its prejudicial effect.

In the last 10 years or so, a divergence has appeared in the interpretation of ‘significant probative value’ between the Victorian Court of Appeal (‘VCA’) and the New South Wales Court of Criminal Appeal (‘NSWCCA’). That divergence is what led to the HCA granting special leave to appeal in *Hughes* with respect only to the admission of tendency evidence under s 97(1). The controversy centred around how distinctive the similarities must be between the past behaviours and the charged acts to satisfy the threshold of ‘significant probative value’. This has often been treated as if it were a question of law, and therefore the subject of precedent.<sup>9</sup> We would argue that, apart from some basic legal questions about the meaning of terms like ‘significant’ and ‘probative value’, it is fundamentally a question of fact — to be precise, factual reasoning. By allowing rule-based legal methods to intrude into factual reasoning, concepts like similarity and distinctiveness are asserted as legal principles, rather than evidentiary features in a reasoning process in which their value should be weighed explicitly. In analysing the history of this factual reasoning in Victoria, New South Wales (‘NSW’) and the HCA, this article will critique such reasoning, highlighting its lack of transparency and consistency, and suggest alternative approaches.

## II THE FACTUAL PROBLEMS

Although it is seldom recognised explicitly, one of the fundamental problems with tendency reasoning in law is the nature of the tendency involved. While a sex offender, for example, may have an enduring sexual inclination, the behavioural manifestations of that inclination are often only occasional (relative to the opportunities available for offending), making the behavioural tendency only a weak predictor of conduct on any given day, or any particular occasion.<sup>10</sup> The problem that has vexed the courts is how such a tendency can properly be used to establish the commission of a particular offence on a particular occasion. To have probative force, it must somehow work in conjunction with other evidence in the case, which often triggers the related concept of coincidence. Through this concept, the rarity of the behaviour amongst the general population acquires logical value. Because the coincidence of rare behaviours, or allegations of such behaviours, is unlikely to arise by chance, a relatively weak tendency may provide

8 *Evidence Act* (Cth) (n 6) s 101(2). See also *Evidence Act* (ACT) (n 6) s 101(2); *Evidence Act* (NSW) (n 6) s 101(2); *Evidence Act* (Norfolk Island) (n 6) s 101(2); *Evidence Act* (NT) (n 6) s 101(2); *Evidence Act* (Tas) (n 6) s 101(2); *Evidence Act* (Vic) (n 6) s 101(2).

9 See below Part IV(B).

10 See Peter M Robinson, ‘Prior Convictions, Conduct and Disposition: A Scientific Perspective’ (2016) 25(2) *Griffith Law Review* 197, 205.

a more plausible explanation for that coincidence. David Hamer has in fact argued that tendency reasoning is merely a subset of a more overarching category of coincidence reasoning.<sup>11</sup> One of the goals of the present study is to test this theory against decided cases.

Controversy has arisen about both the nature and the extent of similarity required to derive significant probative value. Two types of case have been distinguished — those in which the commission of an offence is not in doubt, but the identity of the offender is in issue (‘identification cases’), and those in which the alleged offender is clearly identified as the accused, but the accused denies commission of the offence (‘commission cases’).<sup>12</sup> These two types of case require different approaches to similarity.

In identification cases, tendency is used to identify the accused as the offender, and the prior conduct must therefore be such as to distinguish him or her from other potential suspects.<sup>13</sup> The conduct is sometimes said to be a ‘signature’ or ‘hallmark’ of the accused, and therefore must be distinctive to the point of being practically unique to the accused.<sup>14</sup> Conduct that is common to other members of the public is clearly insufficient in identification cases. However, when commission is in issue, a distinctive tendency is in principle no more likely to repeat itself than a less distinctive one, so coincidence reasoning may be called in aid to render the distinctiveness probative. The distinctiveness required for this form of reasoning may be much less than that required in identification cases.

Another aspect of evaluating similarity is the weight to be attached to similarities in different types of features. Clearly, similarity in the conduct of the offences, sometimes called the *modus operandi*, is relevant, and similarities in the relationship between the accused and the complainants may also reflect on the accused’s typical method for procuring victims, especially in institutional or

11 David Hamer, “‘Tendency Evidence’ and ‘Coincidence Evidence’ in the Criminal Trial: What’s the Difference?” in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 158, 171 (“‘Tendency Evidence’ and ‘Coincidence Evidence’ in the Criminal Trial”).

12 *R v Papamitrou* (2004) 7 VR 375, 389–90 [30] (Winneke P, Ormiston JA agreeing at 396 [48], Buchanan JA agreeing at 396 [49]), citing *DPP v P* [1991] 2 AC 447, 460, 462 (Lord Mackay), affd *RJP v The Queen* [2011] VSCA 204, [19] (Bongiorna JA, Harper JA agreeing at [26], Macaulay AJA agreeing at [27]); *O’Keefe v The Queen* [2009] NSWCCA 121, [59] (Howie J, McColl JA agreeing at [1], Grove J agreeing at [2]) (‘O’Keefe’), affd *Donohoe v The Queen* [2012] NSWCCA 176, [49]–[50], [59] (Garling J, McClellan CJ at CL agreeing at [1], Adamson J agreeing at [121]); *R v PWD* (2010) 205 A Crim R 75, 91 [82] (Beazley JA, Buddin J agreeing at [96], Barr AJ agreeing at [97]) (‘PWD’); *BP v The Queen* [2010] NSWCCA 303, [113] (Hodgson JA, Price J agreeing at [142], Fullerton J agreeing at [143]); *Velkoski v The Queen* (2014) 45 VR 680, 718 [166]–[167] (Redlich, Weinberg and Coghlan JJA) (‘Velkoski’), citing Stephen Odgers, *Uniform Evidence Law in Victoria* (Lawbook, 2<sup>nd</sup> ed, 2013) 466–7; *Hughes* (HCA) (n 4) 65 [39] (Kiefel CJ, Bell, Keane and Edelman JJ), affd *McPhillamy v The Queen* (2018) 92 ALJR 1045, 1051–2 [34] (Edelman J) (‘McPhillamy’ (2018)).

13 See above n 12.

14 See *O’Keefe* (n 12) [59] (Howie J).

family contexts.<sup>15</sup> However, situational context does present the problem that it may be a matter of chance, arising simply from the fact that that is where the accused and the complainants happened to live. More generally, in relation to similarity of features, there is an issue that similarities can simply be cherry-picked to give the impression of distinctive similarity when that similarity is not a systematic component of any tendency.

A related issue is the generality of the tendency. The more abstract the definition of a tendency, the easier it is to draw multiple differing behaviours within the scope of the tendency, both for the purpose of evidencing the tendency and for predicting behaviour. Just as cherry-picking features can allow a prosecutor to manufacture tendencies with no functional reality and make them look distinctive, generality can expand the tendency beyond its functional boundaries to create the illusion of similarity.

The factual issues presented above provide a structure with which to analyse the factual reasoning in cases. They may not be comprehensive, and to the extent that arguments are presented above, they may be controversial. However, they do allow us to approach factual reasoning in the cases in a systemic way. The issues may be summarised as follows:

1. To what extent does tendency reasoning depend on unlikely coincidence?
2. To what extent does distinctiveness contribute to the probative value of tendency evidence?
3. How do different types of similarity contribute to the probative value of tendency evidence?
4. How does the generality of a tendency affect its probative value?

For present purposes, we will limit our consideration to tendency reasoning about commission of sexual offences under s 97, since that alone was the subject of special leave in *Hughes*.<sup>16</sup> Other important concepts, such as coincidence reasoning under s 98, relationship and context evidence, the balancing of prejudice under

15 *R v Milton* [2004] NSWCCA 195, [31] (Hidden J, Tobias JA agreeing at [1], Greg James J agreeing at [57]) (*'Milton'*), affd *R v Harker* [2004] NSWCCA 447, [52]–[32] (Howie J, Santow JA agreeing at [1], Bell J agreeing at [2]) (*'Harker'*); *R v Fletcher* (2005) 156 A Crim R 308, 324 [67] (Simpson J, McClellan CJ at CL agreeing at [1]) (*'Fletcher'*); *R v Ceissman* [2010] NSWCCA 50, [13]–[14] (Latham J, McClellan CJ at CL agreeing at [1], Schmidt J agreeing at [24]); *NAM v The Queen* [2010] VSCA 95, [10] (Maxwell P, Buchanan JA agreeing at [25], Nettle JA agreeing at [26]) (*'NAM'*); *GBF v The Queen* [2010] VSCA 135, [27] (Nettle and Harper JJA and Hansen AJA) (*'GBF'*); *PWD* (n 12) 91 [83] (Beazley JA, Buddin J agreeing at [96], Barr AJ agreeing at [97]); *BJS v The Queen* [2011] NSWCCA 239, [254]–[259] (Hall J, Basten JA agreeing at [38], RS Hulme J agreeing at [48]) (*'BJS'* (2011)); *BJS v The Queen* (2013) 231 A Crim R 537, 551–2 [57], 553 [63] (Hoeben CJ at CL, Davies J agreeing at [256], Adamson J agreeing at [257]); *Rapson v The Queen* (2014) 45 VR 103, 115 [39]–[40] (Maxwell P, Nettle and Beach JJA) (*'Rapson'*); *Saoud v The Queen* (2014) 87 NSWLR 481, 492 [50]–[52] (Basten JA, Fullerton J agreeing at [63], RA Hulme J agreeing at [64]) (*'Saoud'*).

16 *Hughes* (HCA) (n 4) 60 [11] (Kiefel CJ, Bell, Keane and Edelman JJ), 78 [119] (Nettle J), 102 [210] (Gordon J). See also Transcript of Proceedings, *Hughes v The Queen* [2016] HCATrans 201.

s 101, and the possibility of collusion or contamination, will only make fleeting appearances when they overlap with that analysis. Apart from the HCA decisions, we will confine ourselves to the two lines of authority that triggered the legal controversy in *Hughes* — the decisions of the VCA and the NSWCCA.

The question of the admissibility of tendency evidence can reach an appellate court in a number of different ways. There may be an interlocutory appeal after either a direct ruling on admissibility or an indirect ruling as part of a challenge to the joinder of multiple charges. Alternatively, it may arise as part of a final appeal against conviction. The nature of the appeal will affect the scope for the appellate court to interfere, but, for present purposes, we will ignore the legal and procedural technicalities in order to focus on the factual reasoning.

### III CASE REASONING PRIOR TO *HUGHES*

#### A *Victorian Cases Prior to Velkoski*

The *Evidence Act 2008* (Vic) came into force on 1 January 2010, and due to provisions allowing interlocutory appeals, there has been a plethora of decisions of the VCA since that time.

*CGL v Director of Public Prosecutions (Vic)* ('*CGL*')<sup>17</sup> involved 19 counts of sexual offending against 4 complainants. Seventeen of the counts related to 2 stepdaughters, 1 of whom alleged escalating sexual misconduct over several years when she was between 13 and 18 years old (14 counts), while the other (aged 10–12 years) alleged that the accused asked her to massage him on the legs and buttocks while he masturbated to ejaculation (3 counts). The other 2 complainants, aged 10–12 years and 8–9 years, were slightly acquainted with the accused and alleged that he rubbed them in the area of the vagina, one on the outside of her clothes and the other under her clothes. There was no similarity in the context of the latter allegations — one was while watching television, the other in a cubicle area at a dance that the accused was organising. The offences alleged by the latter 2 complainants were separated by about 15 years, with the alleged offences against the stepdaughters occurring in the intervening years.<sup>18</sup>

Six separate tendency notices alleged grooming behaviours by forming relationships with adult women who had young female relatives, sexual attraction to young girls and to stepdaughters in particular, and acting on such attraction by various offensive behaviours such as touching or rubbing the vaginal area.<sup>19</sup> The

<sup>17</sup> (2010) 24 VR 486 ('*CGL*').

<sup>18</sup> *Ibid* 487–8 [6] (Maxwell P, Buchanan and Bongiorno JJA).

<sup>19</sup> *Ibid* 490–1 [13]–[14].

arguments on tendency were the same as for coincidence.<sup>20</sup> The VCA criticised the generality of the asserted tendencies, saying that it made it difficult to satisfy the requirement of significant probative value, and was inconsistent with the requirement of s 97 for the tendency to be ‘to act in a particular way’.<sup>21</sup> The Court held that none of the evidence was cross-admissible because ‘the purported similarities fell far short of what would be required’<sup>22</sup> and were ‘features which would characterise almost any allegation of sexual offending against a young girl’.<sup>23</sup> Thus, the reasoning was directed to whether the nature of the offending conduct distinguished itself from the general run of such offences.

