

THE FUTURE OF JOINT TRIALS OF SEX OFFENCES AFTER *HUGHES*: RESOLVING JUDICIAL FEARS AND JURISDICTIONAL TENSIONS WITH EVIDENCE-BASED DECISION-MAKING

ANNIE COSSINS*

*Since 2009, different interpretations of the Uniform Evidence Law have led to a split between the New South Wales and Victorian appellate courts in relation to the admissibility of tendency/coincidence evidence in joint trials of sex offences. Although a recent appeal to the High Court in *Hughes* was aimed at resolving this split, this article considers whether the case has done so in light of: (i) an examination of the complex legal background to the appeal; (ii) the research on sex offender behaviour about which the High Court was unaware; and (iii) empirical research which contradicts the view that joint trials of sex offences must be avoided because of the dangers inherent in juries' reasoning processes.*

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* BSc (Hons), LLB, PhD (UNSW); Professor of Law and Criminology, Faculty of Law, UNSW Sydney.

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I INTRODUCTION

The frequency of joint trials of sex offences around Australia varies in relation to allegations of similar sexual conduct despite the existence of identical or virtually identical tests for the admissibility of tendency and coincidence evidence (defined below). This variation appears to be solely due to different subjective interpretations of the type of sexual conduct and the type of circumstances that will amount to probative value beyond mere relevance. One of the most interesting variations concerns the different interpretations of the test for admissibility under ss 97 and 98 of the *Uniform Evidence Law* ('UEL'),¹ 'significant probative value'.

These different interpretations have led to a split between the New South Wales and Victorian appellate courts in relation to the admissibility of tendency/coincidence evidence in child sexual assault ('CSA') trials. This split culminated in a recent appeal to the High Court after Robert Hughes appealed against his convictions for several counts of CSA on the grounds that the New South Wales Court of Criminal Appeal ('NSWCCA') had made an error in: (i) concluding that the tendency evidence admitted at his trial possessed 'significant probative value'; and (ii) rejecting the approach of the Victorian Court of Appeal ('VSCA') in *Velkoski* to the assessment of significant probative value.²

In a 4:3 decision, the High Court dismissed the appeal. The importance of the High Court decision lies in the fact that it will affect the admission of tendency evidence in all six *UEL* jurisdictions³ as recognised by Gordon J in *Hughes*,⁴ although there is some indication in the majority judgment that trial and appellate courts may still differ in their ultimate interpretation of whether

¹ The *UEL* has been implemented in most Australian jurisdictions: *Evidence Act 1995* (Cth); *Evidence Act 2001* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic). In South Australia, the admissibility of 'character evidence' is governed by s 34P of the *Evidence Act 1929* (SA), which adopted a test similar to the significant probative value test and the same test as applies under s 101(2) of the *UEL*. The common law governs the admissibility of similar fact evidence in Queensland (*Phillips v The Queen* (2006) 225 CLR 303, 327 [79]) although other reforms have been designed to lower the threshold for the cross-admissibility of similar fact and propensity evidence: see, eg, *Criminal Code Act 1899* (Qld) s 597A; *Evidence Act 1977* (Qld) s 132A. In Western Australia, s 31A of the *Evidence Act 1906* (WA) increased the likelihood of propensity evidence being admitted in a joint trial. The interpretation of 'significant probative value' under s 31A(2) is similar to the NSW approach: *AJ v Western Australia* (2007) 177 A Crim R 247.

² *Hughes v The Queen* (2017) 344 ALR 187.

³ See n 1.

⁴ *Hughes* (n 2) 248 [211].

the type of sexual conduct adduced as tendency evidence, and the specific circumstances in which it occurs, have significant probative value.

For this reason, as well as the closeness of the decision, this article analyses the extensive legal background to *Hughes* in order to investigate whether:

- 1 the majority judgment in *Hughes* has resolved the dispute between the Victorian and New South Wales appellate courts;
- 2 judges should be making judgments about the behaviour of alleged sex offenders without specialised knowledge to inform them, as suggested by Gageler J in *Hughes*;⁵ and
- 3 future cases should consider the empirical evidence which contradicts the long-held proposition that evidence about a defendant's other criminal misconduct will be misused by juries.

Before discussing the facts and judgments in *Hughes*, it is necessary to summarise the legal background to the case for greater understanding of its significance.

II THE LEGAL BACKGROUND

Since the 1800s, the admissibility of a defendant's other criminal misconduct⁶ in a criminal trial has attracted considerable controversy because of its assumed prejudicial effect on juries.⁷ At common law in Australia, such evidence became known as 'propensity' or 'similar fact' evidence and was only admissible in exceptional circumstances. These were if:

- it was relevant to the current charges;
- it had striking similarities with the events and conduct that were the subject of those charges; and
- there was no rational view of the evidence consistent with the accused's innocence (the *Pfennig* test).⁸

⁵ *Ibid* 215 [110].

⁶ That is, evidence of an accused's criminal misconduct committed before or after the events that are the subject of the current charges. In CSA trials, this evidence may include prior convictions as well as allegations by other children or adults of sexual assault, as occurred in *Hughes*.

⁷ For a review of the historical case law, see Annie Cossins, 'The Legacy of the *Makin* Case 120 Years on: Legal Fictions, Circular Reasoning and Some Solutions' (2013) 35 *Sydney Law Review* 731.

⁸ *Pfennig v The Queen* (1995) 182 CLR 461.

Evidence of other criminal misconduct is known as tendency or coincidence evidence under ss 97 and 98 of the *UEL*, although these terms were intended to encompass common law propensity and similar fact evidence.⁹ Tendency evidence is defined under s 97 as '[e]vidence of the character, reputation or conduct of a person, or a tendency that a person has or had ... to act in a particular way, or to have a particular state of mind'. It is notable that the definition does not refer to similarities in a person's conduct or state of mind, a point emphasised by the majority judges in *Hughes*.¹⁰ By contrast, coincidence evidence is defined under s 98 with reference to similarities — it refers to two or more events being used to prove the improbability of the events occurring coincidentally, having regard to the similarities of the events and/or the circumstances in which they occurred. If the similarities are sufficient, only then can the events be used to prove that the accused committed the alleged act (such as a sexual assault) or had a certain state of mind (such as sexual attraction).

Admissibility under ss 97 and 98 is framed in negative terms, in that tendency/coincidence evidence will not be admissible *unless* the court thinks the evidence will have significant probative value. As a second, albeit higher, test of relevance,¹¹ the test involves asking whether 'the evidence is capable, to a significant degree, of rationally affecting the assessment ... of the probability of the existence of a fact in issue'.¹² It is a subjective evaluation because ss 97(1)(b) and 98(1)(b) refer to whether '*the court thinks* that the evidence will ... have significant probative value'.¹³ This inherent subjectivity is important for critiquing what different courts have said about when tendency/coincidence evidence will be considered to exhibit significant probative value, a point highlighted by the majority in *Hughes*, discussed below.

If the evidence in question does have significant probative value and is adduced by the prosecution, s 101(2) of the *UEL* requires a court to balance its

⁹ Law Reform Commission, *Evidence* (Interim Report No 26, 1985) vol 1, 460–4 [810]–[811], vol 2, 46–7. 'Similar fact evidence' refers to evidence that may, because of the degree of similarity in the evidence of different events and/or witnesses, show the identity of the offender or 'the improbability of coincidence if a number of similar accounts are all true': *R v Best* [1998] 4 VR 603, 606 (Callaway JA).

¹⁰ *Hughes* (n 2) 198 [33]–[34] (Kiefel CJ, Bell, Keane and Edelman JJ).

¹¹ *Dao v The Queen* (2011) 81 NSWLR 568, 589 [98] (Allsop P). See also *R v Fletcher* (2005) 156 A Crim R 308, 319 [49] (Simpson J). In *R v Lockyer* (1996) 89 A Crim R 457, 459, Hunt CJ at CL held that "significant" probative value must mean something more than mere relevance but something less than a "substantial" degree of relevance'.

¹² *Dao* (n 11) 604 [184] (Simpson J).

¹³ *Evidence Act 1995* (NSW) ss 97–8, cited in *ibid* 576 [27] (Spigelman CJ), 589 [97]–[98] (Allsop P) (emphasis added).

probative value against any prejudicial effect it *may* have on the defendant. Although this balancing test is a less stringent rule of exclusion than the *Pfennig* test,¹⁴ tendency/coincidence evidence will only be admissible if its probative value *substantially* outweighs any prejudicial effect.¹⁵

As stated above, s 97 does not expressly rely on similarities between the charges in question and the other criminal conduct adduced to prove a defendant's tendency. But still the question remains: what degree of similarity is required for tendency evidence to possess *significant* probative value? This issue has plagued the interpretation of s 97 since it was enacted, particularly in sexual assault trials. It is this contentious issue that the High Court had to deal with in *Hughes* because of the belief that lay jurors will engage in propensity reasoning if dissimilar evidence of the defendant's conduct is admitted.

III THE PREJUDICIAL EFFECT OF OTHER CRIMINAL MISCONDUCT: 'REASONING PREJUDICE' AND 'MORAL PREJUDICE'

What is the risk of prejudice to someone like Hughes, who was tried in a joint trial where the jury heard evidence from several complainants and tendency witnesses? The term 'prejudice' has a particular meaning in criminal trials, especially in those involving tendency/coincidence evidence. While evidence is not unfairly prejudicial merely because it assists in proving the prosecution case by inculpating the accused,¹⁶ it may be excluded because of unfairness to the accused,

in that it might place him at risk of being improperly convicted, either because its weight and credibility cannot be effectively tested or because it has more prejudicial than probative value and so may be misused by the jury.¹⁷

The specific reasons for restricting the admissibility of other criminal misconduct evidence have been elucidated in several cases:

¹⁴ See *R v Ellis* (2003) 58 NSWLR 700, 717 [88]–[89]. According to *R v RN* [2005] NSWCCA 413, [11], the essence of the balancing process under s 101(2) was described by McHugh J in *Pfennig* (n 8) 528–9.

¹⁵ The balancing test also involves a degree and value judgment (*Fletcher* (n 11) 319 [48] (Simpson J)) but the *Pfennig* test is not considered to have any application to s 101(2); *Ellis* (n 14) 718 [94].

¹⁶ *Lockyer* (n 11) 460; *R v BD* (1997) 94 A Crim R 131, 139; *Papakosmas v The Queen* (1999) 196 CLR 297, 325 [91].

