Before the High Court

Tendency Evidence in Hughes v The Queen: Similarity, Probative Value and Admissibility

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Abstract

Hughes v The Queen is concerned with the admissibility of evidence of other allegations as tendency evidence in a child sexual assault prosecution. The appellant argues that the other allegations must share distinctive similarities with the charged offence to satisfy the Evidence Act 1995 (NSW) s 97 requirement of ‘significant probative value’. However, this stringency is unjustified. Empirical research into the behaviour of child sex offenders suggests they are not highly specialised in the way they carry out child sexual abuse. Further, the stringent approach to admissibility is inconsistent with the logic of probative value. The power of evidence to discriminate between guilt and innocence depends upon it being consistent with guilt and inconsistent with innocence. The various allegations may not share any peculiar features with the charged offence. However, they can still be far more consistent with guilt than with innocence. Child sexual abuse is unusual in itself. It would be highly improbable for a defendant, though innocent of the child sexual abuse charges, to be the frequent subject of other allegations.

I Introduction

In April 2014, the appellant, Robert Hughes, former star of the Hey Dad ..! television show, was convicted in the District Court of New South Wales (‘NSW’) on 10 counts of child sexual abuse against four complainants, and acquitted of a further count. The evidence of the several complainants was held to be cross-admissible as tendency evidence, notwithstanding the exclusionary rule in s 97 of the Evidence Act 1995 (NSW) (‘Evidence Act’). Tendency evidence of the appellant’s other alleged victims was also admitted.1

Following an unsuccessful appeal to the NSW Court of Criminal Appeal (‘NSWCCA’), the High Court of Australia granted the appellant special leave to appeal on a single narrow point:2 whether the tendency evidence possesses sufficiently distinctive similarities to acquire ‘significant probative value’ as required by the s 97 admissibility test. Before the High Court, the appellant argues

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1 There were six further tendency witnesses, although the evidence of three of those witnesses was held to be admissible only on a single count: Hughes v The Queen [2015] NSWCCA 330 (21 December 2015) [140] (‘Hughes’).

that the nature and circumstances of the various instances of alleged misconduct cover a too wide a range to sustain admissible tendency reasoning.\(^3\) (The further, potentially more stringent, admissibility test in s 101 of the Evidence Act, requiring probative value to substantially outweigh prejudicial risk, is not the subject of a grant of special leave.)

Despite the apparent narrowness of the ground of appeal, the High Court will be cognisant of its broader implications. Most immediately, whatever the High Court says about the ‘significant probative value’ test for tendency evidence in s 97 will have implications for the identical test for coincidence evidence in s 98 of the Evidence Act. The appeal raises questions about the distinction between tendency reasoning and coincidence reasoning. Courts appear to be giving the distinction increasing significance,\(^4\) adding to the complexity of an already messy corner of evidence law. The appeal provides the High Court with an opportunity to stem or reverse the growth in complexity.

Clearly the High Court’s interpretation of ss 97 and 98 will bind other Australian uniform evidence law jurisdictions.\(^5\) A factor prompting the granting of special leave was that NSW courts in recent years appear to be finding tendency and coincidence evidence admissible more readily than Victorian courts. In this respect, NSW courts have moved in the same direction as foreign jurisdictions, particularly in child sex offence cases.\(^6\) Interestingly, the Victorian Attorney-General has intervened in the High Court appeal in support of the NSW position.\(^7\)

As the Royal Commission into Institutional Responses to Child Sexual Abuse has recognised, evidence of other alleged victims is extremely valuable in these prosecutions.\(^8\) The Royal Commission is currently considering recommending legislative relaxation of the exclusionary rules.\(^9\) A High Court decision endorsing less stringent exclusion may reduce the perceived need for statutory intervention. Conversely, a decision endorsing a more stringent approach may amplify calls for legislative reform.