In *PNJ v Director of Public Prosecutions (Vic)* (*‘PNJ’*),<sup>24</sup> the accused was charged with 14 counts of sexual assault and three counts of common assault over a two-year period against 14–16 year-old boys resident at a youth training centre at which he was employed as a youth officer.<sup>25</sup> The offences ranged from masturbation to oral sex and anal intercourse. The appeal was against cross-admission based on coincidence, but the VCA’s reasoning about similarities relied on tendency authorities<sup>26</sup> and has been cited (with some controversy) in later tendency cases.<sup>27</sup> The Court found it incorrect to consider similarities of circumstances that were outside the accused’s control, such as (in this case) the age range of the victims or the location of offending, since they were inherent in the nature of the youth facility.<sup>28</sup> It concluded that the acts alleged were commonplace for this sort of offending, and ‘cannot be said to distinguish the [accused’s] offending from that of any other such offender’.<sup>29</sup> What would have been necessary was ‘something distinctive about the way in which the accused ... took advantage of the setting or context’.<sup>30</sup>

*NAM v The Queen* (*‘NAM’*)<sup>31</sup> involved 11 counts of sexual offending over a period

20 Ibid 494 [28], 496–7 [37].

21 Ibid 494 [27], 497 [39]–[40].

22 Ibid 494 [26]. See also ibid 497 [38].

23 Ibid 495 [31].

24 (2010) 27 VR 146 (*‘PNJ’*).

25 Ibid 147 [1] (Maxwell P, Buchanan and Bongiorno JJA).

26 Ibid 148–50 [9]–[14].

27 *DPP v BCR* [2010] VSCA 229, [14] (Neave and Weinberg JJA and T Forrest AJA); *PWD* (n 12) 83–4 [41]–[43], [80]–[84] (Beazley JA); *KRI v The Queen* (2011) 207 A Crim R 552, 564 [58] (Hansen JA, Buchanan JA agreeing at [1], Tate JA agreeing at [67]) (*‘KRI’*); *RHB v The Queen* [2011] VSCA 295, [17] (Nettle JA, Harper JA agreeing at [29]) (*‘RHB’*); *BSJ v The Queen* (2012) 35 VR 475, 478–9 [18]–[21] (Maxwell P, Buchanan and Hansen JJA); *Murdoch (A Pseudonym) v The Queen* (2013) 40 VR 451, 474–6 [96]–[98] (Priest JA, Redlich and Coghlan JJA agreeing at [8]) (*‘Murdoch’*); *Reeves (A Pseudonym) v The Queen* (2013) 41 VR 275, 299–300 [94] (Priest JA) (*‘Reeves’*); *Velkoski* (n 12) 698 [81], 705–6 [110] (Redlich, Weinberg and Coghlan JJA). Cf Gageler J disapproves *PNJ* (n 24); *Hughes* (HCA) (n 4) 75–6 [101]; Nettle J approves of *PNJ* (n 24) at: 88 [159].

28 *PNJ* (n 24) 151 [19] (Maxwell P, Buchanan and Bongiorno JJA).

29 Ibid 151 [22].

30 Ibid 151 [20].

31 *NAM* (n 15).

of eight years against the accused's two underage granddaughters.<sup>32</sup> Maxwell P, with whom the other judges agreed, seemed to merge the discussion of tendency within the framework of coincidence.<sup>33</sup> Distinguishing *PNJ* on the facts, Nettle JA held that the surrounding circumstances of the accused having the care of the complainants were significant because of the distinctive way in which the accused took advantage of them 'to encourage an aura propitious to offending'<sup>34</sup> — by disinhibiting them with alcohol and other treats, walking around naked in their presence, encouraging them to go naked, swimming naked and getting them to swim between his legs so he could touch them.<sup>35</sup>

In *GBF v The Queen* ('*GBF*'),<sup>36</sup> there were two complainants, both of whom worked with the accused at a hotel where he was the chef. The first was also a long-time family friend, who suffered escalating unwanted sexual attention from him over a five-year period, first by brushing across her breast or vagina when he walked past at work, later by cornering her at work and at his home to kiss her and fondle her breasts and vagina, and ultimately by removing her pants and attempting to rape her.<sup>37</sup> These occasions were often accompanied by repeated begging for her consent and disregard of her negative responses. The second complainant first experienced the accused's attention when she joined the hotel as a bar maid at the age of 18. He also brushed against her breasts and groin and made lewd sexually suggestive remarks. On one occasion, he cornered her, rubbed her breasts and inserted his hand inside her pants, rubbing and digitally penetrating her vagina. There was also evidence of breast-touching from two other former female employees.<sup>38</sup>

The Crown issued four tendency notices and four coincidence notices in like terms, and the VCA, with counsels' concurrence,<sup>39</sup> regarded the arguments on both types of notice to be substantially the same.<sup>40</sup> It was dismissive of the Crown's first tendency notice as too general in asserting a tendency to have a sexual interest in female staff and to act upon that interest:

[D]epending on what is meant by a 'sexual interest', one would have to allow that a very large proportion of the adult male population share the same tendency. Equally, to say that the [accused] had a tendency to act upon his sexual interest in female staff members with whom he worked is so general as to be practically

32 Ibid [1]–[2] (Maxwell P).

33 Ibid [20].

34 Ibid [28].

35 Ibid [28]. See also [16]–[17] (Maxwell P).

36 *GBF* (n 15).

37 Ibid [5]–[10] (Nettle and Harper JJA and Hansen AJA).

38 Ibid [11].

39 Ibid [20]–[22].

40 Ibid [20].

inutile. As expressed, it could mean no more than that the [accused] was inclined to encourage conversation with female staff members or perhaps ask them out for a date.<sup>41</sup>

This raises an important caution about generality. Tendency notices often talk in terms of acting upon a particular sexual interest, but that is only damning, or for that matter, unusual, if such acting is, per se, illicit — for example, when the sexual interest is directed towards an underage child. When the sexual interest is directed towards an adult, alleging that the accused acted on that interest progresses the matter no further towards guilt.

The other three notices were more specific. The second asserted a tendency to touch the breasts of female staff members, based not only on such touching behaviours themselves but also ‘brushing’ against and looking at their breasts and looking down the front of their shirts. This tendency was considered ‘remarkable and unusual’<sup>42</sup> and significantly probative of offences involving touching of breasts. However, the context was regarded as important:

Contrastingly, for a man to touch a woman on her breast without her consent in a social setting away from the place of work, although no doubt just as criminal, strikes us as significantly less unusual and, in that sense, very much less remarkable ... [I]t is a commonplace in sexual offending of this kind and cannot be said to distinguish the [accused’s] offending from any other such offender.<sup>43</sup>

Regardless of what one may think about the Court’s exogenous knowledge of non-consensual breast-touching, the logic is consistent with previous decisions in requiring unusualness of the conduct relative to other putative offenders. This workplace tendency evidence was held inadmissible for offences alleged to occur on social occasions, including after-work drinks.

The third tendency notice alleged an even more unusual tendency, that of touching the vaginas of female staff, and such a tendency was held admissible to offences of that kind and other vaginal touching and penetration occurring in the work context. However, in view of the fact that the Court regarded touching of female staff’s breasts at the workplace unusual enough to warrant admission on breast-related offences, the following passage is surprising:

Contrastingly, we do not consider that an offence of rape or attempted rape on a co-worker in a social setting away from work is, without more, so unusual or otherwise remarkable in the relevant sense as to make it significantly probative of an offence of rape or attempted rape committed at work on another co-worker.<sup>44</sup>

41 Ibid [31].

42 Ibid [32].

43 Ibid [36].

44 Ibid [45].

Clearly, the Court placed a greater weight on the workplace context than the unusualness of the behaviour itself, which seems to detract from any theory of unlikely coincidence (since rape is much more unusual than relatively minor workplace misconduct). This approach led to evidence of workplace incidents being held not to be relevant to allegations of offences in social settings, and vice versa. Similarly, the tendency alleged in the fourth notice, to kiss female co-workers, was held to be too general, and a more specific tendency to kiss co-workers *at work* not significantly probative of kissing a co-worker on a social occasion.<sup>45</sup>

The Court also drew a distinction based on the nature of the tendency that has been replicated in later cases:

Whether tendency evidence has significant probative value depends on the nature of the tendency. For example, evidence that an accused had a sexual interest in a complainant might be significantly probative of an allegation that he committed a sexual offence against that complainant. But, without more, it would not be significantly if at all probative that he committed a sexual offence against someone other than the complainant. Contrastingly, evidence that an accused had a tendency to commit a particular kind of act or to commit a particular kind of act in particular circumstances, might be significantly probative of an allegation that the accused committed another act of the kind or committed another act of the kind in particular circumstances.<sup>46</sup>

In *MR v The Queen*,<sup>47</sup> the accused was charged with two counts relating to child pornography, and one count of an indecent act, namely vaginal intercourse, with his underage daughter.<sup>48</sup> The VCA relied on the fact that s 97 does not require similarity to uphold the trial judge's ruling that the evidence on the child pornography counts, which included photographs and a video of the accused's naked daughter, was admissible to show a tendency to have a sexual interest in the daughter and a willingness to act on it.<sup>49</sup> The fact that the tendency was directed specifically to the accused's daughter might have been sufficient to satisfy the requirement for specificity elaborated in *GBF*.<sup>50</sup>

*KRI v The Queen* ('*KRI*')<sup>51</sup> was a case in which the specificity of the Crown's tendency notice was entirely artificial. The indictment alleged 15 sexual offences committed over three years against four boys aged between 7 and 13. The relevant

45 Ibid [47].

46 Ibid [26] (citations omitted).

47 [2011] VSCA 39 ('*MR*').

48 Ibid [4]–[5] (Hansen JA).

49 Ibid [12]–[15].

50 See *GBF* (n 15) [26] (Nettle and Harper JJA and Hansen AJA).

51 *KRI* (n 27).

tendencies notified in the focal notice 4B were as follows:

[A tendency to] sexually assault [a] child complainant (who is friends with the [accused's] son and visiting at [his house]) by touching [the] penis and or licking [the] anus and or inserting his penis into the complainant's anus on the couch or in the bedroom while the [accused's] son is present and on all but one occasion is asleep and [the accused's] partner has gone to bed ...

[A tendency to] have a sexual interest in the friend of the [accused's] son who is present in the home and sitting on the couch, watching TV or sleeping in the [accused's] son's bedroom and a willingness to act upon it or attempt to [do so] in the presence of his son who on all but one occasion [was] asleep.<sup>52</sup>

The first tendency alleges 'a particular state of mind',<sup>53</sup> namely a sexual interest, but it is highly unlikely that such a sexual interest would be limited to boys who are sitting on couches, watching television or sleeping specifically in the son's bedroom. Nor could the evidence in the case support such specificity, because to prove such a specific tendency it would be necessary to show that the accused lacked such a sexual interest if the boy was *not* sitting on a couch, watching television or sleeping in the son's bedroom. In reality, the evidence could show no more than a sexual interest in underage boys and a willingness to act upon it in a variety of ways (which is what the trial judge found).<sup>54</sup> The second tendency 'to act in a particular way' could be criticised on the similar grounds. The VCA found the necessary unity in a generalised tendency not specified in notice 4B, namely to exploit the opportunity afforded by a boy staying overnight to opportunistically pursue a sexual interest.<sup>55</sup>

In *RHB v The Queen* ('*RHB*'),<sup>56</sup> the VCA had to decide whether prior convictions for indecency offences against daughters over a number of years were admissible on a charge of indecent acts against a granddaughter. While casting doubt on the coincidence reasoning in *PNJ*, it emphasised that it was dealing with tendency evidence rather than coincidence.<sup>57</sup> Nevertheless its conclusion, which has been often quoted, seems to rely heavily on unlikely coincidence:

[I]t is a remarkable thing for a man to commit sexual acts against his female lineal descendants. It is still more remarkable when, in each case, the nature of the acts is similar if not identical, even if they are commonplace sexual acts. It is even more remarkable that in each case the acts were committed in the home while the victim was in the [accused's] care, while other adults were close by and

52 Ibid 556 [17].

53 Ibid.

54 Ibid 558 [25] (Hansen JA).

55 Ibid 563–4 [57].

56 *RHB* (n 27).

57 Ibid [17] (Nettle JA).

the risk of detection was significant. It follows that, if accepted, the evidence of the [accused's] prior offending against his daughters would demonstrate that he had a tendency to be sexually attracted to his young female descendants and to act upon that attraction in similar ways at different times, when the victims were in his home under his care and thus vulnerable to his advances.<sup>58</sup>

When analysed closely, this passage contains logical flaws. The first three sentences emphasise the unlikely or 'remarkable' nature of the behaviour. What is then said to follow from that is not in any way dependent on such unlikelihood. The same conclusion could have been reached even if the acts were unremarkable. There is also no attempt in this passage to consider whether the acts were unusual *for this type of offence*.

