Judicial College of Victoria

R v Bauer (2018) 266 CLR 56

Summary

In *R v Bauer* [2018] HCA 40, the High Court issued a unanimous judgment on three important issues:

- When is tendency evidence admissible in a sexual assault case where there is a single complainant?
- How should a judge balance the different statutory considerations on when to allow pre-recorded evidence from a previous trial?
- What can a judge consider when deciding whether previous representation evidence is 'fresh in the memory'?
- The Court acknowledged that their previous judgments on tendency evidence had caused difficulty, and they must provide a clear test for trial judges to apply.[1]

Under the new test, a single complainant's evidence of the accused's uncharged acts against him or her may be admissible as tendency evidence to prove sexual offences charges without the need for special or unusual features.[2] Proof of the accused committing sexual acts against a complainant on one occasion makes it more likely that the accused committed a similar sexual offence against that complainant on another occasion, when the opportunity presents, where the two events are not too separate in time.[3]

In relation to the admissibility of a previous trial recording, the High Court held that when assessing a complainant's unwillingness to give evidence, the trial judge must treat unwillingness as a spectrum, and consider whether using the previous trial recording will prejudice the accused. Where the risk of prejudice is low, a lesser degree of unwillingness may justify use of the recording of the previous trial.[4]

Finally, the High Court affirmed that the experience of sexual offences may stay fresh in the memory for a long period,[5] and issues of credibility or reliability of previous representations are for the jury to determine.[6]

TENDENCY EVIDENCE

The High Court's began its consideration of the tendency evidence by acknowledging that:

> previous decisions of this Court have left unclear when and if a complainant's evidence of uncharged sexual and other acts is admissible as tendency evidence in proof of charged sexual offences....
>
> The admissibility of tendency evidence in single complainant sexual offences cases should be as straightforward as possible consistent with the need to ensure that the accused receives a fair trial. With that objective, the Court has resolved to put aside differences of opinion and speak with one voice on the subject.[7]

1 *R v Bauer* (2018) 266 CLR 56, 81-82 [47].
2 *Ibid* (2018) 266 CLR 82 [48].
3 *Ibid* (2018) 266 CLR 83 [50].
4 *Ibid* (2018) 266 CLR 78-79 [61]-[42].
5 *Ibid* (2018) 266 CLR 99 [89].
6 *Ibid* (2018) 266 CLR 103 [75].
7 *Ibid* (2018) 266 CLR 81-82 [47].

To provide that clarity, the High Court stated the new rule for admissibility as follows:

> 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*.[8]

The High Court summarised the logic of this rule by saying:

> [W]here one person is sexually attracted to another and has sought to fulfil that attraction by committing a sexual act with him or her, it is the more likely that the person will continue to seek to fulfil the attraction by committing further sexual acts with the other person as the occasion presents.[9]

The Court noted that *IMM*[10] had been a source of confusion for trial judges on this point. In *IMM*, the High Court held that where the principal issue was the complainant's credibility, evidence from the complainant of an uncharged act was not rationally capable of adding significantly to the probability of the complainant telling the truth about the charged acts unless there were some special features associated with the uncharged act.[11]

In *Bauer*, the High Court rejected the generality of that statement, and held that *IMM* may be distinguished where there is a course of offending of generally similar sexual acts along with a series of uncharged acts. Further, the Court held that *IMM* must not be read as departing from cases like *HML*,[12] *JLS*,[13] *MR*,[14] *PCR*,[15] *Velkoski*[16] or *Gentry*[17] which held that single complainant sexual tendency evidence generally has high probative value.

The High Court also rejected the argument that Hughes[18] requires proof of special features to establish significant probative value. Special features are only necessary where there are multiple complainants, in order to link the cases involving different complainants together.[19]

8 *Ibid* (2018) 266 CLR 82 [48] (citations omitted).
9 *Ibid* (2018) 266 CLR 88 [60]. See also 83 [50].
10 *IMM v The Queen* (2016) 257 CLR 300.
11 *R v Bauer* (2018) 266 CLR 85 [53]. See also *IMM v The Queen* (2016) 257 CLR 300 [61]-[64].
12 *HML v The Queen* (2008) 235 CLR 334.
13 *JLS v The Queen* (2010) 28 VR 328 [19]-[20], [22]-[23], [28].
14 *MR v The Queen* [2011] VSCA 39 [13]-[15].
15 *PCR v The Queen* [2013] VSCA 224 [37]-[38].
16 *Velkoski v The Queen* (2014) 45 VR 680 [92]-[93], [168], [235].
17 *Gentry v DPP* [2014] VSCA 211 [24]-[29].
18 *Hughes v The Queen* (2017) 263,CLR 338
19 *R v Bauer* (2018) 266 CLR 88-87 [56]-[58].