The High Court should reject the appellant’s invitation to tighten the admissibility of tendency and coincidence evidence. This is not to suggest that the Court should accept the respondent’s submissions in their present form. This column suggests refinements that bring the respondent’s arguments more in line with inferential logic and reduce unnecessary complexity in the tendency/coincidence distinction. In order to determine the significance of similarity and, more broadly, to develop a robust and workable approach to

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4 See below nn 49–51.
5 The term ‘significant probative value’ also appears in the first stage admissibility test for propensity and relationship evidence in s 31A of the non-uniform Evidence Act 1906 (WA).
6 See below nn 24–6.
7 Attorney-General (Vic), ‘Intervener’s Submissions’, Submission in Hughes v The Queen, Case No S226/2016, 4 November 2016, [5.49].
9 Ibid 450 [10.8.2].
tendency and coincidence evidence, the Court should be attentive to the logic of the two inference structures and of probative value.

II  The Admissibility of General and Dissimilar Tendency Evidence

In the District Court trial, each complainant gave direct evidence of the Hughes’ commission of the offence against her. Hughes denied all the allegations. The respondent sought to strengthen its case on each count by relying on the tendency evidence of other alleged victims. Each witness testified that Hughes had committed similar misconduct against her. The Crown invited the inference that Hughes committed this kind of sexual misconduct on other occasions, had a tendency to commit this kind of sexual misconduct, and that this increased the probability that Hughes committed the charged offence against each complainant.

In the High Court, the appellant argues that the tendency evidence fails to meet the admissibility threshold in s 97 of the Evidence Act and was wrongly admitted. The alleged acts and their circumstances covered too wide a range. The complainants ranged in age from six to 16 years, with one of the other tendency witnesses being as old as 24. Some of the alleged victims were friends’ children, others were his daughter’s friends, while others worked with him on the television program, *Hey Dad...!*. The alleged sexual acts ranged from Hughes touching the alleged victims’ genitalia or somewhere else with his hands or penis, to the alleged victims touching or masturbating him, to Hughes exposing his penis, to kissing. The offences allegedly took place in various locations, from a children’s bedroom, to a public park, to Manly beach, to Hughes’ dressing room at the television studio. Some of Hughes’ alleged acts were furtive or guileful, while others were brazen and exhibitionistic.

To encompass the wide variety in the alleged misconduct and its circumstances, the Crown pitched Hughes’ alleged tendency at a very general level — a tendency to have and act on a sexual interest in female children under 16 years of age. In the High Court, the appellant argues that such a general tendency — lacking distinctiveness and covering what are actually dissimilarities — is incapable of achieving ‘significant probative value’ as required by s 97. In advancing this argument, the appellant relies, in particular, on the Victorian Court of Appeal (‘VCA’) decision in *Velkoski v The Queen*: ‘If the evidence does no more than prove a disposition to commit crimes of the kind in question, it will not have sufficient probative force to make it admissible.’ The VCA affirmed the use of ‘terms such as “remarkable”, “unusual”, “improbable” and “peculiar”’ when characterising the types of conduct that are properly the subject of tendency

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12 (2014) 45 VR 680 (*Velkoski*).
Evidence. The VCA criticised the NSWCCA for lowering the admissibility threshold ‘too far’.

In Hughes, the NSWCCA expressly rejected the stringency of the Velkoski approach. The NSWCCA held that the evidence had significant probative value despite the dissimilarities and the absence of more distinctive similarities. The respondent finds support for this position in IMM v The Queen where Nettle and Gordon JJ observed that the nature of sexual attraction is such that it is likely to be ‘fulfilled on different occasions by different sexual acts of different kinds’. The respondent adds that ‘reported cases demonstrate that sexual behaviour usually comprises a variety of acts’. Empirical research largely bears out the respondent’s views. The literature suggests that child sex offenders specialise to a degree, for example, preferring children to adults, family members to non-family members, and, less often, one gender to the other. However, the literature also reveals variation in ‘the nature of sexual acts (hands-on, hands-off, oral sex, and penetration) and victim’s age’.