¹⁷ *Dietrich v The Queen* (1992) 177 CLR 292, 363 (Gaudron J) (citations omitted). See also *Philips v The Queen* (2006) 225 CLR 303; *Dupas v The Queen* (2012) 40 VR 182.

- to prevent ‘undue suspicion against the accused [which] undermines the presumption of innocence’;¹⁸
- to prevent juries from using the evidence ‘for an unintended and illegitimate purpose’ or ‘attach[ing] undue and disproportionate weight’ to it;¹⁹
- ‘juries … tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct’;²⁰
- “[c]ommon assumptions about improbability of sequences are often wrong”, and when the accused is associated with a sequence of deaths, injuries or losses, a jury may too readily infer that the association “is unlikely to be innocent”;²¹ and
- ‘in many cases the facts of the other misconduct may cause a jury to be biased against the accused’.²²

However, the above assumptions about jury reasoning are not based on empirical research but have acquired the status of truth from their repetition throughout the decades. In fact, the empirical evidence does not support them:

[A]ll of these hypotheses undergirding the conventional wisdom about prior crimes evidence are empirically testable. More than that, they have already been tested and most stand refuted or, at least, rendered highly implausible. That notwithstanding, many judges and legal scholars have been largely indifferent to, or unaware of, the empirical evidence, apparently persuaded that their own intuitions, grounded in decades of judicial experience, provide ample basis for the status quo, however clumsily cobbled together it may be.²³

¹⁸ *Pfennig* (n 8) 512 (McHugh J).

¹⁹ *Dupas* (n 17) 200 [77].

²⁰ *Pfennig* (n 8) 512 (McHugh J).

²¹ Ibid, quoting *Perry v The Queen* (1982) 150 CLR 580, 594 (Murphy J).

²² *Pfennig* (n 8) 512–13 (McHugh J).

²³ Larry Laudan and Ronald J Allen, ‘The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process’ (2011) 101 *Journal of Criminal Law and Criminology* 493, 496.

Because of the strong belief in the ‘poisonous potential’²⁴ of other criminal misconduct, a judicial direction to guard against the risk of impermissible reasoning is, generally, considered insufficient.²⁵ Nonetheless, ‘there are undoubtedly cases where the interests of justice require that evidence should be admitted even though the prosecution intends to rely on the criminal propensity of the accused’.²⁶ In fact, ‘the clearest case of the use of propensity evidence to prove guilt is one involving a sexual offence’.²⁷ The majority in *Hughes* recognised why tendency evidence is so important in a CSA trial:

[I]t is common for the complainant’s account to be challenged on the basis that it has been fabricated or that anodyne conduct has been misinterpreted. Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded.²⁸

As discussed in Part VI, the joint trial in *Hughes* involved five female complainants, all under the age of 16 years. It is this type of fact situation and the

exclusion of what may be seen as highly relevant [supporting] evidence [which] has prompted much judicial agonizing, particularly in cases of alleged sexual abuse of children and adolescents, whose word was sometimes unfairly discounted when opposed to that of ostensibly upstanding adults.²⁹

Courts focus on the *degree* of relevance of the evidence in order to justify its admission despite its prejudicial effect.³⁰ However, ‘[i]f the risk of an unfair trial is very high, the probative value of evidence disclosing criminal propensity may need to be so cogent that it makes the guilt of the accused a virtual certainty’.³¹

²⁴ *R v Handy* [2002] 2 SCR 908, 957 [138]. Several Australian cases confirm the judicial belief in the prejudicial nature of this type of evidence: see, eg, *Martin v Osborne* (1936) 55 CLR 367; *Markby v The Queen* (1978) 140 CLR 108; *Perry* (n 21); *Thompson v The Queen* (1989) 169 CLR 1; *Harriman v The Queen* (1989) 167 CLR 590; *B v The Queen* (1992) 175 CLR 599; *Pfennig* (n 8); *Hoch v The Queen* (1998) 165 CLR 292; *Phillips* (n 17); *Hughes* (n 2) 235 [174] (Nettle J). See also *DPP v Boardman* [1975] AC 421; *DPP v P* [1991] 2 AC 447.

²⁵ *Sutton v The Queen* (1984) 152 CLR 528, 542 (Brennan J).

²⁶ *Pfennig* (n 8) 523 (McHugh J).

²⁷ *Ibid* 525.

²⁸ *Hughes* (n 2) 199 [40].

²⁹ *Handy* (n 24) 927 [42].

³⁰ *Harriman* (n 24) 598–9.

³¹ *Pfennig* (n 8) 529 (McHugh J).

The difficulty for courts is deciding on what basis other criminal misconduct evidence tends to show guilt other than in terms of mere propensity. The answer has been to look at the similarities in the other criminal misconduct and the conduct giving rise to the charges in question, in the belief that sufficient similarities will overcome the prejudicial effect.³²

The problem with this reasoning is that the greater the similarity in the other criminal misconduct, the more likely it will reveal the defendant's propensity to commit a similar offence, although few judges have recognised this.

Indeed, the case law is replete with contradictions about the reasons for admitting prejudicial evidence. For example, in *Sutton*, a sexual assault case, Gibbs CJ discussed the prohibited relevance of propensity evidence but considered that any unfairness from admitting it 'disappears when the similar fact evidence actually does have a very high probative value, and in such exceptional cases justice requires it to be admitted'.³³ Such a decision raises the question as to why judges think that juries *can* be trusted not to use prohibited propensity reasoning with highly probative evidence but cannot be trusted with weakly probative evidence that is less likely to show a defendant's criminal propensities.

In other words, there is an inherent contradiction at the heart of judicial reasoning about when propensity evidence should be admissible, with its apparently strong probative force somehow 'transcend[ing]' its prejudicial effect.³⁴ In reality, as McHugh J recognised in *Pfennig*, this means that judges must balance two concepts (cogency of proof versus fairness of the trial) that are, in fact, impossible to compare because the greater the probative value of the evidence, the greater its supposed prejudicial effect.³⁵ But judges are also practical and sometimes consider that

it may nevertheless be 'just' to admit the evidence [which] ... conveys the notion that it is not only the interests of the accused that are involved. The legitimate interests of the Crown and of the community cannot be overlooked.³⁶

In other words, what is 'just' and what is 'prejudicial' are judicial constructions that vary historically and from case to case.

³² *Sutton* (n 25) 557 (Deane J).

³³ Ibid 534, quoting LH Hoffmann, 'Similar Facts after Boardman' (1975) 91 *Law Quarterly Review* 193, 194.

³⁴ *Perry* (n 21) 609 (Brennan J).

³⁵ *Pfennig* (n 8) 528.

³⁶ Ibid 507 (Toohey J).

Overall, two basic categories of prejudicial reasoning emerge from the case law which were defined by the Supreme Court of Canada in *R v Handy*:

- 1 where the jury reasons that the defendant is a bad person or has a bad character based on other criminal misconduct ('moral prejudice'); and
- 2 where the jury substitutes the evidence of the defendant's other criminal misconduct for the evidence in the trial or gives it disproportionate weight in reasoning towards guilt ('reasoning prejudice').³⁷

Reasoning prejudice is said to arise from 'cognitive distortions' of social reality, including

erroneous generalization and oversimplification, the formation of social attitudes before or despite objective evidence, illusory correlations and preexisting stereotypic judgments of a group, the lack of appreciation of situational constraints on actions of people who may be members of a group, and other inaccuracies in categorizing, evaluating, and explaining social entities.³⁸

By contrast, 'moral prejudice' arises from 'social perceptions or attitudes that deviate from a normative standard or moral value, such as ... fairness, equity, equality, or need'.³⁹ Because it is believed that the degree of prejudice will vary depending on the type of other criminal misconduct, as well as the circumstances of a particular case,⁴⁰ it is important to distinguish between different types of propensity evidence, which this article does by identifying three categories from the case law:

- 1 prior or later convictions, such as in *Pfennig*, where the defendant's later convictions for abduction and sexual assault were admitted;
- 2 similar allegations by two or more complainants, which typically arise in sexual assault trials, such as *Hughes*; and

³⁷ *Handy* (n 24) 924 [31].

³⁸ Key Sun, 'Two Types of Prejudice and Their Causes' (1993) 48 *American Psychologist* 1152, 1152 (citations omitted).

³⁹ *Ibid.*

⁴⁰ *Pfennig* (n 8) 483 (Mason CJ, Deane and Dawson JJ).

- 3 similar events with which the defendant is associated, such as evidence that the defendant was in areas where similar crimes occurred,⁴¹ or evidence to show that the defendant was associated with similar deaths.⁴²

The first category (convictions) is thought to pose a particularly high risk of ‘moral prejudice’ because of the ease with which it can be concluded that the defendant is a ‘bad person’ who will yield to that propensity whenever an opportunity arises.⁴³

For the second category to be admissible, it is permissible to consider the improbability of so many witnesses/complainants making similar allegations unless they were all true. However, this evidence is also assumed to be prejudicial because juries will conclude that the defendant is guilty of all counts simply because of the number of allegations, or the strength of the allegations, rather than considering each count separately and making separate findings beyond reasonable doubt, after which they are then permitted to use improbability reasoning to remove any remaining doubt.

Prejudice is thought to arise in relation to the third category because juries use assumptions about human behaviour to bridge the inevitable evidentiary gaps as a result of a lack of evidence of the defendant’s commission of the *actus reus*. However, in sexual assault cases, coincidence reasoning can be used when identity is a fact in issue — where there are features of the offender’s sexual behaviour with multiple complainants that are sufficiently similar or where the circumstances in which the behaviour occurred are sufficiently similar such that coincidence can be eliminated as a reasonable explanation.

Judicial views about when the probative value of tendency evidence will be sufficient to outweigh its prejudicial effect are inconsistent. While admitting evidence of a defendant’s other criminal misconduct is always thought to carry *some* prejudicial risk to the defendant, the critical issue is whether the risk of prejudicial reasoning by a jury in these cases reaches a sufficient level of *unfairness* to the defendant, thus risking a miscarriage of justice. In relation to CSA trials, in particular, the issue of prejudice is linked to the procedural issue of whether to order joint or separate trials, which, in turn, is dependent on the admissibility of evidence of the defendant’s other criminal misconduct.

⁴¹ See, eg, *Ellis* (n 14).

⁴² See, eg, *Perry* (n 21).

⁴³ *Pfennig* (n 8) 488 (Mason CJ, Deane and Dawson JJ).

