The Queen v Bauer: an attempt to clarify the law surrounding the admission of tendency evidence

Nicholas Bentley reports on *The Queen v Dennis Bauer (a pseudonym)* [2018] HCA 40.

In the unanimous decision of *The Queen v Bauer* [2018] HCA 40, the High Court allowed a Crown appeal and overturned a decision of the Victorian Court of Appeal that quashed 18 counts of sexual offences. Significantly, the court sought to clarify some of the confusion surrounding the admission of tendency evidence in single complainant sexual offence cases.

Tendency evidence prior to Bauer

For over two decades, Australian courts have grappled with determining if evidence of uncharged offending is admissible as tendency evidence to prove the offences charged.

In *HML v The Queen* (2008) 235 CLR 334, six members of the High Court recognised that in a single complainant sexual offence case, a complainant's evidence of uncharged acts will often be of high probative value. The rule satisfied in *HML* was not whether the tendency evidence had significant probative value, but the more burdensome common law threshold that the tendency evidence of uncharged acts only supports a guilty inference and permits no other innocent explanation (see Hoch v The Queen (1988) 165 CLR 292 at 294-295 per Mason CJ, Wilson and Gaudron JJ, 302-303 per Brennan and Dawson JJ; which was confirmed in *Pfennig v The Queen* (1995) 182 CLR 461 at 481-482 per Mason CJ, Deane and Dawson JJ).

Nevertheless, in *IMM v The Queen* (2016) 257 CLR 300, the plurality of the High Court subsequently held that a complainant's evidence of a sole uncharged act that occurred some months after the last charged offence did not have significant probative value. Because the principal issue was the complainant's credibility, the plurality held that her evidence of the uncharged act was rationally incapable of adding significantly to the probability that the complainant was telling the truth about the charged acts. Instead, the Court held that the requisite degree of probative value would be more likely to be met with evidence from an independent source or where the complainant's evidence has some 'special feature' (at [62] – [63]).

Subsequently, in *Hughes v The Queen* (2017) 92 ALJR 52, a majority of the High Court held that a tendency to act in a particular way may be identified with sufficient particularity to have significant probative value, notwithstanding the absence of similarity in the acts which evidence it (at [37]). This was in the context of whether evidence of sexual offences and uncharged acts were admissible as tendency evidence in proof of sexual offences alleged to have been committed against other complainants. Although the acts alleged in *Hughes* were not similar, the evidence showed (1) the accused's tendency to engage opportunistically in sexual activity with underage girls despite a high risk of detection, and (2) that this tendency made more likely the elements of the offences charged (at [62] – [64]).

The facts and rulings of the trial judge

From 1985 until 1997, the complainant ('RC') and her younger half-sister had been placed in the care of two foster parents, Dennis Bauer (a pseudonym) and his then wife. The Crown alleged that Bauer committed various sexual offences against RC over an 11-year period from January 1988 to December 1998, when RC was between four and 15 years old.

In 2016, after several retrials before the Country Court of Victoria, Bauer was found guilty and convicted of 18 charges of sexual offences committed against RC over the 11-year period. A sentence of nine years and seven months' imprisonment with a non-parole period of seven years was imposed.

Three important rulings at the trial were the subject of appeal. First, pursuant to s 380 of the *Criminal Procedure Act 2009* (Vic), the trial judge allowed the prosecution to tender a recording of RC's evidence from the most recent prior trial because RC had a strong preference not to give evidence again ('previous recording'). Second, her Honour permitted the prosecution to adduce tendency evidence pursuant to s 97 of the *Evidence Act 2008* (Vic) that Bauer had a sexual interest in RC and a willingness to act upon it. The evidence was the acts comprising of the 18 charges and uncharged acts concerning several alleged interactions between Bauer and RC ('tendency evidence'). Finally, the trial judge ruled that hearsay evidence relied on by the Crown was admissible pursuant to s 66 of the Evidence Act. In particular, her Honour allowed the Crown to call evidence that RC had disclosed to a school friend that she had been sexually assaulted by Bauer, despite the friend asking RC leading questions at the time and despite the friend's limited independent recollection at trial ('complaint evidence'). Her Honour rejected the respondent's objections that (1) the matters referred in RC's conversation with her friend would not have been fresh in RC's memory (as required by s 66(2)(b) of the Evidence Act) and (2) the complaint evidence should be excluded under s 137 of the Evidence Act because it was so 'vague' that its probative value was significantly outweighed by the prejudice it would cause Bauer.

The Victorian Court of Appeal decision

Bauer appealed against conviction to the Court of Appeal of the Supreme Court of Victoria: *Dennis Bauer (a pseudonym) (No 2) v The Queen* [2017] VSCA 176. Bauer alleged that the trial judge had erred in admitting the previous recording, the tendency evidence and the complaint evidence. The Court of Appeal (comprising of Priest, Kyrou and Kaye

JJA) addressed each of the trial judge's rulings in turn.

First, the Court of Appeal held that as it had not been shown that RC was 'unwilling' to give evidence within the meaning of s 381(1)(c) of the Criminal Procedure Act, a condition of admissibility under that subsection had not been established. In their Honours' view, the statement that RC had a 'preference' to not give evidence again did not mean that she was 'unwilling' to do so.