A similar observation could be made about the decision in *DR v The Queen* ('DR'),<sup>59</sup> which involved 38 counts of sexual offending against the accused's two underage stepdaughters. The tendency notice alleged no more than the fact that the accused had a tendency 'to engage in sexual acts with two of his stepchildren',<sup>60</sup> and the Crown relied more on coincidence.<sup>61</sup> As in *KRI* and *RHB*,<sup>62</sup> the VCA recognised that the issue of significant probative value was a question of fact.<sup>63</sup> With respect to tendency, it was inclined to the view that the sexual abuse of a child, stepchild or grandchild was sufficiently uncommon that such evidence in itself would have significant probative value.<sup>64</sup> However, additional similarities in the complainants' ages when the offending began, 'the context and features of the offences and uncharged acts, and the [accused's] use of fear to make the complainants keep the offending secret',<sup>65</sup> made that conclusion more comfortable.

In *CEG v The Queen*,<sup>66</sup> the complainants were a stepdaughter and daughter of the accused. The VCA approved NSW authority to the effect that while tendency reasoning does not require 'striking similarities, or even closely similar behaviour',<sup>67</sup> for coincidence reasoning similarity is the 'touchstone of admissibility'.<sup>68</sup> To support tendency reasoning, it did require some particularity or peculiarity in the similarities beyond rank propensity,<sup>69</sup> and its analysis focused

58 Ibid [18].

59 [2011] VSCA 440 ('DR').

60 Ibid [33] (Neave and Hansen JJA and Beach AJA).

61 Ibid [37].

62 *RHB* (n 27) [18] (Nettle JA); *KRI* (n 27) 563–4 [57] (Hansen JA).

63 *DR* (n 59) [58] (Neave and Hansen JJA and Beach AJA).

64 Ibid [88].

65 Ibid [89].

66 [2012] VSCA 55 ('CEG').

67 Ibid [22] (Nettle and Harper JJA and Hollingworth AJA), quoting *PWD* (n 12) 91 [79] (Beazley JA).

68 *CEG* (n 66) [21] (Nettle and Harper JJA and Hollingworth AJA), quoting *PNJ* (n 24) 148 [8].

69 *CEG* (n 66) [12]–[14].

on the predictive quality of the tendency.<sup>70</sup>

In *Reeves (A Pseudonym) v The Queen*,<sup>71</sup> the VCA followed *RHB* in saying that the extent of peculiarity or remarkability of the conduct will ‘guide the assessment of [its] probative value’.<sup>72</sup> The peculiarities on which they upheld admission of the evidence were that:

- the victims were a prepubescent daughter and stepdaughter;
- they were under the care of the accused who created and took advantage of the situation of performing a therapeutic act aimed at relieving the symptoms of a skin condition;
- the accused removed their underpants to allow access to their vaginas; and
- he did so while others were present and awake in the house.<sup>73</sup>

This was enough to satisfy the majority, but Priest JA, consistent with views expressed earlier in *Murdoch (A Pseudonym) v The Queen*,<sup>74</sup> found that the evidence did not reach the high degree of cogency required as it did not distinguish the accused’s alleged offending from any other such offender.<sup>75</sup>

## **B NSW Cases Prior to Velkoski**

The uniform legislation was introduced in NSW well before Victoria, as the *Evidence Act 1995* (NSW), commencing on 1 September 1995. The original form of s 97 expressed the admissibility criterion in a negative form, requiring exclusion if the evidence did not have significant probative value. This was amended to its current form by the *Evidence Amendment Act 2007* (NSW), which commenced on 1 January 2009. The amendment is of no consequence to the current exercise.

As in Victoria, early cases leant on common law authorities. In *R v AH*,<sup>76</sup> the NSWCCA, relying on pre-*Evidence Act 1995* (NSW) authority, distinguished between relationship evidence aimed at putting the other evidence in context, which did not have to comply with ss 97 and 101, and evidence of a ‘guilty

<sup>70</sup> Ibid [14].

<sup>71</sup> *Reeves* (n 27).

<sup>72</sup> Ibid 289 [53] (Maxwell ACJ) (citations omitted).

<sup>73</sup> Ibid 289–90 [54] (Maxwell ACJ).

<sup>74</sup> *Murdoch* (n 27) 470–1 [80] (Priest JA).

<sup>75</sup> *Reeves* (n 27) 299 [94].

<sup>76</sup> (1997) 42 NSWLR 702 (*AH*).

passion<sup>77</sup> adduced to show a propensity or tendency.<sup>78</sup> In *R v Veitch*,<sup>79</sup> the NSWCCA approved dicta from that case to the effect that evidence of guilty passion would usually have significant probative value if the ‘conduct’ was not too remote in time.<sup>80</sup>

In the case of *R v F* (*F*),<sup>81</sup> a gym master was charged with indecent assaults committed at different times over an 11-year period against former pupils of his school. Defence counsel argued, in effect, that much of the supposedly similar evidence was insufficiently distinctive, as it simply arose from the school context or the limited ways in which a boy could be assaulted. It is instructive to examine in separate categories the nature of the similarities that the NSWCCA found sufficient to warrant admission:

### Situational

1. The four boys were all students at the school aged between 12 and 14 years;<sup>82</sup>
2. ‘[T]he accused was working as a gym teacher at the school’;<sup>83</sup>
3. All alleged offences ‘occurred when the boys were in their school uniforms or gym clothes’;<sup>84</sup>
4. On three occasions ‘the approaches were made to the boys in the privacy of the sports room or [the accused’s] office (which [was] located in the sports room)’;<sup>85</sup> and
5. One student ‘was summonsed from economics class’, another was told ‘Mr F wants you over at the high bar’.<sup>86</sup>

### Conduct of the offence

6. All incidents involved penis play;<sup>87</sup>
7. Two ‘occurred whilst the accused supported the boys on gym equipment and touched them on the crotch’;<sup>88</sup>

77 Ibid 708–9 (Ireland J).

78 Ibid.

79 [1999] NSWCCA 185 (*Veitch*).

80 Ibid [42], citing *AH* (n 76) 708–9 (Ireland J).

81 (2002) 129 A Crim R 126 (*F*).

82 Ibid 136 [20] (Wood CJ at CL).

83 Ibid.

84 Ibid.

85 Ibid 137 [20].

86 Ibid.

87 Ibid 136 [20].

88 Ibid 137 [20].

8. On three occasions the ‘boy was grabbed from behind’;<sup>89</sup>
9. On ‘three occasions the accused inserted his hand ... inside their pants and underpants’;<sup>90</sup> and
10. On ‘three occasions each boy was restrained in the use of his hands’<sup>91</sup> (in one, the wrists were strapped to the high bar; in another, the boy’s hands were on the parallel bar; in a third, the boy had his hands held by the accused behind his back).<sup>92</sup>

### **Contextual behaviours and circumstances**

11. The accused watched all the boys while they showered;<sup>93</sup>
12. He playfully slapped two of the boys on the bottom;<sup>94</sup>
13. With two boys he spoke about sexual matters — with one, ‘he spoke about “wanking”, penis size, a woman “getting wet” during sex, and foreskin’;<sup>95</sup> he asked another whether pictures of Samantha Fox gave him an erection;<sup>96</sup>
14. Three of the boys had difficulties at school — one had learning difficulties (petit mal epilepsy), misbehaved by calling another boy’s sister a slut and was disciplined by the accused; another was bullied by other students at the school; the parents of a third boy were separated and he got into trouble with the Deputy Principal for having pornographic magazines;<sup>97</sup> and
15. Those same three boys were given special attention by the accused, who told them they were special.<sup>98</sup>

Of the situational features, the age of the complainants might contribute to a suggestion of a guilty passion for underage boys, but the other factors seem incapable of distinguishing guilt from innocence — they could apply to almost any interaction the accused had with the complainants. For similar reasons, none of the situational factors would support an argument of unlikely coincidence.

On the question of tendency, the NSWCCA diluted the evidence into a very general tendency — ‘to touch or fondle the penises of young boys in their first or

89 Ibid.

90 Ibid.

91 Ibid.

92 Ibid.

93 Ibid.

94 Ibid.

95 Ibid.

96 Ibid.

97 Ibid.

98 Ibid.

second years of high school, with the state of mind that would convert such a non-consensual act into one amounting at law to an indecent assault'.<sup>99</sup> The Crown's assertion of the propensity was more specific, largely due to the incorporation of commonplace situational factors:

[A] modus operandi involving conduct directed toward young boys at the school where he taught, who had a vulnerability, who had come into the [accused's] reach as his students, and who were indecently assaulted by him within the facilities available to him, either at the school, or at the adjoining premises which he used for his gymnastic teaching activities.<sup>100</sup>

Despite impliedly criticising the trial judge for failing to elaborate her reasoning,<sup>101</sup> the NSWCCA was hardly more illuminating. It drew no real distinction between tendency and coincidence, dealing with ss 97, 98 and 101 compendiously and concluding in favour of admission on the basis of 'the number and coincidences of the acts and dealings'<sup>102</sup> which were sufficient to '[carry] the day for the Crown'.<sup>103</sup>

Hidden J, delivering the unanimous judgment in *R v Milton* ('*Milton*'),<sup>104</sup> a case of homosexual intercourse with two underage boys, regarded similarity and dissimilarity as relevant, but not determinative, of whether tendency evidence should be admitted, but gave no hint of what might make such evidence admissible in the absence of similarity.<sup>105</sup> Eschewing the need for similarity in the 'sexual activity ... and the circumstances surrounding it',<sup>106</sup> Hidden J proceeded to base his Honour's judgment on rather generalised similarities in grooming behaviours — employing the boys, encouraging them to drink alcohol and use drugs to 'loosen their natural sexual inhibitions'<sup>107</sup> — and the willingness 'to impose his will upon them in the teeth of their resistance'.<sup>108</sup>

*R v Barton* ('*Barton*')<sup>109</sup> raised the important issue of whether evidence of less serious sexual misconduct had probative weight in proving more serious misconduct. The accused was employed at an institution at which delinquent teenage boys were detained, and was charged with sexual misconduct with

99 Ibid 143 [40].

100 Ibid 143 [41].

101 Ibid 139 [30].

102 Ibid 144 [46].

103 Ibid 143 [45].

104 *Milton* (n 15).

105 Ibid [30].

106 Ibid [31].

107 Ibid.

108 Ibid [31]. This was quoted with approval in *Harker* (n 15) [52] (Howie J) and *Fletcher* (n 15) 323 [64] (Simpson J).

109 [2004] NSWCCA 229.

respect to six of the boys.<sup>110</sup> Grove J expressed the issue in this way:

On the issue of tendency, it was ... necessary to ask whether allegations of conduct of a lesser degree of seriousness ... such as watching the boys whilst they showered, being alone in their cabins with them, touching their bodies including genitals whilst applying lotions for skin disorders or, on one occasion, examining an anus for haemorrhoids (Ricky, Danny, Khaled and Jason) should be admitted as probative of allegations of masturbation, fellatio and anal intercourse (Anthony and Anton).<sup>111</sup>

The decision to sever the trials of the more serious charges echoed the language of the identity cases, requiring a level of similarity amounting to a signature of the accused. The Court seemed concerned that a generality of tendency would increase the risk of prejudice:

The learned trial judge did not discriminate between the actions of lesser and those of greater degree of seriousness. Between the two assemblages of described conduct, there was no discernible pattern or ‘signature’. There must have been a real risk that the jury would conclude guilt on the basis of a general impression that the [accused] had some sexual interest in the complainants rather than focussing upon the necessity for proof of the actual offences charged.<sup>112</sup>

In the case of *R v Nassif*,<sup>113</sup> Simpson J purported to distinguish and elaborate the reasoning processes of coincidence and tendency, but like those before her Honour, Simpson J gave no logical justification for this assertion: ‘[t]he more numerous the claims of tendency evidence, and the more specific, the stronger the probative value’.<sup>114</sup>

In *R v Fletcher* (*‘Fletcher’*),<sup>115</sup> her Honour warned against making too much of rank propensity, while reiterating the oft-heard theme that tendency evidence is strengthened by similarity:

A lay person may well be forgiven for thinking that evidence of a tendency to sexual misconduct with adolescent boys could rationally affect the assessment of the probability that the [accused] sexually miscondacted himself with the complainant as an adolescent.

But this is where caution needs to be exercised. While it may be tempting to

110 Ibid [3] (Grove J). A seventh complainant failed to attend court to give evidence, leading to a directed acquittal.

111 Ibid [10].

112 Ibid [14] (Grove J, Dunford J agreeing at [69], Kirby J agreeing at [70]). See also *Dao v The Queen* (2011) 81 NSWLR 568, 605 [194]-[199] (Simpson J) (*‘Dao’*).

113 [2004] NSWCCA 433.