As well as relying on Velkoski, the appellant also relies on the exclusionary rule’s position as ‘one of the most deeply rooted and jealously guarded principles of our criminal law’. But the tide has been turning against strong exclusionary principles, particularly with regard to other allegations of child sexual abuse. As the respondent notes, for admissibility in England, both at common law and under the Criminal Justice Act 2003 (UK), the courts do not generally demand anything more distinctive than the paedophile’s ‘stock in trade’. The New Zealand courts agree, indicating ‘sexual activity with children is in itself unusual, even where it does not involve unusual acts’. And many United States jurisdictions have developed statutory or common law exceptions to the exclusionary rule for

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15 Velkoski (2014) 45 VR 680, 717 [164].
17 Ibid [198]–[200].
25 Robin v The Queen [2013] NZCA 105 (15 April 2013) [25].
evidence of a defendant’s other child sexual abuse. As mentioned above, the Royal Commission into Institutional Responses to Child Sexual Abuse is currently considering whether to recommend that Australian legislatures relax the exclusionary rule, in child sexual offence cases or more broadly.

### III The Relationship between Predictive Certainty and Probative Value

The more and less stringent approaches to admissibility diverge on two key issues: the level of the admissibility threshold, and the attribution of probative value. On the first issue, the VCA in *Velkoski* indicated that ‘significant probative value’ is a ‘high threshold of admissibility’ and ‘requires far more than “mere relevance”’. The NSWCCA in *Hughes* suggested ‘[i]t must mean something more than mere relevance but something less than a “substantial” degree of relevance’. On this point, a majority of the High Court in *IMM* suggested that s 97 requires that evidence be ‘important’, ‘of consequence’, and ‘influential’. This may put the High Court somewhere between the NSW and Victorian courts, although the distance between the different formulations is difficult to discern.

The second difference between the two approaches — the readiness with which probative value should be attributed to tendency evidence — may be more discernible. The appellant advocates parsimony, noting traditional concerns over the ‘insufficient cogency’ of tendency reasoning. The respondent supports a more generous approach, suggesting the reason for the exclusionary rule ‘was not because propensity evidence lacked probative force but because of fundamental policy considerations concerning … the danger of unfair prejudice’. (This danger is handled in the *Evidence Act* by s 101, which is not the subject of a grant of special leave to appeal.) The appellant is right; prejudice has not been the sole concern. The exclusionary rule has also reflected doubts about whether ‘behavioural patterns are constant and … past behaviour is an accurate guide to

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27 Royal Commission, above n 8, 448–50 [10.8.2].


contemporary conduct. These doubts are well placed, as far as they go. Psychological theories of character, recidivism data, and risk assessment techniques suggest that human behaviour is often inconsistent and unpredictable. It is difficult to be certain whether a person, having offended once, will offend again. But this does not mean that tendency evidence lacks probative value.

Properly understood, probative value comprises two components, and predictive certainty corresponds to just one of these. Evidence in a criminal trial is used to determine whether the defendant is proven guilty, rebutting the presumption of innocence. Evidence discriminates between the hypothesis of guilt and the hypothesis of innocence. The capacity of evidence to discriminate — its probative value — is a function of its consistency with the hypothesis of guilt, and its inconsistency with the hypothesis of innocence. The predictive value of evidence corresponds with the first component. Evidence offering only limited predictive certainty may still attain considerable probative value due to the second component — the inconsistency of the evidence with innocence.

Consider a close relation of tendency evidence: motive evidence. In the recent appeal against conviction for a spouse killing, R v Baden-Clay, the High Court clearly found motive evidence influential. It was one of two types of evidence specifically mentioned by the Court as entitling the jury to find the killing intentional, ‘reject[ing] the alternative verdict of manslaughter in favour of murder’. This is not because motive evidence has strong predictive value. There are, no doubt, many married men who have affairs, make promises to their lovers, and get worried about being discovered. Very few murder their wives. But when the wife dies in suspicious circumstances, ‘[m]otive, if proven, is a matter from which a jury might properly infer intention’. The Court’s reasoning emphasises the second component of probative value. Motive evidence is relatively incompatible with manslaughter. ‘[I]t tested credulity too far to suggest that his evident desire to be rid of his wife was fortuitously fulfilled by her unintended death’.