IV CROSS-ADMISSIBILITY IN CSA TRIALS

A case like *Hughes* poses difficulties for judges because the decision to order a joint trial of all the charges or separate trials is dependent on whether the complainants' evidence is cross-admissible in a joint trial as tendency/coinidence evidence.

The main fact in issue in a CSA case will usually be whether or not the alleged sexual conduct occurred with no other evidence but the complainant's word against that of the defendant. As recognised by the High Court in *Hughes*,⁴⁴ tendency evidence that shows a defendant has engaged in sexual conduct with another child is likely to be 'significant' (that is, 'important' or 'of consequence') in establishing whether or not the defendant committed the sexual conduct complained of.⁴⁵ But because of the subjective element ('the court thinks') inherent in interpreting the word 'significant' under s 97, the importance of the evidence will depend on a judge's knowledge and assumptions about the behaviour of child sex offenders, as discussed below. As a result, this subjective element introduces uncertainty about when, and in what circumstances, the evidence of multiple complainants will be cross-admissible in a joint trial.

There has been a number of joint child sexual assault trials in which juries have returned a mixture of guilty and not guilty verdicts,⁴⁶ which suggests that properly instructed juries are capable of carefully considering the evidence pertaining to each count separately. This indicates that propensity reasoning is not inevitable. Jury research shows that a significant proportion of both jurors and jury-eligible citizens hold a wide range of misconceptions about children's ability to give reliable evidence and about the impact of sexual abuse on children, all of which favour the defence case.⁴⁷ The significance of the misconceptions brought to the jury room is exemplified by the finding in one study that '92 per cent of defence counsel ... utilised one or more of the misconceptions

⁴⁴ *Hughes* (n 2) 208–9 [81] (Gageler J), 226–7 [153]–[155] (Nettle J), 249 [215] (Gordon J).

⁴⁵ *Lockyer* (n 11) 459.

⁴⁶ See, eg, *R v OGD [No 2]* (2000) 50 NSWLR 433; *Phillips* (n 17); *AE v The Queen* [2008] NSWCCA 52; *R v WAH* [2009] QCA 263; *Ward v The Queen* [2017] VSCA 37; *Hughes* (n 2).

⁴⁷ Anne Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153; Anne Cossins, Jane Goodman-Delahunty and Kate O'Brien, 'Uncertainty and Misconceptions about Child Sexual Abuse: Implications for the Criminal Justice System' (2009) 16 *Psychiatry, Psychology and Law* 435; Jane Goodman-Delahunty, Natalie Martschuk and Annie Cossins, 'What Australian Jurors Know and Do Not Know about Evidence of Child Sexual Abuse' (2017) 41 *Criminal Law Journal* 86.

about child sexual assault as the platform for the defence case during cross examination of the child complainant and in opening or closing addresses to the jury'.⁴⁸ Studies also show that the use of gender and victim stereotypes within sexual assault scenarios can negatively influence perceptions of complainant credibility.⁴⁹

In fact, cross-admissibility questions do not focus on the risk of misconceptions and stereotypes giving rise to an unfair trial, or even counteracting the possibility of impermissible propensity reasoning.

At common law, cross-admissibility has historically been dependent upon a judge being satisfied that the complainants' allegations are 'strikingly similar',⁵⁰ a test that has found considerable utility under the *UEL*. A topic of considerable controversy in the New South Wales and Victorian appellate courts has been whether that test and similar formulations, such as 'underlying unity', 'pattern of conduct' or 'distinctiveness' are logically and empirically appropriate tests for determining whether or not multiple allegations of CSA have 'significant probative value' under ss 97 and 98 to be admitted in a joint trial.

The question is whether a high threshold of strikingly similar behaviour is warranted under the *UEL*, a question tackled by the High Court in *Hughes*. But how did this high threshold evolve in Victoria? This is discussed in Part V.

V THE NEW SOUTH WALES AND VICTORIAN APPROACHES TO SECTION 97

The controversy surrounding the admissibility of tendency/coincidence evidence has increased in recent times as a result of a series of decisions by the VSCA. In *Velkoski v The Queen*, the Court noted that the interpretation of s 97 is 'regarded as being in an unsettled state', with different approaches being taking in the VSCA and the NSWCCA despite the fact that trials in Victoria and

⁴⁸ Suzanne Blackwell, 'Child Sexual Abuse on Trial in New Zealand' (Paper, Criminal Law Symposium, Auckland, November 2008) 15.

⁴⁹ Barbara Masser, Kate Lee and Blake M McKimmie, 'Bad Woman, Bad Victim? Disentangling the Effects of Victim Stereotypicality, Gender Stereotypicality and Benevolent Sexism on Acquaintance Rape Victim Blame' (2010) 62 *Sex Roles* 494; Regina A Schuller et al, 'Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender and Victim Stereotypes' (2010) 13 *New Criminal Law Review* 759; Blake M McKimmie, Barbara M Masser and Renata Bongiorno, 'What Counts as Rape? The Effect of Offense Prototypes, Victim Stereotypes, and Participant Gender on How the Complainant and Defendant Are Perceived' (2014) 29 *Journal of Interpersonal Violence* 2273.

⁵⁰ *R v Wilmot* (1989) 89 Cr App R 341, 348.

New South Wales are subject to the same rules of evidence under the *UEL* (with minor differences only).⁵¹

As will be seen, this difference was the subject of much discussion in the High Court judgments in *Hughes*, particularly since one of the grounds of appeal was based on this difference in approach, with the Victorian Director of Public Prosecutions being given leave to intervene.⁵²

Since the enactment of the *UEL* in 1995, the striking similarities test (and similar formulations) has been applied in several cases when assessing whether the evidence of multiple complainants has significant probative value. This test, and similar formulations, have been regularly argued in submissions by defence counsel and/or applied by trial and appeal judges to admit or exclude evidence under ss 97 and 98.⁵³

It is necessary to analyse the validity of the striking similarities test and other formulations that require degrees of similarity when considering the conduct of a defendant who is accused of serial child sex offending because judicial interpretations of significant probative value do not appear to be founded on any empirical basis. For example, in *CGL v Director of Public Prosecutions (Vic)*, the VSCA remarked that

[w]hen s 97(1) speaks of a tendency ‘to act in a particular way’, we hardly think that Parliament had in mind a tendency which would be expressed as generally as ‘a tendency to act upon sexual attraction to young girls aged between eight and 13 years’.⁵⁴

This is despite the fact that s 97 does not specify how particular the conduct by the accused has to be to give rise to a tendency; nor did the Law Reform Commission ('LRC'), when recommending the enactment of uniform evidence legislation, state that only strikingly similar or a similar pattern of behaviour was

⁵¹ (2014) 45 VR 680, 686 [25].

⁵² *Hughes* (n 2) 192 [11] (Kiefel CJ, Bell, Keane and Edelman JJ).

⁵³ See, eg, *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89; *R v Milton* [2004] NSWCCA 195; *R v Harker* [2004] NSWCCA 427; *R v Barton* [2004] NSWCCA 229; *Fletcher* (n 11); *R v GAC* (2007) 178 A Crim R 408; *KJR v The Queen* (2007) 173 A Crim R 226; *R v Smith* (2008) 190 A Crim R 8; *AE v The Queen* (n 46); *R v Ford* (2009) 273 ALR 286; *LJW v The Queen* [2010] NSWCCA 114; *PNJ v DPP (Vic)* (2010) 27 VR 146; *NAM v The Queen* [2010] VSCA 95; *DPP (Vic) v BCR* [2010] VSCA 229; *CGL v DPP (Vic)* (2010) 24 VR 486; *PG v R* [2010] VSCA 289; *KRI v The Queen* (2011) 207 A Crim R 552; *MR v The Queen* [2011] VSCA 39; *DR v The Queen* [2011] VSCA 440; *Harris v The Queen* (2015) 44 VR 652; *Page v The Queen* [2015] VSCA 357; *DPP (Vic) v Alexander* [2016] VSCA 92.

⁵⁴ *CGL* (n 53) 497 [39].

required for admissibility.⁵⁵ In fact, when s 97 was enacted it omitted ‘any requirement of similarity’, contrary to the LRC’s draft provision.⁵⁶

How specific or similar to the facts in issue should evidence of a defendant’s other sexual conduct be before it is accepted that it amounts to ‘acting in a particular way’ under s 97 so that the evidence has significant probative value? The answer to this question is essential for deciding whether the evidence of multiple complainants will be heard in a joint trial. It was the key issue for the High Court in *Hughes*.⁵⁷

The state of the law in New South Wales is best explained by what the NSWCCA said in *Hughes* when it reiterated that the New South Wales authorities had eschewed the common law requirements of finding an ‘underlying unity’, ‘pattern of conduct’ or ‘striking pattern of similarity’ in deciding whether or not tendency evidence had significant probative value.⁵⁸

In particular, the NSWCCA quoted the view of Campbell JA in *Ford* that s 97 did not require that the tendency evidence show a tendency to commit acts that are closely similar to the charged acts but merely to show ‘a tendency to act in a particular way’ which could mean ‘a tendency to engage in a particular type of behaviour’.⁵⁹ Indeed, the tendency evidence does not have to be ‘compellingly rare or exceptional’ before it can have significant probative value,⁶⁰ and although it may also involve assessing the ‘similarities in the conduct relevant to the offence’,⁶¹ that is not a strict requirement. Thus, through an inferential process of reasoning (the relevance inquiry), ‘[t]here is a wide range of evidence relevant to the determination of the guilt of a person of a particular crime’.⁶² Such an approach is consistent with what the literature reveals about the behaviour of child sex offenders, including their wide variety of sexual acts, and the frequency of their crossover behaviours, as discussed below.

In *Hughes*, the appellant had argued that the tendency evidence arising from some counts had no relevance in relation to other counts due to a lack of similarities in the sexual behaviour and/or in the circumstances in which the sexual behaviour occurred. Thus, Hughes argued that ‘both the circumstances surrounding the sexual acts, and the acts themselves, were different in nature and

⁵⁵ LRC, *Evidence Law Reform: Stage 2* (Discussion Paper No 23, August 1985) 15.

⁵⁶ *Hughes* (n 2) 195 [23] (Kiefel CJ, Bell, Keane and Edelman JJ).

⁵⁷ *Ibid* 190 [1]. See Part VI.

⁵⁸ *Hughes v The Queen* (2015) 93 NSWLR 474, 513 [166], 514 [174] (‘*Hughes (NSWCCA)*’).

⁵⁹ *Ibid* 513 [170]–[171], quoting *Ford* (n 53) 297 [38], 298 [41].