114 Ibid [51].

115 *Fletcher* (n 15).

think, for example, that evidence of a sexual attraction to male adolescents has probative value in a case where the allegations are, as here, of sexual misconduct with a male adolescent, an examination must be made of the nature of the sexual misconduct alleged and the degree to which it has similarities with the tendency evidence proffered. There will be cases where the similarities are so overwhelming as to amount to what, in pre-*Evidence Act* days was called ‘similar fact’ evidence, showing ‘a striking similarity’ between the acts alleged; and there will be cases where the similarities are of so little moment as to render the evidence probative of nothing.<sup>116</sup>

Citing *R v Harker* (*‘Harker’*)<sup>117</sup> and *Milton*,<sup>118</sup> her Honour emphasised the similarity in grooming behaviours:

In my opinion, the [accused]’s argument focused too narrowly upon a tendency to have sexual intercourse in a particular fashion. The DPP’s explanation ... shows that the ‘tendency’ which it sought to establish was wider, and more detailed. The DPP sought to establish a pattern of behaviour, or even a *modus operandi*. ... This included the use of his position as parish priest in meeting Catholic families and involving himself in their lives, developing a special relationship with the families, the children of the families, and in particular with a child the focus of his attention; and the introduction of the child to sexually explicit material and, eventually, inappropriate sexual behaviour.<sup>119</sup>

Rothman J, in dissent, took the view that the evidence of developing a relationship with the family and the child ‘would be unexceptionable amongst any pastoral care worker’,<sup>120</sup> and therefore the tendency must be established by similarities in the sexualised behaviours only, namely, the grooming by introduction to sexual material and the sexual activity itself.<sup>121</sup>

The legal power of a ‘guilty passion’ is seen to its fullest extent in the case of *Rodden v The Queen*,<sup>122</sup> where a taped telephone call in which the accused conceded to the complainant that he had done something to her which hurt her and led her to have counselling was admitted as tendency evidence, despite the complete absence of any information about what he had done, let alone any attempt to evaluate similarity.<sup>123</sup>

116 Ibid 319-20 [49]–[50] (McClellan CJ agreeing at [1]).

117 *Harker* (n 15).

118 *Milton* (n 15).

119 *Fletcher* (n 15) 324 [67] (McClellan CJ at CL agreeing at [1]).

120 Ibid 329 [95].

121 Ibid 329 [94]–[97], 334-5 [120]–[122].

122 (2008) 182 A Crim R 227 (*‘Rodden’*).

123 Ibid 236–7 [38]–[43] (Hall J).

*AW v The Queen* (*'AW'*)<sup>124</sup> was a case in which the Crown sought to bolster charges of sexual assault, indecency and non-consensual intercourse with a child by tendency evidence of the accused viewing hardcore child pornography on the internet. In other words, it evidenced a passion for children, not being the complainant, unaccompanied by any attempt to act upon it. The Court found such evidence from the complainant's mother (the accused's de facto partner) to be 'powerful',<sup>125</sup> and sufficient to satisfy both ss 97 and 101.<sup>126</sup>

In *R v PWD* (*'PWD'*),<sup>127</sup> another institutional case, the offending behaviours themselves varied,<sup>128</sup> but there were commonalities in situational factors and contextual behaviours and circumstances much like in the case of *F*.<sup>129</sup> The situational factors were a commonplace of everyday life at the boys' school where the alleged offences took place.<sup>130</sup> The contextual grooming behaviours included befriending the boys, having them alone in his private room at night and going on drives with them.<sup>131</sup> Beazley JA seemed to ignore the import of evidence that negated the grooming tendency.<sup>132</sup> Logically, to infer that ostensibly innocent interactions were a calculated grooming behaviour precursing illicit behaviour, they must not only be present for illicit interactions but also not present for innocent interactions; and even if such interactions did form part of the tendency, they would not add to its probative value unless they were capable of distinguishing guilt from innocence. In fact, there was substantial evidence that the alleged grooming behaviours were commonplace without any illicit purpose:

The Crown tendered two statements from boys who had been at the school at the relevant times that said the [accused] had not made any sexual advances to them and the defence tendered a bundle of statements to the same effect. That evidence indicated that the [accused] had been involved with many boys over the years, had been alone with them in his room and given them lifts in his car, all with no suggestion of any untoward conduct.<sup>133</sup>

To some extent, a very generalised vulnerability of the victims was also relied on in *PWD*,<sup>134</sup> and this was also true of *Dao v The Queen*,<sup>135</sup> in which a Catholic priest

124 [2009] NSWCCA 1 (*'AW'*).

125 *Ibid* [49] (Latham J).

126 *Ibid* [48]–[49] (Latham J, Bell JA agreeing at [1], Fullerton J agreeing at [58]).

127 *PWD* (n 12).

128 *Ibid* 77 [4] (Beazley JA, Buddin J agreeing at 93 [96], Barr AJ agreeing at 93 [97]).

129 *F* (n 81).

130 *Ibid* 82 [35] (Beazley JA).

131 *Ibid* [36].

132 *Ibid* 81 [30]–[33], 90 [76].

133 *PWD* (n 12) 85 [52] (Beazley JA).

134 *Ibid* 90 [76].

135 *Dao* (n 112).

was charged with sexual offences against three underage altar boys.<sup>136</sup> There was little similarity between the circumstances of the offences, but the NSWCCA relied on the following similarities to support cross-admissibility:

Common to the allegations made by SM, JC and MB was a history of behavioural or emotional problems rendering them vulnerable, and ... the [accused]'s taking advantage of that vulnerability by paying them special attention, and 'grooming' them for sexual exploitation, when he was alone with them, ostensibly for pastoral purposes. There was an element of planning, or at least pre-meditation, in what the Crown asserted the [accused] did.<sup>137</sup>

When one examines the evidence, the inference for planning seems rather weak, but there was the particularity that the offences all involved troubled boys who had approached the accused for emotional support, forming a relationship which the accused then exploited.<sup>138</sup> Simpson J, with whom the other judges agreed, contested this passage from the judgment of Howie J in *Harker*:

[T]endency evidence is placed before the jury as evidence tending to prove the guilt of the accused. The jury are asked to reason that, because the accused acted in a particular way on some other occasion or occasions, he or she must have acted in the same way on another occasion.<sup>139</sup>

Her Honour's response placed a low premium on similarity of conduct: 'My difficulty with that formulation lies in the words "in the same way"'. Evidence of a tendency may cast light on the conduct or state of mind of a person without being evidence of conduct of the same kind.<sup>140</sup> Her Honour also rejected the notion that evidence of more serious conduct could not support allegations of less serious conduct, and vice versa, regarding Grove J's distinction in *Barton* as limited to balancing probative value against prejudice under s 101.<sup>141</sup>

*BJS v The Queen*<sup>142</sup> was another religious school case with an accused priest and multiple schoolboy complainants. Hall J, delivering the lead judgment on this point,<sup>143</sup> noted with apparent approval the precedents of *PWD* and *R v Ford* ('*Ford*')<sup>144</sup> to the effect that close or striking similarities were not required for

136 The trial judge severed charges with respect to three other boys: *ibid* 590–1 [108], 591 [113]–[114] (Simpson J).

137 *Ibid* 599 [160].

138 *Ibid* 593–6 [126]–[144].

139 *Harker* (n 15) [57], quoted in *ibid* 603 [181].

140 *Dao* (n 112) 603 [181], citing *Fletcher* (n 15) 324 [67] (Simpson J); *R v Ford* (2009) 273 ALR 286, 297 [38], 298 [41]–[44] (Campbell JA) ('*Ford*').

141 *Dao* (n 112) 605 [193]–[194], 606 [201].

142 *BJS* (2011) (n 15).

143 *Ibid* [50]–[295] (Basten JA agreeing at [38], RS Hulme J agreeing at [48]).

144 *Ford* (n 140).

tendency reasoning,<sup>145</sup> but did find striking similarities necessary for coincidence reasoning.<sup>146</sup> For tendency reasoning, his Honour seemed to require specific and distinctive similarities: '[t]he greater the degree of specificity with which similarities can be identified then more likely will it be that the evidence will be probative of the tendency to act in a distinctive way or do acts of a distinctive kind'.<sup>147</sup>

The alleged similarities were expressed rather vaguely by the Crown,<sup>148</sup> and, despite Hall J's previous emphasis on distinctiveness, his Honour's conclusion matched that generality:

The evidence ... would demonstrate that the [accused] ... was sexually attracted to young male students and acted upon the predilection in various ways and at different times. This is alleged to have occurred in a setting where the students to whom the [accused] directed his sexual attention were students boarding at the College and who exhibited a certain level of trust in the [accused] and who fell into a particular age group.<sup>149</sup>

In *SSN v The Queen*,<sup>150</sup> it was held that an accused's acts of exposing himself to young girls and massaging one girl's vagina showed no more than 'a generalised notion of sexual interest in young children'<sup>151</sup> and were not probative of acts of masturbation and fellatio alleged to have occurred over several years in private against a young boy.<sup>152</sup>

*Sokolowskyj v The Queen*<sup>153</sup> emphasised the functional differences between offending behaviours. The accused was alleged to have indecently touched the 8-year-old daughter of an acquaintance in the parent's room at a shopping centre, while the acquaintance was in the toilet. He had prior convictions for exposing himself to a 15-year-old girl and twice masturbating in public in the presence of adult females, which the NSWCCA rejected as tendency evidence:

There is a large qualitative distinction between on the one hand offences of exhibitionism, involving either public masturbation or exposure of one's genitals, and on the other, engaging in non-consensual, physical contact with the genitals of an underage complainant. In relation to the actions on which the

145 *BJS* (2011) (n 15) [227]–[229], citing *PWD* (n 12) 87–8 [64] (Beazley JA) and *Ford* (n 140) 485 [125] (Campbell JA).

146 *Ibid* [248].

147 *Ibid* [229], quoting *CGL* (n 17) 497 [40] (Maxwell P, Buchanan and Bongiorno JJA).

148 *Ibid* [255] (Hall J).

149 *Ibid* [257].

150 [2012] NSWCCA 163.

151 *Ibid* [49] (McClellan CJ at CL).

152 *Ibid*.

153 (2014) 239 A Crim R 528.

tendency evidence was based, public display was an essential ingredient and the sexual gratification or thrill was apparently achieved by such public exposure of his genitals to women. The offence under consideration was very different. The [accused] is said to have taken steps to prevent discovery by latching the change room door and by warning the complainant not to tell anyone, otherwise he would take retributive action against her family.<sup>154</sup>

The Court found that the Crown had generalised the tendency to sexual activity that lacked the essential elements of the charge — assault and a child.<sup>155</sup>

### C *Velkoski and Beyond* — *Victorian Cases*

By 2014, it was clear that there were divergences in the outcomes of tendency cases in Victoria and NSW. In Victoria, striking similarity was not required, but distinctive similarity was, unless the past conduct was against the same complainant, or perhaps against complainants of the same lineage. Often this was expressed in terms of distinctiveness from the usual run of offences of that type, but not always. In NSW, any requirement of similarity had been abolished, but what took its place was not elaborated. One might say that NSW had reverted to assessing significant probative value without recourse to self-imposed criteria, but the lack of transparency in the factual reasoning processes invited inconsistency.

The VCA addressed these divergences in *Velkoski v The Queen* (*‘Velkoski’*),<sup>156</sup> where the accused sought leave to appeal convictions on 15 counts of indecent acts against three child complainants under his wife’s care at a day care centre. The Court observed that in the early days of the uniform legislation there had been little difference between the jurisdictions. *CGL*<sup>157</sup> (and later Victorian cases) had adopted the language of the NSW case of *AE v The Queen* (*‘AE’*)<sup>158</sup> in finding that similarities were ‘in reality, unremarkable circumstances that are common to sexual offences against children’.<sup>159</sup> Victorian decisions had not required ‘striking similarity’,<sup>160</sup> but were permeated with terms requiring some degree of similarity, such as “‘underlying unity”, “modus operandi”, “pattern of conduct” or “commonality of features””.<sup>161</sup> However, recent decisions in NSW had arrived at a position more closely aligned with that expressed by Beazley JA in *PWD* than

154 *Ibid* 538 [43] (Hoeben CJ at CL).

155 *Ibid* 538 [44].

156 *Velkoski* (n 12).

157 *CGL* (n 17).

158 *AE v The Queen* [2008] NSWCCA 52 (*‘AE’*).

159 *Ibid* [42] (Bell JA, Hulme and Latham JJ), quoted in *CGL* (n 17) 495 [31] (Maxwell P and Buchanan and Bongiorno JJA) and *Velkoski* (n 12) 696 [73] (Redlich, Weinberg and Coghlan JJA).

160 *Velkoski* (n 12) 704 [102], 718 [169].

161 *Ibid* 698 [82].