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35 Mike Redmayne, Character in the Criminal Trial (Oxford University Press, 2015), 10–14.
38 A particular manifestation of the logical structure of probative value is the odds-likelihood ratio form of Bayes Theorem: see, eg, Richard O Lempert, ‘Modeling Relevance’ (1977) 75 (S&6) Michigan Law Review 1021, 1022–7. Regrettably, a full Bayesian analysis is beyond the scope of this column.
39 (2016) 334 ALR 234 (‘Baden-Clay’).
40 Ibid 247 [67], the other being post-offence concealment and lies: 248 [72].
41 Ibid 246 [64].
42 Ibid 247 [70], quoting De Gruchy v The Queen (2002) 211 CLR 85, 92 [28].
Tendency evidence also derives its probative influence from the relative values of the two components. It does not require predictive certainty — that a person, having committed one offence, has a high probability of committing another. The second component of probative value must also be considered: the relative inconsistency between the evidence and the defendant’s innocence. It might be said to ‘test… credulity too far’ to suggest that the defendant, though innocent of the charged offence, has allegedly committed a similar offence on another occasion. This consideration featured in Pfennig v The Queen. The defendant was charged with child abduction and murder, and the Crown adduced evidence that the defendant had a prior conviction for a similar offence. The prior conviction would have provided a weak basis for predicting that the defendant would commit a further child abduction. However, it acquired considerable probative value due to its incompatibility with the defendant’s innocence. As McHugh J commented, the defendant innocence would present the ‘remarkable coincidence [that] in addition to the [defendant], there was present … that day another person [with] a propensity to abduct a young boy’. This seems highly improbable because very few people have the inclination and capacity to abduct children. The recidivism rates for child abduction (or child sexual abuse) may fall far short of 100 per cent, however, the incidence rates of such conduct are far lower. Tendency evidence, like motive evidence, can possess considerable probative value while offering limited predictive certainty.

IV The Difference between Tendency Reasoning and Coincidence Reasoning

Part of the respondent’s justification for admitting the general tendency evidence in Hughes is that similarity is less important to tendency reasoning than it is to coincidence reasoning. Various courts have recently accepted this distinction, largely as a matter of statutory interpretation. The admissibility of ‘coincidence evidence pursuant to s 98 of the [Evidence] Act does, in terms, depend upon similarity. Tendency evidence does not.’ However, this distinction is overdrawn and unhelpful to the law’s workability. As Basten JA notes, ‘there is an awkwardness in the separation’.

44 Ibid.
46 Ibid 542.
47 Redmayne, above n 35, 22; Hamer, above n 21, 253.
48 See further David Hamer, “‘Tendency Evidence” and “Coincidence Evidence”: What’s the Difference?’ in Andy Roberts and Jeremy Gans (eds), Critical Perspectives on Uniform Evidence Law (Federation Press, forthcoming).
51 Saoud v The Queen (2014) 87 NSWLR 481, 490 [43].
It is somewhat misleading to suggest that ‘the existence of similarities is a necessary condition of the admissibility of coincidence evidence’. The reference in s 98 to similarities appears in the description of the excluded evidence, not the admissibility test. Section 98(1) makes coincidence evidence ‘not admissible’. ‘Coincidence evidence’ is defined as:

Evidence that 2 or more events occurred [adduced] to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally ...

Coincidence evidence will be admissible if it satisfies various admissibility tests, including the possession of ‘significant probative value’. The admissibility tests contain no reference to ‘similarity’ and they are identical for tendency evidence and coincidence evidence.

Still, given that s 98 coincidence reasoning depends on similarity, it is plausible that probative value is in proportion to the quantum of similarity — the number of similarities and/or their distinctiveness. Consider, for example, DNA evidence that relies on this style of coincidence reasoning. Where the defendant’s profile matches the perpetrator’s profile, the significance of the match is derived from the improbability of the match occurring by coincidence. The improbability of the coincidence increases with the distinctiveness of the shared profile, determined largely by the number of loci in the profile. For example, mitochondrial DNA profiles based on a single locus will be far less probative than nuclear DNA profiles based on 13 loci. The new Australian DNA profiling kit, Powerplex 21, incorporating 21 loci, is ‘much more sensitive and discriminating’ than the older Profiler Plus, incorporating 10 loci.