In *IMM*, the High Court had established that the probative value of evidence must be taken at its highest.[20] The Court doubted, but did not decide, whether the line of authority which required the prosecution to exclude the possibility of concoction, contamination or collusion was correct.[21] In *Bauer*, the Court returned to that issue and said:

> As was established in *IMM*, that is a determination to be undertaken taking the evidence at its highest. Accordingly, unless the risk of contamination, concoction or collusion is so great that it would not be open to the jury rationally to accept the evidence, the determination of probative value excludes consideration of credibility and reliability. Subject to that exception, the risk of contamination, concoction or collusion goes only to the credibility and reliability of evidence and, therefore, is an assessment which must be left to the jury.[22]

Finally, the High Court set out the directions that should usually be given in relation to tendency evidence in a single complainant sexual offence case. The direction should contain the following:

- The Crown argues that the evidence establishes the accused's sexual interest in the complainant and tendency to act on it which the Crown contends makes it more likely the accused committed the charged offence(s).
- If appropriate, the Crown also relies on the evidence to put the charges in context and the manner in which the evidence does so.
- If persuaded, the jury can use evidence of uncharged acts for the stated purpose(s) and no others.
- It is not enough to convict the accused that the jury is satisfied that uncharged acts have been committed, or that the accused had a sexual interest in the complainant which he or she acted on in the past.
- The jury can only convict of a charged offence if, upon their consideration of all the evidence, they are satisfied of guilt beyond reasonable doubt.[23]

20 *IMM v The Queen* (2016) 257 CLR 300 [44].
21 *IMM v The Queen* (2016) 257 CLR 300 [59].
22 *R v Bauer* (2018) 266 CLR 91-92 [69] (citations omitted). See also 92 [70].
23 *Ibid* (2018) 266 CLR 97-98 [86].

Previous trial recordings

Criminal Procedure Act 2009 s 381(1) provides that on a retrial, the court can admit the recording of the complainant giving evidence in the previous trial if it is in the interests of justice to do so. Two factors it must consider are the availability or willingness of the complainant to give further evidence and whether the accused would be unfairly disadvantaged by the admission of the recording.

The High Court held that:

> An inquiry as to a person's "willingness" to act is not ordinarily conceived of as limited to whether the person refuses to act. It is naturally and ordinarily understood as seeking to ascertain to what degree the person is willing or unwilling to act – conceptually, where along the scale of willingness which extends from abject refusal to unbridled enthusiasm the person is disposed.[24]

The High Court observed that the legislation requires the judge to weigh multiple considerations to determine whether it is in the interests of justice to admit the recording. The nature of this exercise means that the factors will pull in different directions, and the strength of one factor must be judged against the strength of other factors. Therefore, where there is little risk of disadvantage, it may be in the interests of justice to admit the recording even if the complainant has a low degree of unwillingness.[25]

The failure of defence counsel to seek leave for additional cross-examination on any further specific matters also supported the conclusion that it was in the interests of justice to admit the recording.[26]

Complaint evidence

The High Court observed that in the early days of the Uniform Evidence Law, 'fresh in the memory' required temporal proximity,[27] but:

> Since then, it has rightly come to be accepted by intermediate courts of appeal that the nature of sexual abuse is such that it may remain fresh in the memory of a victim for many years.[28]

The Court then included a lengthy extract of AF's evidence before rejecting the complaint that AF's evidence was generic and non-specific. The fact that the statements were made in response to leading questions, or contained inconsistencies or inaccuracies, did not affect their admissibility, but went to the weight of the evidence, which was for the jury to assess.[29] As RC was alleging a continuous course of offending over 11 years, it was not necessary for the representations to be linked to a single charge. The evidence confirmed the existence of the accused's ongoing sexual interest in the complainant and his tendency to act on it over that period of time.[30]

24 *Ibid* (2018) 266 CLR 78-79 [41].
25 *Ibid* (2018) 266 CLR 79 [42].
26 *Ibid* (2018) 266 CLR 79-80 [43].
27 *Graham v The Queen* (1998) 195 CLR 606.
28 *R v Bauer* (2018) 266 CLR 99 [89].
29 *Ibid* (2018) 266 CLR 101-102 [91]-[92].
30 *Ibid* (2018) 266 CLR 103-104 [97].