*AE* or *Fletcher*,<sup>162</sup> to the effect that close similarities or commonalities of features were not a prerequisite of tendency reasoning.<sup>163</sup>

The Court recognised that the recent decisions had given rise to a perception that the threshold of admissibility had been lowered but considered that, with respect to Victoria, this perception may have been ‘more apparent than real’.<sup>164</sup> The decisions in *PNJ*,<sup>165</sup> *NAM*,<sup>166</sup> *GBF*<sup>167</sup> and *RHB*<sup>168</sup> seemed difficult to reconcile with the trend of decisions in NSW,<sup>169</sup> but passages in the Victorian case of *DR*<sup>170</sup> — to the effect that incestuous behaviour is sufficiently uncommon in itself to have significant probative value — approached the NSW position.<sup>171</sup> Ultimately, the Court rejected the recent line of authority on the basis that it went too far in lowering the threshold of admissibility and did not give effect to the notion of ‘significant probative value’.<sup>172</sup>

The Court also opined that, unless the tendency evidence all related to the same complainant, only similar ‘remarkable and out of the ordinary’<sup>173</sup> relationships with the accused would be sufficiently unusual to support admission. For the ‘not so uncommon ... [relationships] of parent and child or teacher and pupil, some other features of similarity must be present’.<sup>174</sup> Thus even where the complainants shared a lineal relationship with the accused, some additional commonality would be required. The following formulation of the Court’s logic was later rejected by the HCA in *Hughes*:

In order to determine whether the features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal ‘underlying unity’, a ‘pattern of conduct’, ‘modus operandi’, or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely. It is the degree of similarity of the *operative features* that gives the tendency evidence its relative strength.<sup>175</sup>

162 *PWD* (n 12); *AE* (n 158); *Fletcher* (n 15).

163 *Velkoski* (n 12) 714 [144] (Redlich, Weinberg and Coghlan JJA).

164 *Ibid* 700 [91].

165 *PNJ* (n 24).

166 *NAM* (n 15).

167 *GBF* (n 15).

168 *RHB* (n 27).

169 *Velkoski* (n 12) 705-6 [110] (Redlich, Weinberg and Coghlan JJA).

170 *DR* (n 59).

171 *Velkoski* (n 12) 707 [115] (Redlich, Weinberg and Coghlan JJA).

172 *Ibid* 717-18 [164].

173 *Ibid* 718 [168].

174 *Ibid*.

175 *Ibid* 719 [171] (emphasis added).

Similarity in the ‘operative features’ was therefore required to establish a pattern that would increase the likelihood of occurrence in the future — in other words, predictive power. A mere state of mind, such as a sexual interest in the victims and a willingness to act upon it, would amount only to rank propensity, and would be insufficient.<sup>176</sup>

*Velkoski* had an immediate impact in the case of *Rapson v The Queen*,<sup>177</sup> which involved multiple complaints of indecent acts performed on eight underage boys over several years by a Christian brother working at a Catholic school. The trial judge held all the evidence of charged and uncharged acts to be admissible as tendency, but not coincidence evidence. On appeal the Crown conceded (and the Court agreed) that, as a result of the recent decision in *Velkoski*, the evidence of two victims who alleged much more serious acts of penile-anal rape was not cross-admissible with the lesser counts, leading to all convictions being quashed.<sup>178</sup>

*Gentry (A Pseudonym) v Director of Public Prosecutions*<sup>179</sup> admitted evidence of an underaged complainant’s possession of underwear with seminal stains of the accused as evidence of the accused’s ongoing guilty passion for her. The Court did not see *Velkoski* as changing the law,<sup>180</sup> but interpreted it in this way:

In cases involving a single complainant, generalised evidence of an accused’s sexual interest in and sexual misbehaviour towards the complainant may have a highly probative value, and may legitimately contribute to an assessment of the probability of the charged acts having occurred. Such evidence is demonstrative of a specific tendency of the [accused] to show a sexual interest in and commit sexual offending against a particular victim. The vice identified in *Velkoski*, in contrast, was the prosecution’s reliance upon an offender’s state of mind to cover the offender’s general sexual interest or predilection in relation to a class of persons.<sup>181</sup>

*Lancaster v The Queen*<sup>182</sup> reinforced this liberal approach to admitting evidence of an illicit passion for a specific child, even when unaccompanied by illicit conduct:

The trial judge was ... correct to allow the evidence of the [accused] giving the complainant the gift of the gee-strings to be led as tendency evidence. Giving a child a sexually provocative garment, accompanied by a request that she try it on

176 *Ibid* 720 [173].

177 *Rapson* (n 15).

178 *Ibid* 104 [4]-[5], 111 [21]-[22] (Maxwell P, Nettle and Beach JJA).

179 (2014) 244 A Crim R 106 (‘*Gentry*’).

180 *Ibid* 112 [23] (Redlich JA).

181 *Ibid* 113 [29], followed in *Sutton (A Pseudonym) v The Queen* (2015) 47 VR 496, 514 [69] (Maxwell P and Redlich JA).

182 (2014) 44 VR 820 (‘*Lancaster*’).

and wear it in his presence, was evidence which was powerfully suggestive of a sexual interest in that child on the part of the [accused].<sup>183</sup>

In a similar vein, in *Thu v The Queen*<sup>184</sup> sending text messages expressing love to an underage complainant was seen as significant evidence not only of a sexual interest in the applicant but of a willingness to act on it by (in the instant case) raping her.<sup>185</sup>

*Bauer (A Pseudonym) v The Queen* ('*Bauer No 1*')<sup>186</sup> demonstrated the more conservative approach to admission when the evidence relates to different complainants. The fact that the complainants were young female relatives (sister-in-law, daughter, foster-daughter) was insufficient in the absence of something distinctive or unusual compared to other offences of like kind.<sup>187</sup> As we will see, when, as a result of this decision, the alleged offences against the foster-daughter alone were reheard, the VCA's rejection of cross-admissibility on the ground of lack of special features was overturned by the HCA.<sup>188</sup>

*Page (A Pseudonym) v The Queen* ('*Page*')<sup>189</sup> was one of the few cases to attempt to elaborate the differences in the actual reasoning processes in coincidence and tendency reasoning. Consistent with *Velkoski*, similarity of relationship alone was insufficient to admit evidence of past convictions of indecent acts against four biological granddaughters on charges of indecent acts and penetration of a step-granddaughter. The VCA opined that reasoning based on improbability of coincidence required a higher level of similarity than that required to establish a tendency:<sup>190</sup> '[w]ith tendency reasoning ... the evidence may reveal a "pattern of conduct" or "*modus operandi*" without there necessarily being the similarity required in order to exclude coincidence'.<sup>191</sup>

On the other hand, for coincidence reasoning, the distinctiveness of a single feature might be sufficient to make coincidence improbable, especially if the number of occurrences is high.<sup>192</sup> Dissimilarities of other features will not diminish the probative value of that coincidence.<sup>193</sup>

The Court found the requisite similarity (over and above relationship and

183 Ibid 844 [87] (Nettle and Redlich JJA and Almond AJA), citing *Gentry* (n 179) 112-13 [24]-[29] (Redlich JA). See also *Clark (A Pseudonym) v The Queen* [2015] VSCA 297.

184 [2017] VSCA 28 ('*Thu*').

185 Ibid [16], [34] (Redlich, Beach and McLeish JJA).

186 *Bauer (A Pseudonym) v The Queen* (2015) 46 VR 382 ('*Bauer No 1*').

187 Ibid 420 [172] (Priest JA, Maxwell P agreeing at 385 [1], Weinberg JA agreeing at 385 [1]).

188 See below Part IV(C).

189 [2015] VSCA 357 ('*Page*').

190 Ibid [52]-[53] (Maxwell P, Redlich JA and Beale AJA).

191 Ibid [54].

192 Ibid [57].

193 Ibid [59].

age of victims) in the circumstances of the accused being in a position of parental or quasi-parental trust, contriving to put himself in a position of close physical proximity to the children, and instigating the offensive conduct by engaging in legitimate touching, such as massaging or cuddling.<sup>194</sup>

## D NSW Cases after Velkoski

*Saoud v The Queen*<sup>195</sup> was a case in which the accused allegedly lured two former female employees to his workplace after hours on the pretext of helping him with some work, and then exploited that fact to assault them in somewhat different ways. In upholding the cross-admissibility of the evidence,<sup>196</sup> the NSWCCA drew a distinction between tendency evidence and coincidence evidence:

Tendency evidence can take various forms; it is not necessarily based on the conduct of the accused on separate occasions. On the other hand, when it is there will be an inherent element of similar behaviour in order to demonstrate a tendency, absent which the section is not engaged.<sup>197</sup>

Section 98 has a different structure, although its language is more obscure. ... To allow ‘implausibility reasoning’ it is necessary to have regard to the similarities between the two events and, by way of contrast, any differences.<sup>198</sup>

Nevertheless, the Court recognised the difficulty of the distinction:

[T]here is an awkwardness in the separation of ‘tendency’ evidence and ‘coincidence’, at least in some circumstances. Thus, in a case such as the present, where there was no issue as to the identity of the alleged offender, but rather a dispute as to the occurrence of the offences, evidence of the accused’s conduct on another occasion will combine the implausibility of independent complainants both falsely describing similar conduct with the inference that a person who conducted himself in a particular way on one occasion may well have done so again on another.<sup>199</sup>

The Court seemed unconvinced of any practical difference between the approaches in NSW and Victoria, and did not regard an interlocutory appeal as an appropriate format in which to consider the correctness of *Velkoski*.<sup>200</sup> *Elomar v The Queen*<sup>201</sup> (a

194 Ibid [68]-[71].

195 *Saoud* (n 15).

196 Ibid 492–3 [53] (Basten JA, Fullerton J agreeing at 484 [63], RA Hulme J agreeing at 494 [64]).

197 Ibid 487 [28].

198 Ibid 488 [30], discussing *Evidence Act* (NSW) (n 6) s 98.

199 Ibid 490-1 [43].

200 Ibid 489-90 [36]-[37].

201 *Elomar v The Queen* (2014) 316 ALR 206 (‘*Elomar*’).

terrorism case) did, however, dispute the suggestion in *Velkoski* that a state of mind alone cannot show a tendency as it merely reveals ‘rank propensity’,<sup>202</sup> arguing that this does not accord with the text of the section or the law as stated in NSW.<sup>203</sup>

*Aravena v The Queen*<sup>204</sup> is one of several cases in which tendency was found on the basis of a single prior incident. In 2006, the defendant had pleaded guilty to charges of indecent assault on a woman after chatting with her, offering to share a taxi, riding with her on a bus (at her suggestion) and thereafter, following her, grabbing her, touching her under her skirt and trying to carry her off over his shoulder.<sup>205</sup> In 2013, he was on trial again, having allegedly offered a woman a lift in his van, driven her to a bushland location and got into a scuffle with her.<sup>206</sup> She said that he tried to rape her,<sup>207</sup> but he said he had no sexual intention and was trying to get her out of his van.<sup>208</sup> The NSWCCA held that the earlier offence was admissible as tendency evidence to establish the necessary intent.<sup>209</sup> It is not clear which of the similarities alleged by the Crown<sup>210</sup> were accepted by the Court in finding that the prior conviction had ‘very high’<sup>211</sup> probative value to prove intent, but on close analysis, some seem unsupported by the evidence, and others seemed highly generalised and/or typical of any such assault. It is difficult to see that the Court was relying on much more than rank propensity in this case.

## IV THE HCA AND HUGHES

### A *Prior to Hughes*

While procedures permitting interlocutory appeals were generating regular tendency evidence appeals in the state courts, the HCA had few opportunities. In *Stubley v Western Australia*,<sup>212</sup> the use of the term ‘significant probative value’ in the non-uniform Western Australian legislation allowed the HCA to consider the term, but the issues in the case did not promote a thorough exploration.<sup>213</sup> The accused was a psychiatrist charged with multiple sexual offences including rape committed against two patients in his consultation rooms over 30 years

202 Ibid 280 [370] (Bathurst CJ, Hoeben CJ at CL and Simpson J), quoting *Velkoski* (n 12) 719 [173] (Redlich, Weinberg and Coghlan JJA).

203 *Elomar* (n 201) 280 [371] (Bathurst CJ, Hoeben CJ at CL and Simpson J).

204 (2015) 91 NSWLR 258.

205 Ibid 264 [39]–[42] (Beazley P, Hall and Wilson JJ).

206 Ibid 260–1 [5]–[18].

207 Ibid 261 [19].

208 Ibid 265 [52].

209 Ibid 271 [97].

210 Ibid 263 [37].

211 Ibid 271 [97].

212 (2011) 242 CLR 374 (*Stubley No 2*).