52 Page v The Queen [2015] VSCA 357 (17 December 2015) [46].
53 Evidence Act s 98(1), Dictionary.
54 Ibid s 98(1)(b). There is also a notice requirement in s 98(1)(a), and a prejudicial danger balancing test in s 101(2).
55 Coincidence reasoning does not always require similarity. In a circumstantial murder case, for example, the Crown might draw attention to the improbability that the defendant, if innocent, would be shown to have motive, means, and opportunity, as well as lying to police and destroying evidence.
56 It is arguable that, on its terms, s 98 should apply to forensic pattern matching evidence, the ‘events’ being the presence of genetic material at various locations with matching DNA profiles. ‘The term “event” is very broad and can include any type of occurrence, including human conduct and the results of human conduct’: Stephen Odgers, Uniform Evidence Law (Lawbook Co, 12th ed, 2016) [EA.98.90]. Gilham v The Queen [2012] NSWCCA 131 (25 June 2012) is a special case, but still illustrative. Evidence of similarity in grouping of knife wounds between victims was relied upon at trial without reference to the Evidence Act s 98: at [254], [288]. On appeal, it was held s 98 should have been applied: at [327]. It should be noted, however, that this evidence was both forensic evidence and behavioural evidence.
57 Eg, Committee on Identifying the Needs of the Forensic Sciences Community, Strengthening Forensic Science in the United States: A Path Forward (National Academy of Sciences, 2009) 131.
The respondent argues that tendency reasoning differs from coincidence reasoning in this respect. What matters is not the ‘distinctiveness of the acts’, but rather ‘the strength of the urge, the willingness to act on it and the person’s desire and capacity to resist it’. [T]here is no reason to presume that the narrower the sexual repertoire the more likely it is to be repeated on any particular occasion. As far as they go, these claims appear correct; child sex offenders are not highly specialised and specialisation does not correlate with predictability.

Having said that, specialised or not, criminal behaviour is not very predictable. But then, as discussed above in Part III, predictive certainty does not equate with probative value. Account also has to be taken of probative value’s second component — the inconsistency between the evidence of the defendant’s other misconduct and the defendant’s innocence. This inconsistency may be expressed in terms of improbability of coincidence, but it is also a component of the probative value of tendency evidence. And this component does depend on the distinctiveness or rarity of the similar features. That an offender has committed an unusual offence, rather than a commonplace offence, does not make him or her more likely to reoffend. But evidence that the charged offence bears the defendant’s unusual signature will be highly probative; and the more unusual the signature, the more probative the evidence.

The prior conviction in Pfennig provided considerable probative value as it demonstrated a very unusual tendency. It would have been a massive coincidence for the defendant to have the prior conviction, though innocent of the charged murder. On contested speeding charges, a defendant’s prior convictions for speeding would not carry such probative value because speeding is a very common offence. It would not test credulity or be a remarkable coincidence for the defendant, though innocent, to have prior speeding convictions.

Case law authorities recognise that the probative value of tendency evidence is related to its degree of similarity. Arguably this relationship is acknowledged in the Evidence Act, which defines tendency evidence as evidence adduced to prove a tendency ‘to act in a particular way, or to have a particular state of mind’, reflecting the view that ‘particular’ tendencies are more probative than ‘general’ tendencies. This matches the role played by the term ‘similarities’

59 Contra Mahomed v The Queen [2011] 3 NZLR 145 178 [95]: ‘legitimate [propensity] reasoning … will be based around coincidence’.
62 See above at nn 21–2.
64 Section 97 (emphasis added). The Crown’s dismissal of this as conflation is unpersuasive: The Crown, ‘Respondent’s Submissions’, Submission in Hughes v The Queen, Case No S226/2016, 28 October 2016, [6.19]
in the definition of coincidence reasoning in s 98, further undermining the distinction and the claim that coincidence reasoning is more dependent on similarity than tendency reasoning.

