Judicial College of Victoria

Hughes v The Queen (2017) 263 CLR 338

Hughes v The Queen (2017) 263 CLR 338 is a significant decision for the development of evidence law in Victoria. In this decision, by a 4-3 split, the High Court held that close similarity between events is not essential for tendency evidence to be admissible.

Background

The offender, Robert Lindsay Hughes, was charged with 11 charges of sexual offences against five girls aged between 5 and 15. The forms of offending varied, and included digital vaginal penetration, procuring a girl to touch his penis or masturbate him, rubbing his penis through his clothing against a girl and indecently exposing himself.

The prosecution called tendency evidence from other women who Hughes had sexually touched or indecently exposed himself to. Further witnesses had worked with Hughes and gave evidence that at the workplace, Hughes had sexually touched them or exposed himself to them. The workplace incidents were ruled inadmissible in relation to Hughes' non-workplace offending. However, the evidence was otherwise held admissible and the evidence on the charges was ruled cross-admissible.

Hughes was convicted on all charges. The NSW Court of Criminal Appeal dismissed his appeal against conviction. The High Court granted special leave to appeal in part to address the divergence in approaches on tendency evidence between Victoria and NSW.

Majority judgment

Kiefel CJ, Bell, Keane and Edelman JJ gave the joint majority judgment. The primary ground of appeal was that:

> the Court of Criminal Appeal erred by holding that an "underlying unity" or "pattern of conduct" need not be established before tendency evidence is held to have significant probative value and by declining to follow *Velkoski*.[1]

The majority observed that in relation to the tendency evidence provisions, the legislation departed from the Australian Law Reform Commission's (the ALRC) recommendation that tendency evidence should only be admitted if it contained "substantial and relevant similarity".[2]

The majority then considered three previous decisions: *R v Ford*,[3] *R v PWD*[4] and *Velkoski v The Queen*.[5] After summarising the decisions, the majority criticised the Victorian Court of Appeal's approach in *Velkoski* in two respects.

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[1] *Hughes v the Queen* (2017) 263 CLR 338, 349 [19] ('*Hughes*').

[2] *Hughes* (2017) 263 CLR 350 [22].

[3] *R v Ford* (2009) 201 A Crim R 451 (New South Wales Court of Criminal Appeal).

[4] *R v PWD* (2010) 205 A Crim R 75 (New South Wales Court of Criminal Appeal).

[5] *Velkoski v The Queen* (2014) 45 VR 680 ('*Velkoski*').

First, the majority rejected the part of the Court of Appeal's judgment that held that an interest in "particular victims and his willingness to act on that interest" was only "rank propensity".[6] The majority said:

> These statements, couched in the language of the common law, do not stand with the scheme of Pt 3.6. They are apt to overlook that s 97 applies to civil and criminal proceedings. In criminal proceedings, the risk that the admission of tendency evidence may work unfairness to the accused is addressed by s 101(2). Moreover, s 97(1) in terms provides for the admission of evidence of a person's tendency to have a particular state of mind. An adult's sexual interest in young children is a particular state of mind. On the trial of a sexual offence against a young child, proof of that particular state of mind may have the capacity to have significant probative value.[7]

Second, the majority rejected the Court of Appeal's focus on there being common or similar features between the pieces of evidence so as to demonstrate features such as "underlying unity", "pattern of conduct" or "modus operandi. The majority held that:

> The *Velkoski* analysis proceeds upon the assumption that, regardless of the fact in issue, the probative value of tendency evidence lies in the degree of similarity of "operative features" of the acts that prove the tendency[8]. It is an analysis that treats tendency evidence as if it were confined to a tendency to perform a particular act. Depending upon the issues in the trial, however, a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value notwithstanding the absence of similarity in the acts which evidence it.[9]

The majority explained that assessing the probative value of tendency evidence first requires a consideration of the issue the evidence is tendered to prove. Evidence to prove the identity of a person who committed a known offence involves different considerations than evidence to prove that an offence occurred.[10] While close similarity may be required to prove identity,[11] less similarity is required before the evidence can support another witness' testimony. The majority stated:

> 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.[12]

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[6] *Ibid* 720 [173(f)].

[7] *Hughes* (2017) 263 CLR 354 [32].

[8] *Velkoski* (2014) 45 VR 680, 719 [171].

[9] *Hughes* (2017) 263 CLR 355 [37].

[10] *Ibid* 355 [39].

[11] Consider, for example, cases like *R v Straffen* [1952] 2 QB 911 or *Vaitos v R* (1981) 4 A Crim R 238.

[12] *Hughes* (2017) 263 CLR 356[40].