213 Ibid 379–80 [11]–[12] (Gummow, Crennan, Kiefel and Bell JJ).

earlier, and the tendency evidence admitted at trial was of uncharged acts alleged by three other patients. The accused admitted sexual contact, but alleged consent.<sup>214</sup> To sidestep the problem raised in *Phillips v The Queen*<sup>215</sup> of proving a complainant's consent by a propensity of the accused, the prosecution argued that the evidence showed the accused's tendency for 'bringing about a situation where sexual activity occurs, without consent in its legal sense, but without opposition or resistance from the particular complainant'.<sup>216</sup> The majority proceeded on the basis that 'significant' means 'something more than mere relevance but ... less than ... 'substantial',<sup>217</sup> and that the probative value must be 'important' and 'of consequence' to the issues in question.<sup>218</sup> They held that the prosecution's submission conflated psychological dominance with lack of consent, and overturned the accused's convictions.<sup>219</sup> Heydon J dissented on the ground that the defendant's informal admission of sexual contact did not foreclose the issue of whether the acts actually occurred, and the tendency evidence had significant probative value on that issue. His Honour supported that conclusion with reasoning more akin to coincidence than tendency.<sup>220</sup>

*IMM v The Queen* ('*IMM*')<sup>221</sup> was focused on the extent to which credibility and reliability of the tendency evidence can be taken into account in assessing significant probative value. The HCA found (with Nettle and Gordon JJ dissenting)<sup>222</sup> that on various charges of indecency committed on a child, the child's uncorroborated evidence of the accused running his hand up her leg on a different occasion lacked significant probative value because the child's credibility was the overarching issue:

Evidence from a complainant adduced to show an accused's sexual interest can generally have limited, if any, capacity to rationally affect the probability that the complainant's account of the charged offences is true. It is difficult to see that one might reason rationally to conclude that X's account of charged acts of sexual misconduct is truthful because X gives an account that on another occasion the accused exhibited sexual interest in him or her.<sup>223</sup>

214 *Ibid* 381 [16].

215 (2006) 225 CLR 303.

216 *Stubley No 2* (n 212) 380–1 [14] (Gummow, Crennan, Kiefel and Bell JJ), quoting *Stubley v Western Australia* [2009] WASC 57, [51] (Johnson J).

217 *Stubley No 2* (n 212) 379–80 [11], quoting *Dair v Western Australia* (2008) 36 WAR 413, 429 [61] (Steytler P).

218 *Stubley No 2* (n 212) 379–80 [11], citing J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2004) 686 [21245]. See also *R v Lockyer* (1996) 89 A Crim R 457; *Hughes v The Queen* (2015) 93 NSWLR 474, 506 [133], 515 [182] (Beazley P and Schmidt and Button JJ) ('*Hughes* (NSWCCA)'); *IMM v The Queen* (2016) 257 CLR 300, 314 [46] (French CJ, Kiefel, Bell and Keane JJ), 327 [103] (Gageler J) ('*IMM*'); *Hughes* (HCA) (n 4) 208–1 [81] (Gageler J).

219 *Stubley No 2* (n 212) 395 [74] (Gummow, Crennan, Kiefel and Bell JJ), 397 [83] (Heydon J).

220 *Ibid* 416–17 [143].

221 *IMM* (n 218).

222 *Ibid* 351–3 [176]–[180].

223 *Ibid* 318 [63] (French CJ, Kiefel, Bell and Keane JJ). See also *ibid* 328–9 [107] (Gageler J).

## B *The Decision in Hughes*

Thus, when the case of *Hughes*<sup>224</sup> reached the HCA solely on the issue of significant probative value under s 97, the differences between decisions of the Victorian and NSW courts were largely unresolved. The case involved 11 counts of sexual offences against girls aged between 6 and 15 years. The acts themselves and the circumstances of the offences varied.

Counts 1 and 2 involved the complainant JP who was 14–15 years old. The accused and his wife were dinner guests of her parents. On two occasions, the accused entered the complainant's bedroom and digitally penetrated and rubbed her vagina and clitoris, the first occasion while the accused's daughter was asleep in the same bed. She testified to other similar, uncharged occasions.<sup>225</sup>

Counts 3 to 6 involved the complainant SH who was a 6–8-year-old friend of the accused's daughter. On two occasions when she slept over, the accused entered her bedroom, woke her up and got her to masturbate him until he ejaculated. He then rubbed the semen on her vagina with his penis. She also testified to other similar, uncharged occasions.<sup>226</sup>

Counts 7 to 9 involved the complainant AK who was a 9-year-old school friend of the accused's daughter. Counts 7 and 8 arose out of the accused taking AK and his daughter to the beach. While they were swimming he asked them to swim between his legs. Twice when AK did so, he pinned her between his legs and exposed his penis to her. Count 9 involved the accused rubbing his erect penis against AK's face while he was putting eardrops in her ears. She also gave evidence of other similar, uncharged acts.<sup>227</sup>

In count 10, the complainant EE was a 15-year-old girl who had done work experience for the accused's wife. She met with the accused on several occasions after the work experience had finished, and on an occasion when he drove her home, they started kissing in the driveway, and she placed her hand on his erect penis. EE also testified to other uncharged occasions of sexual interactions in which she appeared to be a willing (but underage) participant.<sup>228</sup>

Count 11 involved the complainant SM, who was a 12–13-year-old girl appearing

224 *Hughes* (HCA) (n 4).

225 *Ibid* 200 [44] (Kiefel CJ, Bell, Keane and Edelman JJ), 217 [121]–[123] (Nettle J); *Hughes* (NSWCCA) (n 218) 504–5 [126] (Beazley P and Schmidt and Button JJ).

226 *Hughes* (HCA) (n 4) 201 [45], 217–18 [124]–[125]; *Hughes* (NSWCCA) (n 218) 504–5 [126].

227 *Hughes* (HCA) (n 4) 201 [46], 218 [126]–[127]; *Hughes* (NSWCCA) (n 218) 504–5 [126].

228 *Hughes* (HCA) (n 4) 201 [47], 218–19 [128]–[129]; *Hughes* (NSWCCA) (n 218) 505 [126]. The NSWCCA report refers to the accused, rather than the complainant, moving her hand onto his penis: *Hughes* (NSWCCA) (n 218) 505 [126]. The HCA version, replicated by both the majority and Nettle J, seems more consistent with the accused's subsequent comment, 'that's it': *Hughes* (HCA) (n 4) 201 [47], 218 [128].

with the accused on the *Hey Dad..!* television show. The accused came out of his dressing room, stood in front of a mirror, dropped his pants and exposed his penis to her, while he looked at her in the mirror. She also gave evidence of uncharged acts when he put his hand under her clothes and onto her chest while she was sitting on his lap for publicity photos.<sup>229</sup>

Evidence of uncharged acts was also given by other witnesses. AA, a member of the accused's extended family, testified that when she was between 10 and 14 years old, he touched her on her breast and between her legs while she was swimming. She also testified to other occasions of breast-touching and exposing himself.<sup>230</sup> BB, another extended family member, testified that he touched her breasts under her shirt and put his hand under the elastic of her jeans when she was attending a birthday party at his home as an 11-year-old.<sup>231</sup> Another childhood neighbour, VOD, testified that while she was staying over at the accused's house as a 7–9-year-old, he entered the bedroom she was sharing with SH and paraded around in the nude.<sup>232</sup> A number of adult female former employees of the costume department for the *Hey Dad..!* television show also testified to inappropriate touching and exposure of his genitals (the 'workplace tendency evidence').<sup>233</sup>

The trial judge held the tendency evidence to be admissible, but the workplace tendency evidence was only held admissible on count 11, which also took place at the workplace.<sup>234</sup> The latter ruling was not challenged on appeal.<sup>235</sup> The accused was found guilty on all counts except count 10, on which the jury could not agree.<sup>236</sup> He appealed to the NSWCCA, arguing (inter alia) that the tendencies revealed were too general and lacked a sufficient level of similarity, relying on the Victorian case of *Velkoski*.<sup>237</sup>

The NSWCCA emphasised that the purpose of tendency evidence is to provide 'the foundation for an *inference* that the person was more likely to act in a particular way or have a relevant state of mind on the particular occasion that is subject of the charge or charges'.<sup>238</sup> This implies a need for predictive power, which the HCA later disavowed.

While rejecting the requirements of underlying unity, pattern of conduct or *modus operandi*, the NSWCCA nevertheless recognised that 'the extent and nature of

229 *Hughes* (HCA) (n 4) 201 [48], 219 [130]–[131]; *Hughes* (NSWCCA) (n 218) 505 [126].

230 *Hughes* (HCA) (n 4) 202 [49], 219 [133]; *Hughes* (NSWCCA) (n 218) 505–6 [128].

231 *Hughes* (HCA) (n 4) 202 [50], 219 [132]; *Hughes* (NSWCCA) (n 218) 505 [127].

232 *Hughes* (HCA) (n 4) 202 [51], 219 [134]; *Hughes* (NSWCCA) (n 218) 506 [129].

233 *Hughes* (HCA) (n 4) 202 [52]–[54], 220 [135]–[138]; *Hughes* (NSWCCA) (n 218) 506 [130]–[132].

234 *Hughes* (NSWCCA) (n 218) 507–8 [139]–[140].

235 *Hughes* (HCA) (n 4) 191 [8] (Kiefel CJ, Bell, Keane and Edelman JJ).

236 *Hughes* (NSWCCA) (n 218) 477–8 [1], 478–81 [4] (Beazley P, Schmidt and Button JJ).

237 *Hughes* (HCA) (n 4) 191–2 [10] (Kiefel CJ, Bell, Keane and Edelman JJ).

238 *Hughes* (NSWCCA) (n 218) 511 [160]–[161] (Beazley P, Schmidt and Button JJ).

any similarity<sup>239</sup> is relevant to the consideration of significant probative value.<sup>240</sup> It considered the case law in detail, but once it moved from statements of legal principle to factual reasoning the analysis became somewhat scant. In dismissing the appeal, the only similarity relied on beyond the rank propensity to act on a sexual attraction to young girls was that ‘the conduct occurred opportunistically, as and when young female persons were in the [accused’s] company’,<sup>241</sup> which hardly adds to the fact of the acts themselves. The NSWCCA did not rely on the other similarity alleged by the Crown in its tendency notice, namely ‘carrying out sexual acts upon the complainants when they were within the vicinity of another person’,<sup>242</sup> possibly because the reported evidence did not clearly support such a tendency. However, this was later prominent in the HCA’s thinking.

The HCA granted special leave to appeal on the narrow grounds of whether the tendency evidence had significant probative value and whether the NSWCCA erred in rejecting the requirements for similarity propounded by the VCA in *Velkoski*.<sup>243</sup>

On the appeal, defence counsel accepted that the evidence of JP and SH was cross-admissible on the basis that ‘each involved the surreptitious sexual molestation of a child in bed notwithstanding that another child was close by’<sup>244</sup> but argued that the remaining tendency evidence lacked probative force. Dismissing the appeal, the majority summarised the issue in this way:

The issue reduces in this case to the question of whether proof that a man of mature years has a sexual interest in female children aged under 16 years ... 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.<sup>245</sup>

The ‘rankness’ of the tendency was therefore tempered by the specific features of opportunism and disregard for the risk of detection (referred to elsewhere as brazenness). Discounting of rank propensity was evident in the majority’s attitude to generality:

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

239 Ibid 513 [167].

240 Ibid 513 [166]–[167], 516 [183].

241 Ibid 519 [199].

242 Ibid 502 [117].

243 *Hughes* (HCA) (n 4) 192 [11] (Kiefel CJ, Bell, Keane and Edelman JJ).