Commentary

Bauer holds the distinction of being a unanimous High Court judgment on tendency evidence. Unlike *Hoch*,[31] *Pfennig*,[32] *HML*,[33] *IMM*[34] or *Hughes*,[35] the Court has spoken with one voice to provide guidance to lawyers, trial judges and intermediate appellate courts on an important topic of evidence in single complainant sexual assault cases. Such cases often involve few witnesses and so surrounding evidence can be significant for juries.

The case makes six points that bear noting.

First, the Court reiterated the rule laid down in *IMM* that the probative value of evidence must be taken at its highest. This was re-expressed in the following terms:

> As has been emphasised, it is not for a trial judge to say what probative value a jury should give to evidence but only what probative value the jury acting rationally and properly directed could give to the evidence. Hence, unless evidence is so lacking in credibility or reliability that it would not be open to a jury acting rationally and properly directed to accept it, the probative value of the evidence must be assessed, for the purposes of s 137, at its highest.[36]

Unlike *IMM*, the court avoids reference to JD Heydon QC's example of the identification made on a foggy night, where the highest is not very high at all.[37] Future courts and commentators will likely continue to wonder if Heydon's foggy night has any ongoing relevance to assessing the value of evidence or whether it is a case study in which 'it would not be open to a jury acting rationally and properly directed to accept it'.

Second, the Court set down a straightforward rule for when tendency evidence in single complainant sexual offence cases will be admitted. While the judgment avoided characterising the rule as a presumption of admissibility, that appears to be the consequence of its rule that no special feature is required and that tendency evidence can eliminate doubts which might otherwise have attended the complainant's evidence of the charged acts.[38]

Third, the High Court has confined the approach in *IMM* to its facts. The 'special features' requirement arose because that case involved a single uncharged act of significantly different gravity. Only in that unusual case will prosecutors need to point to special features to show that the evidence has significant probative value.

31 *Hoch v The Queen* (1988) 165 CLR 292 (2 judgments).
32 *Pfennig v The Queen* (1995) 182 CLR 461 (3 judgments).
33 *HML v The Queen (2008)* 235 CLR 334 (7 judgments)
34 *IMM v The Queen (2016)* 257CLR 300 (3 judgments).
35 *Hughes v The Queen (2017)* 263 CLR 338 20 (4 judgments).
36 *R v Bauer* (2018) 266 CLR 40 [95].
37 *IMM v The Queen* (2016) 257 CLR 300 [50].
38 See *R v Bauer* (2018) 266 CLR 82-84 [48]-[51].

Fourth, in relation to previous trial recordings, the High Court affirmed that the five factors in *Criminal Procedure Act 2009* s 381(1) are considerations, and not pre-conditions.[39]

This aspect of the judgment may have a limited scope of operation, as clause 32 of the Justice Legislation Miscellaneous Amendment Bill 2018 will introduce a presumption in favour of admitting a previous trial recording and declares that the complainant's willingness to give evidence is irrelevant.

Fifth, the High Court has endorsed the intermediate appellate decisions which had affirmed that sexual offending, especially repeated sexual offending, may remain fresh in the memory for an extended period. Combined with the reaffirmation of the *IMM* rule that probative value is a matter for the jury, this would seem to lower the bar on the admissibility of complaint evidence in sexual offence cases.

Sixth, the High Court spelt out a list of directions for use in single complainant tendency cases which omit any need to warn against the dangers of general propensity reasoning. Curiously, the directions omit any reference to *Jury Directions Act 2015* ss 25-30, or the request process in Part 3.[40]Trial judges will need to consider whether the High Court's directions should be read as giving effect of *Jury Directions Act 2015* s 27, or if they only apply to those jurisdictions which do not have a *Jury Directions Act*.

39 Compare *Bauer (a Pseudonym) v The Queen* [2017] VSCA 176 [42].
40 Even though the High Court is aware of the Act, by its reference to *Jury Directions Act 2015* s 61.