In assessing whether proposed tendency evidence has significant probative value, the majority identified two related matters. These are the extent to which: (1) the evidence supports the tendency; and (2) the tendency makes more likely the facts constituting the charged offence.[13] For this purpose, the specificity of the tendency, and the comparison between the tendency and the facts in issue, will be particularly relevant when assessing the probative value of the evidence through the second matter.[14]Despite adopting a more liberal approach to admitting tendency evidence, the majority also cautioned that the test for admissibility involves the judge making an evaluation.[15] Inherent in this process is the potential for reasonable minds to differ, including between the trial judge and an appellate court. Given this risk, and that a wrong decision to admit tendency evidence will likely lead to a successful appeal against conviction, trial judges should be cautious before admitting tendency evidence in marginal cases.[16]

The other ground of appeal related to whether the evidence had significant probative value. After closely reviewing the detail of the individual charges and the tendency evidence, the majority upheld the admission of the evidence. They noted that the appellant's focus on dissimilarities in the acts and circumstances in which the events occurred failed to recognise the purpose of the tendency evidence, stating that:

1. The evidence as a whole was capable of proving that the appellant was a person with a tendency to engage in sexually predatory conduct with underage girls as and when an opportunity presented itself in order to obtain fleeting gratification, notwithstanding the high risk of detection.17

While evidence of a particular modus operandi could have significant probative value, so too could evidence that the accused engaged in offending in circumstances where there was a high risk of detection. The majority held that the evidence did more than demonstrate a disposition to commit crimes. Instead, it showed that a complainant's account which described bizarre and brazen offending was not as implausible as it might initially seem. As the majority explained:

> The force of the tendency evidence as significantly probative of the appellant's guilt was not that it gave rise to a likelihood that the appellant, 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.[18]

[13] *Ibid* 356[41].

[14] *Ibid* 363 [64].

[15] See *Evidence Act* s 97(1)(b).

[16] *Hughes* (2017) 263 CLR 357 [42].

[17] *Hughes* (2017) 263 CLR 360 361 [56].

[18] *Ibid* 362 [60].

Minority judgments

Gageler, Nettle and Gordon JJ each delivered separate dissenting judgments.

Gageler J

Gageler J began by considering the theoretical basis for the tendency rule, and the risks inherent in tendency reasoning. Consistent with the ALRC's warnings, he considered that tendency evidence poses a risk of cognitive bias – overvaluing the predictive power of dispositional evidence.[19]

After tracing the history of the rule, Gageler J observed that the decision whether to admit tendency evidence involves balancing risks. For tendency evidence to have significant probative value, a court must be satisfied that using it for tendency reasoning makes:

> the existence of a fact in issue significantly more probable or improbable … the court must be comfortable that the evidence is of sufficient weight to justify the risk of the evidence unwittingly being given too much weight.[20]

Like the majority, Gageler J adopted the two-part analysis that tendency evidence requires considering the extent to which: (1) the evidence establishes the alleged tendency; and (2) the alleged tendency goes to prove the fact in issue. But unlike the majority, Gageler J considered that evidence needs to demonstrate a pattern or similarity for it to establish the tendency alleged.[21] The specificity of the tendency and the extent to which it matches the conduct alleged are relevant when assessing probative value.[22]

Gageler J referred to several previous cases[23] to show that differences in circumstances could undermine the probative value of tendency evidence. However, his Honour preferred to consider the correct approach to tendency evidence, rather than to be drawn into questions of whether Victoria or NSW were more liberal or more restrictive when it comes to admitting tendency evidence.[24] As part of this, Gageler J quoted with approval two statements of the Victorian Court of Appeal in *Velkoski*:

> One is the statement that for tendency evidence to be admissible "evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct"[25]. The other is the statement … that "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".[26]

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[19] *Ibid* 356 [73].

[20] *Ibid* 370-371 [87].

[21] *Ibid* 371 - 372 [92].

[22] *Ibid* 372 [93].

[23] Including *Saoud v The Queen* (2014) 87 NSWLR 481, 485 [125]; *El-Haddad v The Queen* (2015) 88 NSWLR 93, 113 [72]; *Sokolowskyj v The Queen* (2014) 239 A Crim R 528; *Rapson v The Queen* (2014) 45 VR 103.

[24] *Hughes* (2017) 263 CLR 374-375[102].

[25] *Velkoski* (2014) 45 VR 680, 682 [3].

[26] *Hughes* (2017) 263 CLR 375[103].