244 Ibid 202 [55].

245 Ibid 190 [2].

contrast, a tendency expressed at a level of particularity will be more likely to be significant.<sup>246</sup>

The majority first treated the degree of similarity required as a question of law based on statutory interpretation. They concluded that the absence of any reference to similarity in s 97 or to the related common law concepts of ‘underlying unity’, ‘pattern of conduct’ and ‘modus operandi’ was ‘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 [those] features’.<sup>247</sup> However, when shortly after they held that *Velkoski* wrongly proceeded on the basis that ‘the probative value of tendency evidence lies in the degree of similarity in the “operative features” of the acts’,<sup>248</sup> they seem to be making a point of factual reasoning, not law:

Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded. The particularity of the tendency and the capacity of its demonstration to be important to the rational assessment of whether the prosecution has discharged its onus of proof will depend upon a consideration of the circumstances of the case.<sup>249</sup>

The unlikelihood of the behaviour played a decisive role:

An inclination on the part of a mature adult to engage in sexual conduct with underage girls and a willingness to act upon that inclination are unusual as a matter of ordinary human experience. ... In this case the tendency evidence showed that the unusual interactions which the [accused] was alleged to have pursued involved courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by. This level of disinhibited disregard of the risk of discovery by other adults is even more unusual as a matter of ordinary human experience. The evidence might not be described as involving a pattern of conduct or modus operandi — for the reason that each alleged offence involved a high degree of opportunism; but to accept that that is so is not to accept that the evidence does no more than prove a disposition to commit crimes of the kind in question.<sup>250</sup>

The force of the tendency evidence as significantly probative of the [accused’s]

246 Ibid 204 [64].

247 Ibid 198 [34].

248 Ibid 198 [37].

249 Ibid 199 [40].

250 Ibid 203 [57].

guilt was not that it gave rise to a likelihood that the [accused], having offended once, was likely to offend again. Rather, its force was that, in the case of this individual accused, the complaint of misconduct on his part should not be rejected as unworthy of belief because it appeared improbable having regard to ordinary human experience.<sup>251</sup>

The logic of the latter paragraph, which disavows prediction in favour of improbability reasoning, was elaborated by asking what a jury might think if the tendency evidence were not admitted. The ‘brazenness’ of the accused’s behaviour might seem ‘so much at odds with the jury’s experience of the probabilities of ordinary human behaviour’<sup>252</sup> that they might be disinclined to accept it to the requisite standard of proof. Evidence that the accused had acted in such a brazen manner on other occasions could dispel that doubt. The majority illustrated this argument by reference to the evidence of JP, but apart from count 1, it is not clear how that level of improbability could be attributed to the behaviour on the other counts.<sup>253</sup>

It would be possible, consistent with Hamer,<sup>254</sup> to support the majority position by means of coincidence reasoning, but the lack of similarity between counts 1 to 6 and the later counts would undermine any coincidence. It would also misrepresent what the majority was saying. The majority’s argument *was* based on tendency but, we would argue, not the typical form of tendency reasoning, which draws strength from coincidence. Nor did it rely on the predictive likelihood of the accused offending again in a similar way, which is at the heart of traditional tendency reasoning. The way the tendency evidence was said to have probative power was by demonstrating that, although such brazen behaviour was, of its nature, inherently implausible, the accused had shown that he was one of the rare individuals who had a tendency to engage in such behaviour. In other words, he was the sort of person who would do such a risky and irrational act. This form of reasoning is more akin to the reasoning underpinning the admission of relationship evidence. Relationship evidence is often admitted on the basis that it explains what would otherwise be implausible behaviour on the part of the complainant in not strongly resisting or reporting offending behaviour.<sup>255</sup> A history of prior improper behaviour in a family or institutional setting can make the complainant’s behaviour more plausible as part of an ongoing illicit relationship. In *Hughes*, the majority applied such reasoning to the implausibility of the accused’s behaviour. Such an approach suggests an objective, but rather limited threshold for admission. Not all unusual modes of offending are inherently

251 Ibid 204 [60].

252 Ibid 203 [59].

253 See *ibid* 233 [168]–[169] (Nettle J), in dissent.

254 Hamer, “Tendency Evidence” and “Coincidence Evidence” in the Criminal Trial” (n 11) 171.

255 See, eg, *Johnson v The Queen* (2018) 360 ALR 246, 251 [19] (Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ).

implausible or irrational, so not all unusual or distinctive features would add probative strength.

Gageler J (in dissent) characterised tendency reasoning in the more traditional way as a cognitive process which necessarily involves using the established tendency to predict or ‘postdict’ the accused’s actions or state of mind on the occasion of the alleged offence.<sup>256</sup> His Honour said that sometimes, one or a small number of previous occasions can show a tendency, but more often one needs a pattern of behaviour with ‘repeated circumstances in which common factors have been present’.<sup>257</sup> Usually, this involves ‘degrees of similarity’.<sup>258</sup> His Honour noted that ‘the specificity of the tendency and how precisely [it] correlates to the act or state of mind that the [accused] ... is alleged to have had’<sup>259</sup> is what gives it ‘predictive or “postdictive” value’.<sup>260</sup> Touching on the majority’s reasoning, his Honour argued that the tendency evidence only has the effect of making the complainant’s evidence more plausible to the extent that it can be inferred that the accused has acted on that tendency, so the majority’s approach would not avert the need to assess the likelihood of the accused having acted on the tendency.<sup>261</sup>

In defending the approach of the VCA in *Velkoski* of requiring similarity, common features and other expressions of pattern or unity, his Honour clearly saw those statements as reflecting a logical, factual imperative rather than a legal stipulation.<sup>262</sup> His Honour found that the tendency notified by the prosecution to be very general, and the tendency ultimately accepted by the NSWCCA only slightly less so. Notably, the latter did not explicitly refer to the brazenness of the conduct.<sup>263</sup> Adopting an admittedly conservative approach, his Honour found only limited scope for cross-admissibility and would have allowed the appeal.<sup>264</sup>

His Honour found sufficient similarity in the evidence of JP, SH and AK to establish ‘a pattern of conduct’<sup>265</sup> on the part of the accused to expose his penis and sexually touch girls when the proximity of other persons put him at risk of detection. His Honour would also have admitted SM’s evidence on ‘essentially the same basis’,<sup>266</sup> although it occurred in a work setting. However, his Honour found

256 *Hughes* (HCA) (n 4) 206 [70], citing Michael J Saks and Barbara A Spellman, *The Psychological Foundations of Evidence Law* (New York University Press, 2016) 151.

257 *Ibid* 210–11 [91].

258 *Ibid* 211 [92] (Gageler J), quoting *Saoud* (n 15) 491 [44] (Basten JA).

259 *Hughes* (HCA) (n 4) 211 [93].

260 *Ibid*.

261 *Ibid* 212 [97]–[98].

262 *Ibid* 213–14 [103]–[104].

263 *Ibid* 215 [108] (Gageler J), citing *Hughes* (NSWCCA) (n 218) 518–19 [197]–[200] (Beazley P, Schmidt and Button JJ).

264 *Ibid* 215–16 [109]–[116].

265 *Ibid* 215 [112].

266 *Ibid* 216 [112].

EE's evidence to be materially different in that the incidents were arranged with the complainant, and not opportunistic. Nor did they involve the same element of risk, although his Honour did not clearly press this point.<sup>267</sup>

Nettle J (also in dissent) adopted what his Honour referred to as the 'orthodox approach', in that until recently it had been adopted by most Australian trial judges and courts of criminal appeal, including the NSWCCA, and was (his Honour argued) implicitly approved by the legislature.<sup>268</sup> Rejecting rank propensity, his Honour argued that for prior conduct to have significant probative value there must be 'something more about the nature of the offences or the circumstances of the offending in each case, or ... the victim of each offence'.<sup>269</sup> His Honour gave as examples a prior violent offence against the same victim, suggesting ongoing animosity, or a prior sexual offence against the same victim, suggesting sexual attraction, or a prior offence involving an unusual or distinctive *modus operandi* or circumstantial context.<sup>270</sup> Nettle J propounded the view, adapted from the common law case of *Hoch v The Queen*,<sup>271</sup> that the probative force of tendency evidence under s 97 'lay in similarities of offending, unusual features, some underlying unity, or a system or pattern that, as a matter of common sense and experience, increased the objective improbability of some event having occurred other than as alleged'.<sup>272</sup> A prior record of child sexual abuse did not pass his Honour's test of unusualness — indeed while regarding it as 'depraved and deplorable',<sup>273</sup> Nettle J found it 'anything but unusual',<sup>274</sup> at least when compared to other crimes — and 'not, of itself, a sound basis for the prediction of further sexual offending'.<sup>275</sup> For Nettle J, more would be required, such as 'similarities as between each child's relationship to the accused or the characteristics of each child, or the details of the *actus reus* or the circumstances in which the offence is alleged to have been committed'.<sup>276</sup> In this case, his Honour saw the alleged tendency as too general, and dismissed as insignificant the opportunistic exploitation of children's general vulnerability (as opposed to the exploitation of a particular position of power or authority)<sup>277</sup> and brazenness, since those are features of all such offending.<sup>278</sup> His Honour did, however, stop short of requiring, as *Velkoski* might have done, a

267 Ibid 216 [113].

268 Ibid 234–6 [173]–[175], 244 [194], 248 [207].

269 Ibid 226 [154].

270 Ibid 226–8 [154]–[155]. See also *ibid* 245–6 [199]–[202], 247–8 [206], 248 [208] (Nettle J).

271 (1988) 165 CLR 292, 294–5 (Mason CJ, Wilson and Gaudron JJ).

272 *Hughes* (HCA) (n 4) 227 [155]. See also at 246 [202] (Nettle J).

273 Ibid 228 [157].

274 *Ibid*.

275 Ibid 246 [202].

276 Ibid 228–9 [157].

277 See *ibid* 230–1 [161]–[162].

278 Ibid 229–30 [159]–[160], 233 [168]–[169].

similarity between the ‘operative features’<sup>279</sup> of the acts.

Nettle J found that the allegations of JP, SH and AK all involved the accused taking advantage of ‘a position of custody, authority or control ... [over] female children’,<sup>280</sup> but the nature of the acts alleged by AK were sufficiently dissimilar to warrant exclusion on the other counts, at least under s 101, if not s 97.<sup>281</sup> His Honour also rejected cross-admissibility for the acts alleged by EE, because they involved a ‘reciprocated relationship’,<sup>282</sup> and by SM, because they were dissimilar in nature and occurred outside a domestic setting.<sup>283</sup> Cross-admissibility of uncharged acts was rejected for similar reasons. The evidence of AA and BB would have been admissible on counts 1 to 9, but not 10 and 11; the evidence of VOD would have been admissible on count 11, but not the other counts. The workplace tendency evidence would have been admissible on count 11, but, as the trial judge had ruled, not on the other charges.<sup>284</sup> Hence, Nettle J would have allowed the appeal.

The third dissenter, Gordon J, substantially agreed with Nettle J’s approach, but did not regard the workplace evidence as probative of the tendency alleged by the Crown, since it did not involve underage female victims.<sup>285</sup>

### C The HCA after Hughes

Since the decision in *Hughes*, the HCA has had some opportunity to clarify its position. *R v Bauer (A Pseudonym)*<sup>286</sup> involved 18 charges and several uncharged sexual offences by the accused against his foster-daughter over an 11-year period, starting when she was 5 years old. All but two of the acts were attested by the complainant alone, while the other two were attested by her younger half-sister.<sup>287</sup> The VCA relied on *IMM*<sup>288</sup> to conclude that evidence from the same complainant about prior offensive conduct had little probative value unless it had the sort of special features noted in *Hughes*.<sup>289</sup> The HCA unanimously rejected this analysis and drew a distinction between two types of cases. In cases of prior conduct attested by the same complainant, the Court asserted the following principle as if

279 *Ibid* 247 [206].

280 *Ibid* 232 [166].

281 *Ibid*.

282 *Ibid* 232 [167].

283 *Ibid* 232–3 [167].

284 *Ibid* 249 [209] (Nettle J).

285 *Ibid* 251 [224].

286 (2018) 359 ALR 359 (*Bauer No 2*).

287 *Ibid* 360 [1], 365 [15], 365–6 [18]. See also *Bauer (A Pseudonym) [No 2] v The Queen* [2017] VSCA 176, [7]–[20] (Priest, Kyrou and Kaye JJA) (*Bauer* (VSCA)).

288 *IMM* (n 218).

289 *Bauer* (VSCA) (n 287) [75], [81]–[82] (Priest, Kyrou and Kaye JJA).

it were a binding proposition of law, rather than one of factual reasoning:

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 accused 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*.<sup>290</sup>

It asserted that such evidence has 'very high probative value'<sup>291</sup> as it 'assists to eliminate doubts that might otherwise attend the complainant's evidence of the charged acts'<sup>292</sup> by revealing a guilty passion and a willingness to act upon it 'by engaging in sexual acts of various kinds'<sup>293</sup> — clearly a tendency argument based on a very general tendency.<sup>294</sup> In doing so, the Court dismissed the logic of the *IMM* reasoning that, if the issue is the credibility of the complainant, more evidence from the same complainant does nothing to address that issue.<sup>295</sup> Instead, it acted on the assumption that the evidence would be accepted,<sup>296</sup> which would nullify the *IMM* logic completely. Elsewhere, the Court attempted to distinguish *IMM* by confining it to its particular facts — namely, 'an uncharged act relevantly remote in time and of a significantly different order of gravity from the charged offending'.<sup>297</sup>

The Court saw the requirement of 'special features' in *Hughes* to be directed to cases with a multiplicity of complainants, where such features were necessary to link the differing allegations in a process of 'probability reasoning', a phrase normally denoting reasoning based on coincidence although the Court asserted that it establishes a tendency.<sup>298</sup> Thus in cases of multiple complainants, more specificity is required, but not much. In *Hughes*, the necessary 'common feature' was found in the fact that 'a man of mature years had a sexual interest in female children under 16 years of age and a tendency to act upon it by committing sexual offences against them opportunistically in circumstances which entailed a high

290 *Bauer No 2* (n 286) 374 [48] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

291 *Ibid* 376 [52].

292 *Ibid* 375 [49].

293 *Ibid* 375 [51].

294 *Ibid* 374–6 [49]–[51], 379 [60].

295 *Ibid* 376 [53].

296 *Ibid* 375–6 [51].

297 *Ibid* 377 [55].