⁶⁰ *Ford* (n 53) 316 [126].

⁶¹ *Hughes (NSWCCA)* (n 58) 516 [183].

⁶² *Ibid* 516 [185].

not capable of being the subject of any alleged tendency'.⁶³ The NSWCCA disagreed and decided that the trial judge had correctly assessed the tendency evidence in the case as having significant probative value even though it amounted to dissimilar sexual acts committed in dissimilar circumstances.⁶⁴

Nonetheless, a degree of 'commonality' was identified: Hughes's tendency to have a sexual interest in, and to engage in sexual conduct with, girls under the age of 16 years was exhibited in three different contexts: 'social and familial relationships; his daughter's relationships with her young friends; and the work environment'.⁶⁵ Commonality arose because they 'represented occasions on which young females were present and the applicant used those occasions ... [to engage] in sexual activities with them'.⁶⁶ While the sexual conduct was also dissimilar, 'the conduct alleged was sexual in nature, directed towards young females ... [and] occurred opportunistically'.⁶⁷

Thus, the law in New South Wales means that dissimilar sexual conduct and dissimilarity in the ages of the complainants/witnesses is not a bar to cross-admissibility,⁶⁸ although this was not always the position in the early case law.⁶⁹

Even before the NSWCCA's decision in *Hughes*, the differences in approach between the NSWCCA and the VSCA had become entrenched. For example, in *Doyle*, the defendant had been charged with 38 counts of sexual assault against five male adolescents who had either worked for, or were befriended by, the defendant when he was the owner of a cinema.⁷⁰ The alleged sexual conduct involved a wide range of behaviours, including sexual intercourse, mutual masturbation, fondling, taking photographs and showing the boys pornographic films.

Despite these differences, the trial judge ruled that the evidence of each complainant was cross-admissible in a joint trial after the Crown had argued that the defendant had a tendency to have a sexual interest in young male employees, to use his position of authority to obtain access to male employees for

⁶³ Ibid 509 [152].

⁶⁴ Ibid 518 [194]–[196].

⁶⁵ Ibid 518 [197].

⁶⁶ Ibid 518 [198].

⁶⁷ Ibid 518–19 [199].

⁶⁸ See *BJS v The Queen* (2013) 231 A Crim R 537; *RH v The Queen* (2014) 241 A Crim R 1.

⁶⁹ For a summary, see Annie Cossins, 'The Behaviour of Serial Child Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials' (2011) 35 *Melbourne University Law Review* 821.

⁷⁰ *Doyle v The Queen* [2014] NSWCCA 4.

a sexual purpose, and to engage in sexual activities with them. On appeal, counsel for the appellant did not challenge the trial judge's decision that the Crown could rely on the evidence of each complainant as tendency evidence.⁷¹

In *Velkoski*, the VSCA considered it odd that no such challenge had taken place in *Doyle*, stating:

We have little doubt that had this trial been conducted in [Victoria], and had the trial judge ruled that the evidence was cross-admissible, this would have provoked an interlocutory appeal. As the law stands in this State, taking into account the dissimilarity between the acts forming the basis of each offence, and the period of time between those occasions of offending, there would have been reasonable prospects of success on that appeal.⁷²

In *Saoud*, the NSWCCA had to decide whether the 'undoubted differences'⁷³ between it and the VSCA were able to be reconciled:

A statement of another intermediate court of appeal in such uncompromising terms in relation to uniform legislation ... raises an issue of some sensitivity for this court. [T]o be sure that a real difference of approach has been identified, rather than a difference in semantics, it will be necessary to decide whether comparable cases would be decided differently in each state.⁷⁴

Basten JA then went on to identify 'a number of basic propositions' about tendency/coinckidence evidence under the *UEL*,⁷⁵ including the fact that 'the language of "striking similarities" suggesting a particular strength of probability reasoning is no longer apt, because it is inconsistent with the test of "significant probative value"'.⁷⁶

This article argues that there is a real, rather than a semantic, difference between the two appellate courts. Because this issue was not covered in a lot of detail by the High Court in *Hughes*, this article documents the latest trends that have emerged from the Victorian case law, including frequent reliance on the striking similarities test, and similar formulations, in order to increase the threshold for the admissibility of tendency/coinckidence evidence.

⁷¹ The main ground of appeal was whether the trial judge had misdirected the jury about the proper uses of the tendency evidence: *ibid* [85]–[86].

⁷² *Velkoski* (n 51) 715 [152].

⁷³ *Saoud v The Queen* (2014) 87 NSWLR 481, 489 [35].

⁷⁴ *Ibid* 489 [36].

⁷⁵ *Ibid* 490 [37]; see also at 490–1 [38]–[46].

⁷⁶ *Ibid* 490 [39], quoting *Fletcher* (n 11) 322 [60].

This trend was a turnaround from the position prior to the enactment of the *UEL* in 2009. Previously, the Victorian Parliament had sought to reduce the occurrence of separate trials by enacting s 372(3AA) of the *Crimes Act 1958* (Vic), which created a presumption that if two or more counts of sexual offences were joined in the one presentment, those counts were to be tried together. Under s 372(3AB), this presumption was not to be rebutted simply because the evidence supporting one or more of the counts was inadmissible in relation to another count. These provisions were re-enacted under s 194 of the new *Criminal Procedure Act 2009* (Vic) but appear to have had little impact on the occurrence of separate trials for sex offences in Victoria.

Even though the VSCA considers that it has eschewed striking similarities ‘as a precondition to admissibility, or cross-admissibility’ and relies on concepts such as ‘underlying unity’ or ‘pattern of conduct’, in practice it is clear that ‘striking’, ‘remarkable’ or ‘distinctive’ behaviour is looked for to determine whether or not a pattern or underlying unity can be discerned. As Nettle JA observed in *PG v The Queen*, ‘[s]ometimes, it will be a matter of striking similarity as between one act and another which bespeaks the underlying unity ... Sometimes, there will be something peculiar about the acts.’⁷⁷

The Victorian case law reveals the existence of several different formulations that, arguably, amount to differences without a distinction since the subjective reasoning processes remain the same, irrespective of the formulation used. This inherent subjectivity is illustrated by the wide range of different formulations, set out below. Although the need for ‘peculiarity’ or other such distinctive features might be essential in relation to the admissibility of coincidence evidence when identity is a fact in issue, in order to link the defendant with the alleged acts in question,⁷⁸ the following formulations have mostly arisen in relation to tendency evidence, although the VSCA has observed that ‘the relevant principles are, in many respects, the same’ for coincidence evidence.⁷⁹

- distinctiveness in the features,⁸⁰
- specific distinctive features,⁸¹

⁷⁷ [2010] VSCA 289, [71].

⁷⁸ See, eg, *CW v The Queen* [2010] VSCA 288.

⁷⁹ *Velkoski* (n 51) 720 [174]. See also *BCR* (n 53) [24], where the VSCA observed that ‘the factors which [are] to be considered in determining whether ... tendency evidence [has] significant probative value [are] also relevant in determining whether the evidence [has] significant probative value’ as coincidence evidence.

⁸⁰ *BCR* (n 53) [21]–[27], discussing the complainants’ evidence as either tendency or coincidence evidence. See also *PNJ* (n 53); *Semaan v The Queen* (2013) 39 VR 503.

⁸¹ *Harris* (n 53) 657 [20], discussing coincidence evidence.

- striking similarities or something peculiar about the acts;⁸²
- a sufficiency of commonality;⁸³
- features of commonality;⁸⁴
- the extent to which the conduct can be said to be ‘remarkable’;⁸⁵
- sufficient degree of similarity;⁸⁶
- ‘a relationship which uniquely links the accused person with two or more victims of similar crimes’;⁸⁷
- degree of peculiarity in the acts or in the circumstances;⁸⁸
- such similarities as to demonstrate an underlying unity;⁸⁹
- similarity of the circumstances in which the offending occurred or of the offences themselves;⁹⁰ and
- degree of particularity.⁹¹

Thus, only remarkable, distinctive or peculiar features ‘are significant enough logically to imply that because the offender committed previous acts or committed them in particular circumstances, he or she is likely to have committed the act or acts in issue’.⁹²

Although the VSCA has said that ‘[a]ny perceived difference [between the outcomes in the case law] lies in the application of the principles to the facts’,⁹³ the logic employed in the search for ‘unusual and distinctive features’ is entirely in the eye of the beholder, as the Court recognised in *Velkoski*.⁹⁴ For example,

⁸² *PG* (n 53) [71] (Nettle JA), discussing coincidence and tendency evidence.

⁸³ *KRI* (n 53) 564 [57], discussing tendency evidence.

⁸⁴ *Reeves v The Queen* (2013) 41 VR 275, 288 [49], 290 [56], discussing tendency evidence.

⁸⁵ *Ibid* 289–90 [53]–[54], discussing tendency evidence.

⁸⁶ *KRI* (n 53) 559–60 [35], 564 [61], discussing coincidence evidence; *BSJ v The Queen* (2012) 35 VR 475, 480–1 [30]–[33], discussing coincidence evidence.

⁸⁷ *CW* (n 78) [22], discussing coincidence evidence.

⁸⁸ *RHB v The Queen* [2011] VSCA 295, [17], discussing tendency evidence; *Reeves* (n 84) 289 [53], discussing tendency evidence.

⁸⁹ *RJP v The Queen* (2011) 215 A Crim R 315, discussing coincidence evidence; *RR v The Queen* [2011] VSCA 442, [38], discussing tendency evidence; *Velkoski* (n 51) 698 [82], discussing tendency evidence.

⁹⁰ *DR* (n 53) [58], discussing coincidence and tendency evidence.

⁹¹ *CEG v The Queen* [2012] VSCA 55, [12], discussing tendency evidence.

⁹² *Ibid* [14].

⁹³ *Velkoski* (n 51) 719 [172].