Applying this to the present case, the tendency evidence is consistent with Hughes’ guilt of the charged offences, and inconsistent with his innocence. It is therefore probative evidence of Hughes’ guilt. Contrary to the respondent’s submission, the tendency evidence would have greater probative value if it revealed more unusual and distinctive tendencies matching the charged offence, because it would then be more inconsistent with Hughes’ innocence. However, this does not mean that the evidence lacks significant probative value. Even without great distinctiveness, evidence of Hughes’ other sexual misconduct can still be highly probative. As the English Court of Appeal has observed, ‘[a] sexual interest in small children or prepubescent girls or boys is a relatively unusual character trait’.66

V Beyond Similarity: Frequency, Context, and Fairness

The respondent may be right that, in assessing probative value, a ‘general formulae cannot be determinative for all contexts and purposes’,67 but this point should not be exaggerated. While the admissibility determination ‘requires an individual assessment based on the circumstances of the particular case’,68 it is feasible and useful to provide general guidance about the factors requiring consideration.69 As discussed above in Part IV, such guidance would include a reference to the number and distinctiveness of similarities in the nature and circumstances of alleged misconduct. However, as the respondent notes, similarity is ‘not the exclusive or determinative criteria of probative value’.70

A further crucial factor is the frequency of the other alleged misconduct.71 A greater number of allegations is evidence of a more persistent tendency, and is more consistent with the defendant’s guilt. At the same time, the evidence is more inconsistent with the defendant’s innocence. The greater the number of other allegations, the greater the coincidence if the defendant were innocent. The tendency evidence points more decisively away from innocence towards guilt. Clearly, in Hughes, where allegations were made by five complainants plus six...
further tendency witnesses, the frequency factor gives the tendency evidence considerable probative value.

The respondent also downplays the need for similarity by emphasising the role of evidential context. The primary evidence on each count is direct complainant testimony. The respondent argues that this reduces the demand on the tendency evidence, helping it meet the admissibility threshold. The common law admissibility test operates this way. The joint judgment in Pfennig indicated that, in determining admissibility, propensity evidence should be ‘viewed in the context of the prosecution case’ and ‘taken together with the other evidence’. But there was good reason for this. The Pfennig admissibility threshold, requiring that there be no rational explanation for the evidence consistent with innocence, is a restatement of the criminal standard of proof. The criminal standard is very demanding, but it applies to the evidence as a whole. So, too, should the Pfennig test. If it applied to propensity evidence in isolation, it is difficult to see how it would ever be satisfied.

The admissibility test in s 97 of the Evidence Act is a very different proposition from the Pfennig test. Section 97 requires only that the evidence have a significant impact on the probability of guilt, not that it prove guilt beyond reasonable doubt. Of course, probative value, like relevance, is a relational concept and cannot be determined in a vacuum — relevant to what? Account must be taken of the context and the fact in issue. But, unlike the Pfennig test, s 97 is not so demanding that tendency evidence needs the support of other evidence to have any chance of passing it.