Ultimately, Gageler J observed that:

> 2. The phrase "unless … the court thinks" in the formulation of the tendency rule admits of the potential for judicial understanding of the probative value of evidence of particular tendencies to be informed by social science data and enhanced by judicial education. Judicial evaluations of the probative value of categories of tendency evidence may change as new data comes to light and as informed consensus about best practice is built and adjusted in light of improved understanding. No party or intervener in the present appeal sought to direct attention to data or scholarly work bearing on actual probabilities.27

Without any such social science evidence, Gageler J considered it better to take a conservative approach and require greater specificity and similarity between the conduct and the charges than was present in this case. Applying this, the evidence did not have significant probative value and so, according to Gageler J, the appeal should have been allowed.

Nettle J

Nettle J's judgment is divided into two parts. The first considered the admissibility of evidence from the perspective of conventional principles and decided cases. Nettle J began this analysis by noting the requirement of separate consideration and its impact on admissibility. He stated that:

> 3. Because each count on a multiple count indictment must be considered separately and decided separately by reference only to so much of the evidence adduced as is relevant to that count, the question of whether tendency evidence could have significant probative value in relation to a particular count needs to be decided individually for each count by reference to the facts in issue for that count. It is not an exercise that may properly be undertaken by an analysis expressed in broad generalities. It requires precise particularisation of each tendency alleged and logical analysis of why the alleged tendency, if proved, would have significant probative value in relation to a fact in issue in respect of the count under consideration.28

Prior conduct (even criminal conduct), is not significantly probative of conduct on a charged occasion. As Nettle J stated, something more is required, whether in the circumstances of the previous conduct, its nature, or the people involved, to make the evidence significant. Nettle J gave examples such as previous offences demonstrating animosity to an individual, sexual attraction to an individual or a distinctive modus operandi as features which could make previous criminal offending significantly probative.[29]

Nettle J then observed that sexual offending against children is, regrettably, not so unusual that previous offending, by itself, has significant probative value in relation to later offending. His Honour compared it with the murder of young female children and observed that even though murder of female children is less common than sexual offending against female children, no one would suggest the mere fact of a previous murder would have significant probative value in relation to another murder. Something more is needed in the nature of similarities in the children's relationship with the accused, or the *actus reus* or circumstances of the offending before the evidence has significant probative value.[30]

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[27] *Ibid* 377 [110].

[28] *Ibid* 391-392 [153] (citations omitted)

[29] *Ibid* 392-394[154]–[155].

[30] *Ibid* 395 [157].

Nettle J also distinguished the present offending from previous cases the NSW Court of Criminal Appeal relied on where tendency evidence was admitted despite there being no strong similarities in the *actus reus*.[31] Nettle J considered that in those cases, the common element was the exploitation of an existing relationship of authority by either a teacher (*PWD*) or an employer (*Doyle*) to allow an offender to gratify his sexual interest in children. Here, the tendency evidence sought to show opportunistic offending in circumstances where there was an exploitation of authority, but also where this was not present.[32] Nettle J also rejected the characterisation of the evidence as "brazen" or involving extreme risk taking, noting that the variation in the charged and uncharged incidents showed that there was no common demonstration of risk taking beyond the normal risk taking involved in offending generally.[33]

In the second part of his judgment,[34] Nettle J took a more philosophical approach to the admissibility of tendency evidence. He started by observing that in recent times, NSW Court of Criminal Appeal judges have adopted an approach inconsistent with most trial judges and appellate courts' approaches.[35] Given the re-enactment of the Uniform Evidence Laws following the 2005 ALRC report, this indicates that there should be no departure from the historical approach.[36]

After considering the history of the Uniform Evidence Law, Nettle J concluded that the difference between the final form of the legislation and the ALRC's recommendations were not as significant as the majority judgment thought. While the tendency rule and the section 101 additional requirement were both adjusted into more open-textured tests, these developments occurred during the time when the House of Lords decided *Director of Public Prosecutions v P*,[37] which adopted a more flexible approach to propensity evidence under the UK common law. Thus, Parliament may be taken to be aware of those common law developments and the legislation should be seen as aligned with those developments.[38]

Nettle J considered that *Hughes* represented a significant departure from established principle:

> the decision of the Court of Criminal Appeal in this case amounts to saying that, notwithstanding the absence of any particular similarity in the offending itself or the circumstances of the offending, or any other feature of underlying unity, howsoever expressed, evidence that an accused has committed acts of sexual misconduct against females ranging in age from six years (in the case of SH) to mid-twenties (in the case of LJ) in a variety of different circumstances establishes a tendency to commit sexual offences against female children as and when an opportunity presents, and that the existence of that tendency is of such significant probative value as to make evidence of all of the alleged sexual misconduct admissible as tendency evidence in proof of each charged offence. Until now, no other Australian decision has gone so far in lowering the bar of admissibility … there is no justification in principle or as a matter of statutory interpretation for so lowering the bar.[39]

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[31] For example, *R v PWD* (2010) 205 A Crim R 75, notwithstanding the way it was characterised at 91 [79] per Beazley JA (Buddin J and Barr JA agreeing at 93 [96], [97]); *Doyle v The Queen* [2014] NSWCCA 4.