⁹⁴ *Ibid* 705–6 [110].

in *Harris*, the VSCA explicitly searched for non-distinctive features despite acknowledging the degree of similarity and underlying unity in the offences and circumstances (prepubescent boys, abuse occurring in the same location, at night, involving anal penetration with each boy in the same position).⁹⁵

In *RHB*, it was considered remarkable for a man to commit ‘commonplace sexual acts’ against his female lineal descendants,⁹⁶ while in *PNJ* it was unremarkable for a youth officer to commit such acts against boys in a youth training centre.⁹⁷ In *Murdoch*, the similar age of the complainants, the fact that they were the appellant’s daughters, the highly similar sexual conduct, and the fact that offending occurred in the appellant’s bedroom and took place when the mother was away were considered to be non-distinctive.⁹⁸ But in *DR*, another case of intrafamilial abuse, common factors between the complainant and witnesses were considered to be distinctive because ‘[i]t does not seem to [the Court] that the sexual abuse of a child, step child or grandchild by their parent, step parent or grandparent is such a common occurrence’.⁹⁹

Because of the arbitrariness involved in these assessments, the VSCA has created a distinction between ‘commonplace’ sexual abuse and ‘remarkable’ sexual abuse, although there is no evidence in the literature that suggests that sex offender behaviour can be categorised by reference to those who commit remarkable acts and those who commit commonplace acts of abuse. Indeed, as discussed below, any form of child sex offending is considered to be a mental disorder. The VSCA has also made distinctions between the ‘remarkability’ of intergenerational intrafamilial sexual abuse and the ‘commonplace’ nature of ‘ordinary’ intrafamilial abuse, although there are no such distinctions in the literature. In fact, the requirement of distinctiveness or remarkability about the disputed evidence is akin to introducing a *Pfennig*-type threshold at the relevance stage that is incompatible with s 97 and leaves little scope for s 101(2), which was drafted to weigh probative value against prejudicial effect.

As a result of the distinctions made by the VSCA, applicants commonly argue, on appeal, that the alleged sexual acts are not remarkable, distinctive or unusual but are the kinds that are common to child sex offending such that they are not cross-admissible in a joint trial. A similar argument was made by the applicant in *Hughes*.¹⁰⁰

⁹⁵ *Harris* (n 53) 658 [23]–[25].

⁹⁶ *RHB* (n 88) [18].

⁹⁷ *PNJ* (n 53) 151 [22].

⁹⁸ *Murdoch v The Queen* (2013) 40 VR 451, 476 [102].

⁹⁹ *DR* (n 53) [88].

¹⁰⁰ *Hughes* (n 2) 194 [20] (Kiefel CJ, Bell, Keane and Edelman JJ).

The question, therefore, is whether the decision by the High Court in *Hughes* resolves the differences between the New South Wales and Victorian courts.

VI THE HUGHES CASE

In April 2014, Robert Lindsay Hughes was convicted of 10 counts of sexual assault against four female victims, all of whom were unrelated to Hughes (see Table 1). He was acquitted in relation to another count involving a fifth complainant. The counts included a range of sexual behaviours, from penetration to indecent assaults to indecent exposure, while the circumstances in which the assaults occurred also varied. The complainants were also of different ages, with two under 10 years while three were over the age of 12.

Table 1: Charges and Verdicts in the Hughes Case

Complainant	Age (years)	Relationship	Sexual conduct	Verdict
JP	14–15	Family friend; friend of Hughes's daughter	Counts 1–2: (digital) sexual intercourse	Guilty both counts
SH	6–8	Neighbour; friend of Hughes's daughter	Counts 3–6: indecent assault	Guilty all counts
AK	9	School friend of Hughes's daughter	Counts 7–9: aggravated indecent assault	Guilty all counts
EE	15	Employee of Hughes's wife	Count 10: incitement to commit indecent act	Not guilty
SM	12–13	Child actor in <i>Hey Dad..!</i>	Count 11: exposure	Guilty

The *Hughes* case attracted ‘substantial and extensive’ media attention because Hughes had been an actor in a popular TV series called *Hey Dad..!*¹⁰¹ during the 1980s and 1990s. Along with the fact that some complainants had given interviews to the media before he was charged, there was a view that Hughes

¹⁰¹ *Hughes* (NSWCCA) (n 58) 483 [15].

had undergone ‘trial by media’.¹⁰² However, Hughes’s application for a stay of proceedings was unsuccessful.

At trial, Hughes had unsuccessfully applied for separate trials in relation to the counts pertaining to each complainant. Based on *Ford*¹⁰³ and *PWD*,¹⁰⁴ Zahra DCJ held that Hughes’s alleged sexual behaviour did not need to be closely or strikingly similar to the charged conduct to be admissible.¹⁰⁵ The decision to hold a joint trial of all charges resulted in the cross-admissibility of the evidence of each complainant, as well as the admissibility of evidence from six tendency witnesses (BB, AA, VOD, LJ, CS, VR), all of whom gave evidence of Hughes’s sexual behaviour with them, including sexual touching and exposure. However, the evidence of the tendency witnesses was not admissible in relation to all counts. For example, the evidence of LJ, VR and CS (known as the ‘workplace tendency witnesses’) was only admissible in relation to count 11 since that count also allegedly arose out of sexual conduct in Hughes’s workplace.¹⁰⁶

A *The Appellant’s Arguments before the High Court*

Although the appellant conceded that his conduct constituted evidence of a sexual interest in young females, based on the decision in *Velkoski*, he argued that more was required in relation to the alleged tendency:

[I]t is necessary to have regard to how common this offending is or how particular this offending is or how unusual this offending is in order to determine whether or not the evidence constituting tendency evidence has enough probative force to constitute significant probative value.¹⁰⁷

The appellant also argued that evidence that shows that an accused has a tendency to act on his sexual attraction to young females by engaging in sexual conduct with them would not amount to significant probative value because ‘all it does is demonstrate that the accused is a person likely to commit the offence or offences of the type charged’, which is not enough to amount to ‘significant probative value’ under s 97 of the *UEL*.¹⁰⁸ The appellant drew distinctions

¹⁰² *Ibid* 484 [18].

¹⁰³ *Ford* (n 53).

¹⁰⁴ *R v PWD* (2010) 205 A Crim R 75.

¹⁰⁵ *Hughes* (NSWCCA) (n 58) 507 [136].

¹⁰⁶ *Ibid* 508 [140].

¹⁰⁷ Transcript of Proceedings, *Hughes v The Queen* [2017] HCATrans 16, 4 (PR Boulten SC).

¹⁰⁸ *Ibid* 6.

between the type of sexual conduct alleged by different complainants and argued that the sexual conduct with each complainant occurred in dissimilar contexts.¹⁰⁹

In light of these arguments, Bell J asked a very pertinent question:

[Why is] proof that on more than one other occasion [Hughes] has engaged in indecent sexual touching of a young female child ... not evidence which could rationally affect the assessment of the probability that he committed the act with which he is charged and do so to a significant degree?¹¹⁰

Thus, the issue on appeal in *Hughes* focused on interpretation of the words, 'significant probative value': that is, whether the evidence of Hughes's sexual interest in underage girls and his tendency to sexually molest underage girls opportunistically when there was a high risk of detection amounted to significant probative value.¹¹¹ However, much more was at stake in Hughes's appeal since

the grant of special leave was upon the basis of the desirability of resolving a tension or a possible tension in the approach taken in New South Wales by contrast with that in Victoria in *Velkoski* about the admission of this evidence ...¹¹²

To support his argument, the appellant engaged in speculation, uninformed by any research evidence about child sex offender behaviour, by asserting that 'the age of the complainant is a very important factor' and that 'the older a victim gets, the less likely it will be that that conduct will shed significant light on whether he is likely to have committed an offence on a much younger child'.¹¹³ However, Kiefel CJ and Bell J pointed out a number of inconsistencies in these arguments:

- the indecent assaults that happened on SH and JP in the bedroom were sufficiently similar for the evidence of both complainants to be cross-admissible despite an almost 10-year age difference between them;
- indecent assaults in a bedroom were not sufficiently similar to indecent assault in a swimming pool, despite the fact that the complainants were of the same age; and

¹⁰⁹ Ibid 16.

¹¹⁰ Ibid 17.

¹¹¹ *Hughes* (n 2) 190 [2] (Kiefel CJ, Bell, Keane and Edelman JJ).

¹¹² Transcript of Proceedings (n 107) 17 (Bell J).

¹¹³ Ibid 17 (PR Boulten SC).

- for several of the counts, exposure was a common feature yet was not considered to be sufficiently similar.

B *The Majority's Decision*

The Victorian DPP's submission 'that *Velkoski* evinces an unduly restrictive approach to the admission of tendency evidence' was accepted by the majority, who dismissed the appeal.¹¹⁴ Thus, the NSWCCA's decision that the tendency evidence had been correctly admitted in a joint trial because it had significant probative value in relation to proof of each count was held to be correct.

In relation to the common law terms used by the VSCA to determine when evidence will have significant probative value, the majority noted that these statements 'do not stand with the scheme of Pt 3.6' of the *UEL*.¹¹⁵ In other words, the provision does not refer to similarities or to common law concepts such as 'underlying unity', 'pattern of conduct' or 'modus operandi'. This omission provided 'a clear indication that s 97(1)(b) is not to be applied as if it had been expressed in those terms' so that tendency evidence cannot be limited to conduct exhibiting those features.¹¹⁶ In fact, the use of common law concepts overlooks the fact that in criminal proceedings, 'the risk that the admission of tendency evidence may work unfairness to the accused is addressed by s 101(2)'¹¹⁷

A common law approach also ignores the fact that

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.¹¹⁸

Furthermore, the majority considered that the approach in *Velkoski* limits s 97 to a tendency to perform a particular *act*, which does not reflect the terms of the provision. Rather, it is possible for evidence to have significant probative

¹¹⁴ *Hughes* (n 2) 192 [12].

¹¹⁵ *Ibid* 197 [32].

¹¹⁶ *Ibid* 198 [34]; cf at 213–14 [103]–[104] (Gageler J).

¹¹⁷ *Ibid* 197 [32].

¹¹⁸ *Ibid*.

value at a general level of particularity, ‘notwithstanding the absence of similarity in the acts which evidence it’.¹¹⁹ This statement suggests that evidence of a general tendency to sexually abuse children would satisfy the significant probative value test, as discussed below.

By examining the particular sexual acts in *Velkoski*, the majority concluded that the VSCA in that case had failed to recognise that different sexual acts (touching children on their vaginas and bottoms; soliciting children to touch the defendant’s penis) could have significant probative value in the circumstances where these acts were committed in a day-care centre.¹²⁰ Although it will often be the case that the tendency evidence adduced in a criminal trial has ‘operative features of similarity with the conduct in issue’, the majority in *Hughes* accepted that its probative value will vary depending on whether it is adduced to prove the identity of the offender (which will require ‘close similarity’ between the tendency evidence and the offence(s)), or merely to prove that the defendant committed the alleged offence(s).¹²¹

C General versus Particular Conduct

During the High Court hearing, Edelman J observed that

at a very high level of generality the question might really just be asking whether the tendency evidence could rationally affect the assessment of the existence of a fact in issue. In other words, it is just asking the relevance test. To get to the next hurdle, one needs to descend to a greater level of particularity.¹²²

The question raised but not answered by the *Hughes* case is whether or not judges are qualified to assess this ‘greater level of particularity’ or whether child sex offending, in and of itself, is ‘a tendency … to act in a particular way’.¹²³ Arguably, the answers lie in the unusual nature of CSA as well as the phenomenon, identified in the research literature, of crossover behaviours of a subset of child sex offenders, as discussed below.