Second, the Court of Appeal held that the tendency evidence should not have been admitted as it did not have significant probative value as required by s 97 of the Evidence Act. The court cited *IMM* and *Hughes*, and concluded that the evidence of RC and her half-sister was devoid of any 'special' or 'unusual features' connecting the evidence to give it significant probative value (at [81] – [83]). The exclusion of the tendency evidence meant that one of the charges, which was based solely on the half-sister's evidence, was not cross-admissible in relation to the other charges. The court held that the failure to hear this charge separately had been productive of unfairness to Bauer.

Finally, the Court of Appeal held that the complaint evidence was not admissible under s 66 of the Evidence Act because there was no evidence that the asserted fact was 'fresh in the memory' of RC at the time she made the complaint to her friend (at [112]). In the alternative, their Honours said that the probative value of the complaint was so slight as not to outweigh the risk of unfair prejudice and therefore should have been excluded under s 137 of the Evidence Act (at [113]).

The Court of Appeal held that the admission of the tendency evidence and the complaint evidence had caused a substantial miscarriage of justice to Bauer (at [83] and [114]). The court quashed the convictions and ordered a new trial. The Crown subsequently appealed.

The High Court decision

In a unanimous full court judgment, the High Court allowed the Crown's appeal and set aside the orders made by the Court of Appeal.

First, the High Court held that the Court of Appeal incorrectly applied s 381(1)(c) of the Criminal Procedure Act when assessing the admissibility of RC's previous recording. The High Court explained that the operation of s 381(1) was not confined to complainants who refuse to give fresh evidence. Rather, parliament's choice of the term 'willingness' (rather than refusal) signifies that the question is one of degree (at [41] – [42]). The court held that the trial judge had not erred in finding that it was in the interests of justice to admit the recording and there was no unfairness caused to the defendant.

In relation to the tendency evidence, the High Court acknowledged that previous decisions had created confusion as to when tendency evidence will be admissible (at 47]). To address this, the court explained that 'the court has resolved to put aside differences of opinion and speak with one voice on the subject' (at [47]). In particular, the court held that 'henceforth', evidence of uncharged acts of the accused against the complainant 'may be admissible as tendency evidence' even if they lack any 'special' feature of the kind discussed in earlier cases (at [48]).

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The High Court explained that the reference in *IMM* to 'special features' of a complainant's account of an uncharged act should be understood as 'limited' to cases in which there are multiple offences against a single complainant and the prosecution seeks to 'adduce evidence from the complainant of a single relatively remote and innocuous uncharged act as support for his or her evidence of the charged acts' (at [57]).

Accordingly, in a single complainant sexual offence case, there is 'ordinarily no need for any particular feature of the offending to render evidence of one offence significantly probative of the other' (at [60]). In contrast, where there are multiple complainants, there 'must ordinarily be some feature of or about the offending which links the two together', and, absent such a feature, evidence that the accused has committed sexual offences against one complainant is ordinarily not significantly probative of the accused having committed an offence against another complainant (at [58]).

As to the standard of review, the High Court held that it was 'for the [appeal] court itself to determine whether evidence is of significant probative value, as opposed to deciding whether it was open to the trial judge to conclude that it was' (at [61]). In this respect, the court departed from decisions of the NSW Court of Criminal Appeal, which had held that it was necessary for the appellant to demonstrate *House v The King* error.

The High Court also observed that, 'ordinarily, proof of the accused's tendency to act in a particular way will not be an indispensable intermediate step in reasoning to guilt' (at [80]), and held that, contrary to the practice which has operated for some time in New South Wales, trial judges 'should not ordinarily direct a jury that, before they may act on evidence of uncharged acts, they must be satisfied of the proof of the uncharged act beyond reasonable doubt' (at [86]).

The High Court also held that any risks of collusion or contamination are issues of credibility and reliability, rather than probative value, except where the risks are so great that it would not be open to the jury, acting rationally, to accept the evidence (at [69]). The court was not convinced that any of the tendency evidence was unfairly prejudicial for it to be excluded pursuant to ss 101, 135 or 137 of the Evidence Act, and agreed that there was no basis for severing any of the charges (at [73] – [78] and [88]).

Finally, the High Court determined that RC's representations to her friend were 'fresh in the memory' of RC at the time she made them, and that the complaint evidence should have been admitted. The court reiterated that s 66 of the Evidence Act had been amended in response to *Graham v The Queen* (1998) 195 CLR 606 at 608 [4], to ensure that the 'fresh in memory' requirement is not confined to the time which elapses between the occurrence of the relevant event and the making of the representation about that event. It is well accepted that the nature of sexual abuse is such that it may remain fresh in the memory of a victim for many years (see, for example, R v XY (2010) 79 NSWLR 629 at 646-648 [91]-[92], [98]-[99] per Whealy J (Campbell JA and Simpson J agreeing at 630 [1], [2]).

In assessing the evidence, the High Court agreed that the facts were 'fresh in the memory' of RC at the time she made the complaint to her friend given (1) the nature of the sexual offences, (2) the fact that they were repeated several times over a number of years, (3) that the acts continued up to less than a year before she made the specific complaints, and (4) RC's highly emotional state at the time of the conversation (at [92]). In applying s 137 of the Evidence Act, the High Court concluded that neither the leading questions from RC's friend nor her lack of independent recollection as to the precise words used by RC at the trial was so great as to merit exclusion on the basis of prejudicial effect (at [99] – [100]).