298 *Ibid* 378 [57]–[58].

risk of detection’.<sup>299</sup>

In *McPhillamy v The Queen*,<sup>300</sup> the HCA relied on the absence of such a link, and the length of time between the relevant acts, to discount a generalised tendency as not significant. The accused, then an acolyte at a Bathurst Cathedral, was alleged to have committed sexual offences on two occasions in late 1995 and early 1996 against an 11-year-old altar boy under his supervision. The offences involved the accused following the boy into the Cathedral toilets, masturbating himself and the boy, and performing oral sex on the boy against his wishes.<sup>301</sup> The tendency evidence came from two boys who alleged conduct by the accused in 1985, then a housemaster at their boarding school, of touching their private parts when they came to him for comfort while homesick.<sup>302</sup>

The Court found that, while the accused’s ‘sexual interest in young teenage boys may meet the basal test of relevance’,<sup>303</sup> it fell short of significant probative value because it failed to show a tendency to act on that sexual interest, given the number of intervening years without offending<sup>304</sup> and the lack of linkage between the earlier and later events. Being in a position of supervision on each occasion (the linkage accepted by the NSWCCA)<sup>305</sup> was inadequate because the nature of the supervisory roles was different.<sup>306</sup>

## V CONCLUSIONS

As a result of the HCA decision in *Hughes*, any doubts about the correct legal interpretation of s 97 have been largely eliminated. Section 97 does not require, as a matter of law, any ‘close similarity’ between the tendency evidence and the charged acts in order to meet the standard of significant probative value. However, this does not answer the question of how, as a matter of factual inference, tendency evidence achieves a level of probative value sufficient to meet any legal threshold, whether that stipulated by s 97 or any other sections. Although Victorian and other judges have occasionally referred to the terms ‘to act in a particular way’ and ‘to have a particular state of mind’ in s 97 as importing a legal requirement of particularity or specificity, for the most part they have put their arguments on

299 *Ibid* 378–9 [59], discussing *Hughes* (HCA) (n 4).

300 *McPhillamy* (2018) (n 12).

301 *Ibid* 1047 [3]–[5] (Kiefel CJ, Bell, Keane and Nettle JJ).

302 *Ibid* 1047–8 [6]–[7].

303 *Ibid* 1050 [27].

304 *Ibid*.

305 *McPhillamy v The Queen* [2017] NSWCCA 130, [127] (Humble J).

306 *McPhillamy* (2018) (n 12) 1051 [31] (Kiefel CJ, Bell, Keane and Nettle JJ).

a factual basis.<sup>307</sup>

*Bauer No 2* clarifies that *Hughes* was concerned with multiple-complainant situations. In cases involving a single victim, *Bauer No 2* shows that evidence of a prior guilty passion and a willingness to act upon it *in some way* may well be sufficient, even if the acts themselves are not unusual, distinctive or similar to the alleged offence. In other words, the tendency may be highly generalised. The state courts have at times been satisfied with evidence of a guilty passion only. In Victoria, videoing a daughter naked,<sup>308</sup> or giving her a G-string,<sup>309</sup> or sending text messages expressing love<sup>310</sup> have been found sufficient.<sup>311</sup> In NSW, a taped phone call making vague references to some past indiscretion was held admissible.<sup>312</sup> In *AW*, viewing of hardcore pornography of children *other than* the complainant was held sufficient to show a guilty passion.<sup>313</sup>

When there are multiple complainants who have a similar relationship with the accused, such as daughters, stepdaughters or granddaughters, the requirements of similarity may also be relaxed. Prior to *Velkoski*, the VCA in *DR* expressed in obiter the view that prior offences against children, stepchildren or grandchildren are unusual enough to have significant probative value for offences against other children of the family, though this was not borne out in *CGL*.<sup>314</sup> Other Victorian cases emphasised the ‘remarkable’ and ‘unusual’ nature of offences against young family members without wholly relying on that factor.<sup>315</sup> However, *Velkoski* held that in ordinary relationships like parent and child (or teacher and pupil), ‘other features of similarity must be present’,<sup>316</sup> and this was followed in *Bauer No 1*<sup>317</sup> and *Page*.<sup>318</sup> Given that *Velkoski* was effectively overturned by *Hughes*, the earlier precedents may be revived.

In cases involving multiple non-related complainants, the courts have shunned rank propensity, but allowed it to be displaced by very modest similarities, often of a very generalised kind, such as the victim’s general vulnerability, precursory befriending of the victim, general opportunism or risk-taking in the offending

307 See, eg, *KRI* (n 27) 563, [57] (Hansen JA, Buchanan JA agreeing at 553 [1], Tate JA agreeing at 565 [67]); *RHB* (n 27) [18] (Nettle JA, Harper JA agreeing at [29]); *Bauer No 1* (n 186) 419 [170] (Priest JA, Maxwell P agreeing at 385 [4], Weinberg JA agreeing at 385 [7]).

308 *MR* (n 47) [14] (Hansen JA).

309 *Lancaster* (n 182) 844 [87] (Nettle and Redlich JJA and Almond AJA).

310 *Thu* (n 184) [36] (Redlich, Beach and McLeish JJ).

311 See also *GBF* (n 15) [26] (Nettle and Harper JJA and Hansen AJA).

312 *Rodden* (n 122) 237 [43] (Hall J).

313 *AW* (n 124) [48]–[51] (Latham J). See also *AH* (n 76); *Veitch* (n 79).

314 *DR* (n 59) [88] (Neave and Hansen JJA and Beach AJA); *CGL* (n 17).

315 *RHB* (n 27) [18] (Nettle JA); *Reeves* (n 27) 289 [54] (Maxwell ACJ).

316 *Velkoski* (n 12) 718 [168] (Redlich, Weinberg and Coghlan JJA).

317 *Bauer No 1* (n 186).

318 *Page* (n 189).

conduct itself. In *Hughes*, the majority recognised similarity as an influential factor, but rejected a requirement of particular similarity in the ‘operative features’ of the conduct.<sup>319</sup> They generalised the varied conduct into a tendency to act opportunistically and brazenly without regard to the risk of detection by adults in the vicinity. Their stated test for distinctiveness was that the conduct was so unlikely that, in the absence of the tendency evidence showing the accused to be a person who might behave so implausibly, the complainants’ evidence might not have been believed.<sup>320</sup> We do not challenge the logic of this approach, but argue that in some cases it may be more demanding than the tests of distinctiveness applied by the Victorian courts. In disavowing reliance on the predictive qualities of the evidence, the majority reasoning also differed from the way tendency has often been argued in both NSW and Victoria. *Bauer No 2* explained the *Hughes* requirement of ‘special features’ by reference to probability reasoning which depends on the unlikelihood of the features.<sup>321</sup> Since the offences themselves are uncommon, the question remains as to why the unlikelihood of the rank propensity is dismissed while the unlikelihood of rather generalised features is highly probative. There is also no explanation in either *Hughes* or *Bauer No 2* of why predictive reasoning is appropriate for single complainant cases but not for multi-complainant cases.

Our analysis of factual reasoning about tendency in the state appellate courts provides some support for Hamer’s theoretical position that tendency reasoning is merely a subset of coincidence reasoning.<sup>322</sup> Although those courts persistently assert that there is some fundamental difference between tendency and coincidence reasoning, when that reasoning is exposed it invariably seems to depend to some extent on unlikely coincidence. The implausibility argument relied on by the majority in *Hughes*, we would argue, is a novel departure that sidesteps both predictive and coincidence reasoning. On the other hand, in single-complainant cases, *Bauer No 2* relied on predictive reasoning, not coincidence.

Historically, Victorian courts have required a greater degree of distinctiveness and similarity than the courts of NSW, which must now be tempered in light of the decision in *Hughes*. Nevertheless, there is a commonality between NSW and Victoria on the types of similarity that are influential, and these are unaffected by recent HCA decisions. We have categorised those as:

1. *situational circumstances* (such as an institutional setting in which the accused has a position of care, trust and/or responsibility for the complainant(s));
2. *contextual behaviours and circumstances* (such as the complainant’s unusual

319 *Hughes* (HCA) (n 4) 198 [37] (Kiefel CJ, Bell, Keane and Edelman JJ).

320 *Ibid* 203 [59].

321 *Bauer No 2* (n 286) 378 [57].

322 Hamer, “‘Tendency Evidence’ and ‘Coincidence Evidence’ in the Criminal Trial” (n 11) 171.

vulnerability, the accused's precursory grooming behaviours); and

3. *the offending behaviours themselves.*

The courts have evaluated these similarities by reference to their numerosity, specificity and distinctiveness, often assessed compendiously without reference to how particular similarities contribute to probative value. To the extent that particular similarities are addressed individually, this evaluation is based on distinctiveness or unusualness, but without clearly explaining how this distinctiveness or unusualness enhances the probative value of the evidence. Sometimes, reference is made to how a typical offence of the kind is committed; at other times, reference is made to how remarkable behaviour is compared to the general population. *Hughes* would suggest that the enquiry should be directed to the implausibility of the behaviour.

A generalised tendency is said to be less probative than a specific one, but the reasoning underlying that assertion has never, so far as we can ascertain, been elaborated or explained. Certain kinds of distinctiveness and specificity may support coincidence reasoning, but for tendency purposes, there is no obvious reason why a general tendency would be less predictive than a specific one. What is usually lacking is an analysis of the individual contribution each similarity makes to probative value. If that exercise were undertaken, it would be necessary to consider to what extent they discriminate between guilt and innocence. A situational factor that is present for all guilty and innocent interactions is incapable of such discrimination, and therefore can have no probative value, even if the factor may be functionally instrumental in the guilty behaviour. Several cases in both Victoria and NSW have proceeded on the assumption that so long as one can create a plausible narrative in which a situational or contextual factor plays a role in the offending behaviour, then that factor contributes to probative value.

## VI RECOMMENDATIONS

The decision of the HCA in *Hughes* allows courts in the future to focus on factual reasoning about tendency without regard to real or imagined legal technicalities about how tendency reasoning must progress. To achieve any semblance of consistency, courts must make transparent the manner in which features like similarities enhance probative value in the actual case in front of them.

The starting point is proof that there is a tendency. There is legal controversy about what standard of proof is required to establish a tendency in this context,<sup>323</sup> which goes beyond the scope of this article. It is necessary that the tendency be properly defined, and over-specification be avoided. The mere presence of

323 Ibid 164–6.

particular features at the time of some isolated behaviours does not mean that those features are a functional part of the tendency.

A tendency may involve not only a particular mental state or manner of acting, but also situational circumstances that are functionally related to the tendency, either because they trigger the offending behaviour (eg, intoxication or drug use) or they provide the context in which offending behaviour becomes possible (eg, institutional settings in which the accused is in a position of authority or care). Proving that these circumstances are part of the tendency may, however, be difficult because the mere co-occurrence of a feature with the offending conduct does not of itself establish its functional involvement in the tendency unless it is also absent for the non-offending conduct. However, a larger problem may be demonstrating that such situational and contextual features enhance probative value.

Many cases seem to proceed on the basis that the probative value of a tendency depends simply on the numerosity and distinctiveness of its similarities with the charged acts. What is required is an analysis of the extent to which each of these features points to guilt rather than innocence. Situational features like an institutional setting which are present for all interactions or behaviours of the accused, whether guilty and innocent, have no capacity to discriminate guilt from innocence, and therefore have no probative value. It may well be that the institutional setting does have some functional connection with the tendency, but if it is also present as part of the accused's everyday life, it lacks that discriminative power.

Generally, consistent with Hamer,<sup>324</sup> we would argue that similarities will lack probative value because of their weak predictive power, unless coincidence reasoning is enlisted. If coincidence reasoning is enlisted, it prescribes the requirement of distinctiveness — the similarities must have been so unusual that they were unlikely to have occurred by chance. For tendency reasoning, the HCA in *Hughes* adopted an alternative approach which does not place a high demand on the likelihood that the tendency will manifest itself on subsequent occasions. It requires that the complainant's allegations about the accused's conduct are so implausible or irrational that they might be disbelieved for that reason alone unless tendency evidence is admitted to render them plausible. Unless one of those two lines of reasoning is adopted, the degree of distinctiveness logically required is unclarified by the authorities, and imponderable. It seems that in single-complainant cases, the answer is 'very little'.

In the course of analysing in-depth the factual reasoning about tendency by the appellate courts, we have made arguments about their failings, some of which may be open to debate. The primary purpose of this analysis has been to demonstrate that a more thorough and transparent approach to tendency reasoning

324 Ibid 171.

is required to foster some consistency in this controversial area, and to suggest some promising paths such an approach might take. If our own arguments are debatable, that merely supports the call for more logical rigour and transparency in the hope of discontinuing the courts' 'spectacular exercise in confusion and arbitrariness'<sup>325</sup> complained of by Bagaric.

325 Bagaric, 'Think Twice' (n 3).