The words, ‘to act in a *particular* way or to have a *particular* state of mind’ in s 97 are consonant with the particularity of child sex offending as a mental disorder, not just as a type of criminal behaviour. Child sex offending is defined

¹¹⁹ *Ibid* 198 [37].

¹²⁰ *Ibid* 198–9 [38].

¹²¹ *Ibid* 199 [39].

¹²² Transcript of Proceedings (n 107) 47.

¹²³ *UEL* (n 1) s 97.

as a mental disorder under the *Diagnostic Statistical Manual of Mental Disorders: DSM-5*,¹²⁴ the bible for psychologists and psychiatrists,¹²⁵ which confirms that it is unusual and deviant sexual conduct. Thus, a person's sexual interest in, or sexual activity with, children is not a mere disposition but, rather, a demonstrable particularity; that is, a particular mental disorder under the DSM-5. As such, it seems irrational to consider similarities and dissimilarities in relation to a form of sexual behaviour that amounts to a mental disorder, or to regard some forms of child sex offending as 'commonplace' and others as 'distinctive'.

Other courts have recognised this. For example, in *Robin v The Queen*, the New Zealand Court of Appeal said that '[t]here is a line of authority which establishes that sexual activity with children is in itself unusual, even where it does not involve unusual acts for offending of that kind'.¹²⁶ Similarly, in *Hetherington v The Queen*, the Court noted that it is artificial '[t]o draw a distinction based on severity' when the sexual conduct amounts to the same 'category of offending'.¹²⁷

By contrast, in *Hughes*, Nettle J concluded:

Inasmuch as [the NSWCCA's] reasoning suggests that the commission of sexual offences against female children ... is so unusual that evidence of an accused having committed a sexual offence against one female child is of itself significantly probative of the accused having committed a different kind of sexual offence against another female child, it should be rejected. The commission of sexual offences by adults against children of either sex is depraved and deplorable, but, regrettably, it is anything but unusual.¹²⁸

It may be that this is a case of a judge having been influenced by the number of CSA cases that he has dealt with in his judicial career, but case law does not constitute an empirical measure of the 'normalcy' of this particular type of sexual conduct.

If child sex offending was recognised as unusual sexual behaviour, there would be little scope for judges to be able to use the non-scientific language of 'commonplace sexual acts', as if child sex offending is an ordinary, everyday type of sexuality, and compare it with 'remarkable' or 'peculiar' acts as argued

¹²⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (American Psychiatric Publishing, 5th ed, 2013) 685.

¹²⁵ See Michael B First, 'DSM-5 and Paraphilic Disorders' (2014) 42 *Journal of the American Academy of Psychiatry and the Law* 191.

¹²⁶ [2013] NZCA 105, [25].

¹²⁷ [2012] NZCA 88, [23].

¹²⁸ *Hughes* (n 2) 228 [157].

in *Velkoski*. Unless the unusual nature of child sex offending as a sexual practice is recognised, admissibility under ss 97 or 98 will be based on splitting hairs around what is and is not similar, distinctive or unusual, or what type of sexual acts amount to an ‘underlying unity’.

The majority in *Hughes* considered that the type of child sex offending committed by Hughes was unusual: ‘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.’¹²⁹

Rather than a clear pattern of conduct or modus operandi, as required at common law, the majority considered it was Hughes’ ‘unusual interactions’ which meant he ‘court[ed] a substantial risk of discovery by friends, family members, workmates or even casual passers-by’, thus giving rise to a ‘disinhibited disregard of the risk of discovery’ that was ‘even more unusual as a matter of ordinary human experience’.¹³⁰

The majority were keen to emphasise two issues: first, ‘[t]he fact that the appellant expressed his sexual interest in underage girls in a variety of ways did not deprive proof of the tendency of its significant probative value’.¹³¹ Second, an assessment of Hughes’s conduct did not amount to accepting ‘that the evidence does no more than prove a disposition to commit crimes of the kind in question’.¹³²

So when will sexual conduct with a child amount to ‘significant probative value’? The majority in *Hughes* stated that the test under s 97(1)(b) is to be interpreted following the NSWCCA in *Ford*: ‘the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged’.¹³³ This statement provides broad scope for admitting or excluding disputed evidence but does not clarify what amounts to ‘a significant extent’ in the context of a CSA trial, unless, as suggested above, the majority accepts that any type of sexual activity with a child will make the facts in issue more likely to a significant extent.

¹²⁹ Ibid 203 [57]. Nettle J disagreed, stating that ‘something more is required, such as a logically significant degree of similarity in the relationship of the accused to each complainant; a logically significant connection between the details of each offence or the circumstances in which each offence was committed; a logically significant ... modus operandi or system of offending; or, otherwise, some logically significant underlying unity or commonality’: at 229 [158].

¹³⁰ Ibid 203 [57].

¹³¹ Ibid 204 [63].

¹³² Ibid 203 [57].

¹³³ Ibid 199 [40], quoting *Ford* (n 53) 485 [125].

It is, however, clear that judges do not assess the disputed evidence in isolation, since '[i]t is sufficient if the disputed evidence *together with other evidence* makes significantly more likely any facts making up the elements of the offence charged'.¹³⁴ Because it is necessary to consider each count in a joint trial separately, this means that 'evidence of a tendency might be weak by itself but its probative value can be assessed together with other evidence' in relation to the elements of that particular count.¹³⁵

Nonetheless, it is also possible that the majority's interpretation of s 97 does not go far enough since their Honours' analysis leaves the way open for courts to continue employing a restrictive approach because of the subjective analysis (based on 'human experience') necessarily involved in assessing 'significant probative value':

[T]he open-textured nature of an enquiry into whether 'the court thinks' that the probative value of the evidence is 'significant' means that it is inevitable that reasonable minds might reach different conclusions ... [particularly] in marginal cases ... In any event, the open-textured, evaluative task remains one for the court to undertake by application of the same well-known principles of logic and human experience as are used in an assessment of whether evidence is relevant.¹³⁶

How helpful is the resort to 'human experience', rather than expert evidence from, for example, the DSM-5, about child sex offending? The probative value of evidence of other sexual behaviour with children is necessarily linked to the

¹³⁴ *Hughes* (n 2) 199 [40] (emphasis added).

¹³⁵ *Ibid* 204 [61].

¹³⁶ *Ibid* 200 [42]. Since *Hughes*, two VSCA decisions illustrate the role of judges' 'human experience' in deciding whether particular evidence possesses 'significant probative value': *Bauer v The Queen [No 2] [2017]* VSCA 176; *Henderson v The Queen* [2017] VSCA 237. Nonetheless, the Court in *Bauer* acknowledged that '[m]uch of the accepted approach to tendency evidence in [Victoria] — digested and explained in *Velkoski* — must now be significantly qualified in light of the treatment of the subject by the majority in *Hughes*' and that 'the admissibility of tendency evidence does not depend on the assessment of any operative features of similarity with the conduct in issue': *Bauer* (n 136) [55], [61]. Note that *Henderson*, unlike *Bauer*, was not a CSA case but one that involved alleged violence and sexual assault in an adult domestic relationship. However, the tendency evidence in dispute in both *Henderson* and *Bauer* arose from a single source: the complainant. Based on the High Court decision in *IMM v The Queen* (2016) 257 CLR 300, the tendency evidence given by a single complainant must now meet the high threshold for admissibility under the *UEL*: that is, the evidence must have a 'special feature' that would give it significant probative value: at 318 [61]–[62]. See also *Bauer* (n 136) [81], where the Court did not consider any scientific literature on the behaviour of child sex offenders in relation to the validity of the need for a 'special feature' to give the disputed evidence 'significant probative value'.

extent to which it increases the probability of the existence of the elements of the specific charge,¹³⁷ although this is still a subjective assessment based on whether a judge takes a general or a particular approach:

A tendency expressed at a high level of generality might mean that all the tendency evidence provides significant support for that tendency. But it will also mean that the tendency cannot establish anything more than relevance. In contrast, a tendency expressed at a level of particularity will be more likely to be significant.¹³⁸

But how does a judge choose that level of particularity if that assessment is uninformed by expert evidence and the only tool left is the judge's human experience? The obvious counterargument is that the s 97 test would become redundant if similarities were not read into it. Even if one were to concede that the word 'significant' has to involve an analysis of the similarities or dissimilarities in the tendency evidence in question, that interpretation comes down to 'how much similarity', an inherently subjective process, usually undertaken in the absence of any reference to the scientific literature.

Because child sex offending has been defined as a mental disorder, judges would be hard-pressed to argue that evidence of any sexual contact with a child would not rationally affect the assessment of the probability of the defendant's commission of a sexual act with another child, unless the sexual acts had been committed, say, many years apart. Why would evidence of a mental disorder not also be sufficient to support proof of a tendency to a significant extent?

The literature on child sex offenders reveals that issues such as victim choice and sexual behaviours are not stable amongst a proportion of sex offenders (such as Hughes). While some child sex offenders do make very specific age, gender and relationship choices, many do not. There is a group of offenders — depending on the study, from a significant minority to more than 50% of offenders — who are not specific in their choice of victim and exhibit crossover behaviours: that is, those who sexually abuse both boys and girls, and/or children of different ages, and/or related and unrelated children.¹³⁹ This means that sex offenders fall into two broad groups:

¹³⁷ *Hughes* (n 2) 199 [41].

¹³⁸ *Ibid* 204 [64].

¹³⁹ See Gene G Abel et al, 'Multiple Paraphilic Diagnoses among Sex Offenders' (1988) 16 *Bulletin of the American Academy of Psychiatry and the Law* 153; Mark R Weinrott and Maureen Saylor, 'Self-Report of Crimes Committed by Sex Offenders' (1991) 6 *Journal of Interpersonal Violence* 286; Michele Elliott, Kevin Browne and Jennifer Kilcoyne, 'Child Sexual Abuse Prevention: What Offenders Tell Us' (1995) 19 *Child Abuse and Neglect* 579; Peggy Heil, Sean Ahlmeyer

- 1 those who target children of similar ages and/or genders and with whom they have a similar relationship (related or unrelated); and
- 2 those who exhibit crossover behaviours and target children of different ages, different genders and/or with whom they have a mixture of relationships (related and unrelated).