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73 The Crown, ‘Respondent’s Submissions’, Submission in Hughes v The Queen, Case No S226/2016, 28 October 2016, [6.30]–[6.32]. The Evidence Act s 97(1)(b) indicates that the probative value of the tendency evidence is to be assessed ‘either by itself or having regard to [the Crown’s] other evidence’. But this is unremarkable. The use of tendency evidence necessarily involves drawing a comparison between the other alleged misconduct and the charged offence. Some reference to the other evidence of the charged offence is unavoidable.
78 Sutton v The Queen (1984) 152 CLR 528, 563–4; R v Hodge (1838) 2 Lew CC 227.
81 Smith v The Queen (2001) 206 CLR 650, 654 [7].
82 IMM (2016) 330 ALR 382, 391 [46]. However, the issue of identity does not necessarily demand a greater level of similarity than any other issue, despite all submissions making this suggestion: Hughes, ‘Appellant’s Submissions’, Submission in Hughes v The Queen, Case No S226/2016, 7 October 2016, [63]; The Crown, ‘Respondent’s Submissions’, Submission in Hughes v The Queen, Case No S226/2016, 28 October 2016, [6.14], [6.26], [6.47]; Attorney-General (Vic), ‘Intervener’s Submissions’, Submission in Hughes v The Queen, Case No S226/2016, 4 November 2016, [5.80], [5.82].
Further, it is not clear that the contextual approach relied on by the respondent operates fairly. If tendency evidence can garner support from the other evidence in achieving ‘significant probative value’, then relatively weak tendency evidence may gain admission on the back of an otherwise strong prosecution case. At the same time, the Crown will have difficulty getting tendency evidence admitted where there is little other evidence and the need for tendency evidence is more acute. This seems wrong. The greater the Crown’s need for tendency evidence, the more valuable the tendency evidence will be in prosecuting the charges. Need should correlate positively with probative value, not negatively.

The need principle contradicts the support principle advanced in the respondent’s submissions. However, the need principle is consistent with a more open approach to tendency evidence in child sexual assault prosecutions. The Crown will generally have the complainant’s direct evidence, but often it will have very little else and may struggle to displace the presumption of innocence. Child sexual assault prosecutions are inherently difficult to prosecute. It would be consistent with fair trial principles — according to which ‘regard must be had “to the interests of the Crown acting on behalf of the community as well as to the interests of the accused”’, to take account of the Crown’s need for further evidence in determining the probative value and admissibility of other allegations against the defendant.

VI Conclusion

The appellant argues that the Crown’s tendency evidence lacked ‘significant probative value’ and should have been excluded under s 97 of the Evidence Act. The appellant favours the Victorian approach to s 97, which demands distinctive similarities. The analysis provided here does not support that position.

The appellant relies on the law’s traditional emphasis on remarkable similarities, and its traditional scepticism regarding the cogency of tendency evidence — derived from the relative inconstancy and unpredictability of human behaviour. However, probative value does not demand predictive certainty or remarkable similarities.

Probative value measures the extent to which evidence can discriminate between the competing hypotheses of guilt and innocence. Probative value has two components, corresponding with the competing hypotheses. Evidence will be probative of guilt where it is: first, consistent with guilt; and, second, inconsistent with innocence.

Criminal behaviour is not predictable, and tendency evidence, like motive evidence, rarely offers predictive certainty. Despite this, the tendency evidence in Hughes was consistent with Hughes’ guilt. The dissimilarities do not discount this

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83 Hamer above n 65, 185.
84 Donald K Piragoff, Similar Fact Evidence: Probative Value and Prejudice (Carswell, 1982), 149.
85 Royal Commission, above n 8.
86 Dietrich v The Queen (1992) 177 CLR 292, 335 (Deane J), quoting Barton v The Queen (1980) 147 CLR 75, 101.
consistency. Empirical research on the behaviour of child sex offenders does not suggest that they are highly specialised. It would not be unusual for a child sex offender, on different occasions, to sexually touch one child, procure a second child to sexually touch him, and expose himself to a third child.

Further, the tendency evidence in Hughes was inconsistent with Hughes’ innocence. In the language of the High Court, it would be a ‘remarkable coincidence’\(^{87}\) for Hughes, while innocent of the charged offence, to be the subject of so many other allegations. This would ‘test… credulity too far’.\(^{88}\) As recognised in the recent jurisprudence of England and New Zealand, ‘sexual activity with children is in itself unusual, even where it does not involve unusual acts’.\(^{89}\) This remains true notwithstanding the depressing regularity with which these matters reach trial and appeal courts.

\(^{87}\) Pfennig (1995) 182 CLR 461, 542 (McHugh J).

\(^{88}\) Baden-Clay (2016) 334 ALR 234 247 [69].

\(^{89}\) Robin v The Queen [2013] NZCA 105 (15 April 2013) [25].