[32] *Hughes* (2017) 263 CLR 397-399[160]-[163].

[33] *Ibid* 401-402 [169].

[34] *Ibid* 403-404 [173].

[35] *Ibid* 405-408 [175]-[179].

[36] *Ibid* 409 [181].

[37] [1991] 2 AC 447, 460-461 per Lord Mackay of Clashfern LC (the other Law Lords agreeing at 463).

[38] *Hughes* (2017) 263 CLR 409-415 [182]-[192].

[39] *Ibid* 416-417 [194] (citations omitted)

Nettle J also expressed concerns about the limits of the effect of the Court of Criminal Appeal's decision. Without a controlling principle like similarity, the mere fact of multiple offences against children without any commonality would become admissible. Like the majority, Nettle J rejected any need for similarity in "operative features". However, unlike the majority, he was not ready to conclude that *Velkoski* actually imposed this requirement. In any event, Nettle J considered that a "logically significant connection" was necessary. This could be found in the acts in question, the circumstances of the offending, the relationship between the parties or some other aspect of the factual matrix.[40]

For these reasons, Nettle J favoured what he termed the "orthodox approach" to tendency evidence and would have allowed the appeal.

Gordon J

Gordon J agreed with Gageler and Nettle JJ and noted that courts have long recognised the dangers of tendency evidence. Addressing those dangers requires "identified similarities or other logically significant connections between the evidence and the facts in issue".[41] Applying this, Gordon J held that the evidence did not possess a sufficient logical connection and so it should not have been admitted. Thus, Gordon J would have allowed the appeal.

[40] *Hughes* (2017) 263 CLR 421[206].

[41] *Ibid* 424 [217].

Conclusion

The *Hughes* majority has sought to address the divergence in practice between Victoria and NSW on the admissibility of tendency evidence. By adopting the NSW approach,[42] the majority has supported a more liberal approach to the admissibility of tendency evidence than has been the practice in Victoria.

However, within the judgment, two significant matters were not considered. First, section 101, which requires that the probative value of tendency evidence from the prosecution must substantially outweigh the risk of prejudice, was mentioned by the majority only in passing and without any significant consideration.[43] While *The Queen v Dickman*[44] considers, to some extent, what does and does not constitute unfair prejudice in the context of section 137, the impact of *Hughes* on the operation of section 101 is a matter for future cases.

Second, the majority expressly confined itself to considering the evidence as tendency evidence. It did not seek to analyse the evidence in terms of the improbability of the complainants making false allegations as a form of tendency evidence.[45] This leaves open the potential for coincidence evidence, which expressly relates to similarities,[46] to require closer similarity than tendency evidence. This may affect the admissibility of evidence from several complainants under an "improbabilities of similar lies" style coincidence reasoning.

In *Bauer (a Pseudonym) v The Queen (No 2)*[47] the Victorian Court of Appeal undertook a thorough consideration of *Hughes* and emphasised two limiting considerations which still apply to the admission of tendency evidence. First, as seen in *IMM v The Queen*,[48] some form of corroboration or special feature is necessary where the evidence comes from a single complainant. Without this, the evidence of the relevant tendency (the first stage of the analysis) will not be sufficiently strong for the tendency evidence as a whole to have significant probative value. Second, the basis for admitting the evidence in *Hughes* was the offender's willingness to act on his sexual attraction "with a disinhibited disregard of the evidence risks of discovery".[49] Therefore, while operative similarity is not essential, something more (such as a brazen disregard of the risk of discovery) is required for the existence of the tendency to be strongly probative of guilt (the second stage of the analysis).

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[42] *R v Ford* (2009) 201 A Crim R 451 (New South Wales Court of Criminal Appeal); *R v PWD* (2010) 205 A Crim R 75 (New South Wales Court of Criminal Appeal).

[43] *Hughes* (2017) 263 CLR 345 [32].

[44] *R v Dickman* (2017) 261 CLR 601

[45] *Hughes* (2017) 263 CLR 357[43].

[46] *Evidence Act 1995* (NSW) s 98(1).

[47] [2017] VSCA 176.

[48] (2016) 257 CLR 300.

[49] *Hughes* (2017) 263 CLR 361; *Bauer (a Pseudonym) v The Queen (No 2)* [2017] VSCA 176, 31-32 [61].