These crossover behaviours mean that the sexual behaviour itself is highly variable, depending on: (i) the child's gender (offenders engage in different sexual behaviours with boys compared to girls); (ii) the child's age; and (iii) the offender's access to the child, including location. Thus, confining the word 'significant' to sexual acts or ages or genders of children that are 'distinctive' or 'highly similar' ignores the reality of the variety of sexual acts to which any one victim could be subject.

Hughes's sexual behaviours provide a good example. He chose an age range of 6 to 16 years and children with whom he had a range of relationships. He engaged in a variety of sexual behaviours, and the locations in which the abuse occurred were different, all of which is consistent with the literature on crossover offenders. Taking the tendency evidence as a whole, it acquires significant probative value because it demonstrates the defendant's variety of sexual behaviours with differently aged children, one of the hallmarks of crossover offending behaviour.

This should be sufficient for the evidence to have a *significant* effect on the 'assessment of the probability of the existence of a fact in issue in the proceeding', which is what the test under s 97 is designed to do: that is, not prove guilt beyond reasonable doubt, but increase the probability of the defendant's guilt.¹⁴⁰

D *Problems with the Majority's Decision in Hughes*

The majority's reasoning appears to falter in relation to count 10. The appellant had argued

and Dominique Simons, 'Crossover Sexual Offenses' (2003) 15 *Sexual Abuse: A Journal of Research and Treatment* 221; Jill S Levenson, Jennifer Becker and John W Morin, 'The Relationship between Victim Age and Gender Crossover among Sex Offenders' (2008) 20 *Sexual Abuse: A Journal of Research and Treatment* 43; Daphne J Sim and Michael Proeve, 'Crossover and Stability of Victim Type in Child Molesters' (2010) 15 *Legal and Criminological Psychology* 401.

¹⁴⁰ *Ford* (n 53) 467 [44].

that there was a ‘world of difference’ between the evidence concerning EE (count 10), who was 15 years old and whom the appellant encouraged to commit indecent acts in a park and in a driveway, and the evidence concerning SH (counts 3 to 6), which involved intrusive acts ‘in a darkened bedroom, in her bed, when she was only six, seven or eight’.¹⁴¹

While the majority focused on Hughes’s tendency to sexually abuse underage girls in the vicinity of other people, this was not the case with EE. Nonetheless, the majority considered that a similarity with the other counts arose because ‘the appellant encouraged EE to stimulate his penis as they stood kissing in the driveway of her family home, in circumstances in which EE was fearful that they would be seen’.¹⁴²

While it is harder to agree that there was a high risk of detection with EE (one of the components of the tendency argument), EE’s evidence amounts to weak tendency evidence which was strengthened by considering all the evidence together. Thus, the appellant’s argument

ignore[d] the fact that in relation to, for example, count 4, involving SH, the evidence of EE needed to be considered together with the evidence involving (i) counts 1 to 3 and counts 5 to 11, (ii) uncharged acts relating to the complainants SH, JP, AK and SM, and (iii) uncharged acts relating to the tendency witnesses VOD, AA and BB.¹⁴³

The majority believed that the above evidence, which the appellant had conceded was admissible, reinforced EE’s evidence and helped to show the appellant’s tendency to opportunistically sexually assault underage girls despite a high risk of detection. This means that the probative value of EE’s evidence had to be considered separately for each count. In doing so, all the other evidence that had been held to have significant probative value in relation to each particular count was considered *together* with EE’s evidence.

However, Gageler J did not agree with this conclusion, because EE’s evidence was not of the same nature as that of the other complainants. Rather than being opportunistic, the circumstances involved planning by Hughes, and his behaviour did not amount to ‘a tendency to initiate fleeting physical sexual contact in circumstances in which he was at risk of detection’.¹⁴⁴ Therefore, EE’s evidence was not ‘capable of proving a tendency of sufficient specificity to have

¹⁴¹ *Hughes* (n 2) 204 [62].

¹⁴² *Ibid* 203 [56].

¹⁴³ *Ibid* 204 [62].

¹⁴⁴ *Ibid* 216 [113].

the effect of increasing the probability of the appellant having engaged in the conduct alleged against JP, SH, AK or SM to an extent that can be described as significant'.¹⁴⁵

This analysis presupposes that Hughes did not engage in any planning in relation to the other complainants. However, the facts speak otherwise. While Hughes's behaviour appeared to be opportunistic, he had a propensity for seeking out situations where he could gain access to underage girls. For example, SH's evidence was that Hughes had sexually assaulted her at least five times in the same circumstances — as the child of a neighbour he only gained access to her when she slept over in his home with his daughter. With AK he devised reasons for her to come in contact with his penis, and devised occasions when he could either expose himself to, or sexually touch, SM.

Gageler J upheld the appeal on the grounds that EE's evidence should not have been cross-admissible in a joint trial, which meant that all the convictions should have been quashed and a new trial ordered.¹⁴⁶ Gageler J was worried about the problem of 'cognitive bias' by a jury in a joint trial 'because it inheres in the process of reasoning involved in the tribunal of fact making entirely proper use of evidence'.¹⁴⁷ Nonetheless, his Honour agreed with the majority that

[a] tendency to have such a sexual interest and to engage in sexual activities with female children less than 16 years of age ... is so abnormal as to allow it to be said that a man shown to have such a tendency is a man who is more likely than other men to have engaged in a particular sexual activity with a particular female child on a particular occasion.¹⁴⁸

However, Gageler J raised the key problem that is left unresolved by the majority judgment: a man who has a tendency to commit CSA is more likely than someone else to have committed CSA on other occasions — but how much more likely?

[H]ow much more likely is not easy to tell, in part because common experience provides no sure guide, and the abhorrence any normal person naturally feels for

¹⁴⁵ Ibid 216 [114].

¹⁴⁶ Ibid 216 [115]–[116]. Gordon J agreed with the reasons and orders of Gageler J and Nettle J: at 251–2 [225]–[226].

¹⁴⁷ Ibid 206 [72], 207 [73].

¹⁴⁸ Ibid 215 [109].

such a tendency highlights the risk that any subjective estimation of the likelihood will be greater than is objectively warranted.¹⁴⁹

But why do judges think they should be left with making a subjective estimation based on common experience? Gageler J recognised that the wording of s 97 ('the court thinks') allows for 'judicial understanding of the probative value ... of particular tendencies to be informed by social science data' which would allow judges to make informed decisions based on the latest data and 'best practice'.¹⁵⁰ However, his Honour observed that '[n]o party or intervener in [Hughes] sought to direct attention to data or scholarly work bearing on actual probabilities'.¹⁵¹

In the absence of such 'scholarly work', Gageler J said it was best if he took a 'conservative approach', deciding that he was

unable to be satisfied that either a tendency to be sexually interested in female children, or a tendency to engage in sexual activities with female children opportunistically, bears on the probability that a man who had such a tendency engaged in a particular sexual activity with a particular female child on a particular occasion to an extent that can properly be evaluated as significant.¹⁵²

However, his Honour accepted that the evidence of JP, SH and AK, who were abused in a familial setting, was 'sufficient to establish that the appellant had engaged in a pattern of conduct' involving sexual touching and exposure when there was a risk of detection.¹⁵³ Although SM had not been abused in the same type of setting, there were sufficient similarities in Hughes's sexual conduct for SM's evidence to be cross-admissible 'on essentially the same basis'.¹⁵⁴ This argument reveals the arbitrariness of what amounts to general or particular sex offending. There is little but subjective 'human experience' to distinguish the reasoning of Gageler J and the majority judges. And both approaches are but a step away from saying, as this article has argued, that evidence of any kind of sexual activity with a child will be significantly probative under s 97.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid 215 [110].

¹⁵¹ Ibid.

¹⁵² Ibid 215 [111].

¹⁵³ Ibid 215–16 [112].

¹⁵⁴ Ibid.

VII DO JURORS MISUSE TENDENCY EVIDENCE ABOUT AN ACCUSED?

Like Gageler J, Nettle J recognised that his approach was the orthodox approach to the interpretation and application of s 97: that is, the need to show ‘a logically significant or recognisable modus operandi … or, otherwise, some logically significant underlying unity or commonality’.¹⁵⁵

Nettle J also justified this approach because of ‘the dangers that attend the receipt of tendency evidence’.¹⁵⁶ In fact, his Honour was so concerned by the decision in *Hughes* that he warned that ‘no other Australian decision has gone so far in lowering the bar of admissibility’, and that there was no justification for doing so.¹⁵⁷ His Honour interpreted the decision to mean that

whenever an accused is alleged to have committed a succession of different sexual offences against a succession of children, in different circumstances … evidence of all of the alleged offences is admissible in proof of each of them …¹⁵⁸

Nettle J particularly objected to the fact that different sexual acts with different children, on their own, would not be sufficient to amount to significant probative value, but that together they would ‘establish a tendency to commit sexual offences against children’ to a significant extent.¹⁵⁹ In other words, Nettle J interpreted the majority’s decision as representing the proposition that ‘a tendency to commit sexual offences [generally] makes it significantly more likely that the accused has committed the sexual offence with which he or she is charged’, and asked, ‘what then is to be the limit to the admission of tendency evidence?’¹⁶⁰

Arguably, the issues raised by Nettle J ought to be considered when the court is required to balance the probative value of the tendency evidence against its prejudicial effect under s 101(2): that is, against ‘the dangers that attend the

¹⁵⁵ *Ibid* 229 [158].

¹⁵⁶ *Ibid* 235 [174].

¹⁵⁷ *Ibid* 244 [194].

¹⁵⁸ *Ibid* 245–6 [199]. Gordon J also believed that, as a result of *Hughes*, ‘evidence of any sexual misconduct, whether against an adult or a child, may be admitted as tendency evidence at the trial of offences against children. That is not how s 97(1)(b) operates or was intended to operate’: at 250–1 [219]. However, this outcome is unlikely given the previous decision in *Sokolowskyj v The Queen* (2014) 239 A Crim R 528, in which general sexual misconduct not involving a child was not admitted as tendency evidence.

¹⁵⁹ *Hughes* (n 2) 246 [199].

¹⁶⁰ *Ibid* 246 [199], [200].

receipt of tendency evidence'.¹⁶¹ Even if the majority in *Hughes* has lowered the bar of admissibility under s 97, the presumed dangers associated with juries' misuse of tendency evidence could be prevented on the grounds that the probative value of the evidence does not substantially outweigh its prejudicial effect on the defendant.¹⁶² The question is, are Nettle J's fears justified? Is the prejudicial effect of juries' reasoning processes real or imagined?

For example, the mere reiteration of the existence of a danger does not amount to proof of its existence no matter how often it is repeated. While citing case law about the dangers, Nettle J did not cite empirical evidence which has shown that these dangers are more theoretical than real. As stated above, research shows that jurors do not engage in the type of impermissible reasoning that judges have long supposed.¹⁶³

Although the rules governing the admissibility of tendency and coincidence evidence have been developed to protect defendants' rights to a fair trial, they are based on untested and unproven assumptions about jury decision-making processes. A recent research project empirically tested how juries reason in simulated joint trials where the complainants' evidence was admissible as tendency evidence, and in separate trials with and without tendency evidence, in order to determine the degree of risk of unfair prejudice from the admission of such evidence.¹⁶⁴ Specifically, the project investigated the type of reasoning processes that juries engage in when faced with a joint trial of sex offences which does not reveal strikingly similar, remarkable or distinctive sexual behaviours by the defendant.

A Methodology

A total of 1,029 jury-eligible mock jurors, some of whom had been called up for jury duty, were recruited and assigned to one of 90 juries which deliberated to a verdict after being shown different versions of a video-recorded trial involving the same basic evidence.¹⁶⁵ By comparing: (i) verdicts and jury reasoning in a basic separate trial; (ii) a separate trial with relationship evidence; (iii)

¹⁶¹ *Ibid* 235 [174].

¹⁶² *UEL* (n 1) s 101(2).

¹⁶³ See Laudan and Allen (n 23) 496.

¹⁶⁴ Jane Goodman-Delahunty, Annie Cossins and Natalie Martschuk, *Jury Reasoning in Joint and Separate Trials of Institutional Child Sexual Abuse: An Empirical Study* (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, May 2016).

¹⁶⁵ *Ibid* 24.

a separate trial with tendency evidence; and (iv) a joint trial, the project investigated whether jury verdicts and individual juror ratings of defendant culpability were affected by any of the above types of impermissible reasoning. To undertake this comparison, the evidence and charges in the separate trials were constant: that is, one complainant, called Timothy, became the focal complainant and the charges involving him became the focal offences (both penetrative and non-penetrative offences). The joint trial also contained evidence from Timothy along with two other complainants. This made it possible to compare the verdicts for the focal offences in the four different trial types.¹⁶⁶

All jurors completed pre-trial and post-trial questionnaires which included specific questions about the trial.¹⁶⁷ Overall, the impact of evidence strength, the number of charges and the presence of particular judicial directions on jury decision-making in joint versus separate trials was tested.

Specifically, the study was designed to determine if jurors engaged in three possible types of impermissible reasoning during deliberation:

- 1 Accumulation (reasoning) prejudice, which arises when a defendant faces multiple charges and/or multiple witnesses give evidence against him since it is believed that a jury will give more weight to the evidence because the accumulation of the charges and/or witnesses gives the appearance of a stronger case than actually exists.
- 2 Character (moral) prejudice, which is based on the belief that the defendant is a bad person and deserves to be punished, usually because of the type of charges against him.
- 3 Inter-case conflation of the evidence, which arises when juries mistakenly substitute facts about one complainant for facts about another complainant in a joint trial.¹⁶⁸

B *Findings*

With the addition of more inculpatory evidence in the form of tendency evidence, conviction rates for the focal offences increased significantly in the tendency evidence and joint trials, compared to the basic separate trial.¹⁶⁹ This was expected since juries in the tendency evidence and joint trials were given a tendency evidence direction which instructed them about how to use the evidence

¹⁶⁶ Ibid 76.

¹⁶⁷ Ibid 79–81.

¹⁶⁸ Ibid 45–8.

¹⁶⁹ For reasons of space, this part provides only a brief summary of the project's findings.

from other witnesses/complainants. The question was whether this increase in conviction rates was due to permissible or impermissible reasoning.

There was, however, no significant increase in conviction rates: (i) for the two counts relating to the focal complainant in joint trials compared to separate trials; or (ii) for the single count relating to the complainant with the weakest evidence in the joint trials. In addition,

mock juror ratings of victim blame did not vary in response to increases in the number of Crown witnesses, as might be expected if jurors were improperly accumulating the evidence. Rather, victim blame was predicted by individual mock jurors' misconceptions about child sexual abuse.¹⁷⁰

Both quantitative and qualitative analyses revealed that jurors and juries were able to distinguish between 'the same types of offence alleged by different complainants, based on the strength of evidence'.¹⁷¹ Juries also discriminated between the penetrative and non-penetrative offences, which confirmed that they assessed the different counts separately, making distinctions between counts pertaining to the same complainant, as well as distinguishing between counts pertaining to *different* complainants. These findings, therefore, did not support the widespread judicial belief in accumulation (reasoning) prejudice or character (moral) prejudice.

The project examined the content of jury deliberations as well as individual jurors' open-ended responses about the reasons for their verdicts. Contrary to expectations, juries were not prone to impermissible reasoning and made very few factual errors, with only 7.7% of juries making more than two factual errors.¹⁷² The vast majority of errors were corrected during deliberations while none of the 90 jury verdicts was based on mistaken substitution of the facts: that is, inter-case evidentiary conflation.¹⁷³ When a quantitative analysis of the content of jury deliberations was conducted, it revealed that impermissible reasoning was rare, and, when it did occur, it was more likely to occur in the separate trials without tendency evidence than the trials *with* tendency evidence.

Contrary to judicial expectations, 'no evidence of emotional or illogical reasoning by juries' was found in any of the trials with tendency evidence.¹⁷⁴ In fact, jurors' reasons for their verdicts revealed that 90% of convictions 'were

¹⁷⁰ *Jury Reasoning in Joint and Separate Trials* (n 164) 27.

¹⁷¹ Ibid.

¹⁷² Ibid 26.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

based on the consistency of evidence from multiple witnesses, the credibility of the witnesses and the pattern of grooming behaviour engaged in by the defendant.¹⁷⁵ Crucially, the study found that ‘the culpability of the defendant was predicted by mock jurors’ assessments of the credibility of the complainants, not the overall number of counts and witnesses’.¹⁷⁶

The project concluded that analyses of jurors’ reasons for convictions ‘provided negligible support for the notion that joint trials produce verdicts based on inter-case conflation of the evidence, [impermissible] character prejudice or accumulation prejudice’.¹⁷⁷ Thus, the study found no support for the long-standing, judicial assumption that jurors in joint trials will engage in impermissible reasoning as a result of the cross-admissibility of dissimilar evidence from two or more complainants.

VIII CONCLUSION

This article investigated whether the split between the NSWCCA and the VSCA in relation to the interpretation of s 97 of the *UEL* was resolved by the recent High Court decision in *Hughes*. While this article documented the fact that sexual conduct with a child amounts to a mental disorder under the DSM-5, and thus constitutes unusual sexual behaviour, the majority in *Hughes* also believed that child sex offending by a mature adult was unusual, not based on the psychiatric literature, but on ‘ordinary human experience’. As such, the majority considered that *Hughes*’s ‘unusual interactions’ with female children (which involved a high risk of detection) meant that the disputed tendency evidence satisfied the significant probative value test under s 97 of the *UEL*.

An alternative way of framing the argument is to acknowledge child sex offending as a mental disorder and, with reference to the literature on child sex offenders, including studies on their crossover behaviours, to recognise that people who sexually abuse children typically engage in a wide variety of sexual behaviours in a variety of circumstances. So which approach is preferable — judges’ ordinary human experience or scientific research? The problem with the former approach is that the majority’s judgment — while apparently lowering the bar of admissibility too far under s 97 (according to Nettle J) — actually leaves the way open for judges in future cases to raise the bar of admissibility based on their ordinary human experience since judges’ ‘human experience’ is highly variable. The problem with the latter approach is that it is dependent on

¹⁷⁵ Ibid 26–7.

¹⁷⁶ Ibid 27.

¹⁷⁷ Ibid.

prosecutors presenting expert evidence or relevant data to courts for their consideration, as suggested by Gageler J.

But these cases are far too important to be left to subjective interpretations of child sex offender behaviour. Perhaps more importantly, it is time for courts to examine the reality of their great fear that juries in joint trials of sexual abuse allegations will engage in impermissible propensity reasoning. Rather than considering each count of sexual abuse separately, it is assumed (rather than proved) that juries either will engage in accumulation prejudice, because the number of charges and/or witnesses gives the appearance of a stronger case than actually exists, or will decide a case based on moral or character prejudice. However, as documented above, the empirical research on juries' reasoning processes in joint trials does not support the long-standing fears about juries' impermissible reasoning in joint trials.

In terms of public policy arguments, clearly s 97 was drafted to apply in all types of criminal trials.¹⁷⁸ However, if a higher threshold continues to be set for the admissibility of tendency evidence in CSA trials, this will have the undesirable effect of reducing the incidence of joint trials in situations where the defendant has allegedly engaged in crossover behaviours. Given the prevalence of CSA in the Australian community¹⁷⁹ and the extent of institutional CSA as revealed by a number of recent inquiries, such as the Royal Commission into Institutional Responses to Child Sexual Abuse, such an outcome will have significant social and legal consequences. The hope is that trial judges will either follow the majority's lead in *Hughes* by using an expansive definition of their 'ordinary human experience' or prosecutors will take the hint from Gageler J and incorporate expert evidence about the variety of child sex offending behaviour in their submissions in order to inform what 'the court thinks' under s 97 of the *UEL*.

¹⁷⁸ Note that the Royal Commission into Institutional Responses to Child Sexual Abuse has recommended amendments to the *UEL* in the form of a special provision governing the admissibility of tendency and coincidence evidence in CSA trials: *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, 2017) pts 3–4, 642 (recommendation 45). Because this recommendation is a relatively complicated provision, it is arguable that it may not necessarily result in more joint trials of child sex offences.

¹⁷⁹ Around the world, the highest prevalence for CSA against girls was found in Australia, with a prevalence of 21.5%: Marije Stoltenborgh et al, 'A Global Perspective on Child Sexual Abuse: Meta-Analysis of Prevalence around the World' (2011) 16 *Child Maltreatment* 79, 85. This finding was stable over more than 20 years.