The High Court again considers the admission of tendency evidence

Nicholas Bentley reports on *McPhillamy v R* (2018) 92 ALJR 1045; 361 ALR 13; [2018] HCA 52

Hot on the heels of *R v Bauer* (2018) 92 ALJR 846; 359 ALR 359 ('Bauer'), the High Court has once again reiterated the subtle but important thresholds to be met before admitting tendency evidence. In *McPhillamy v R*, the High Court reversed a majority decision of the NSW Court of Criminal Appeal that had upheld the conviction of the appellant for six counts of sexual assault. In ordering a new trial, the High Court emphasised that while evidence of a sexual interest is relevant, its probative value generally turns on whether the evidence demonstrates a tendency to act on that interest.

The facts and rulings of the trial judge

The appellant was charged with six counts of sexual offences against an 11 year-old altar boy ('A'), alleged to have occurred on two separate occasions between November 1995 and March 1996 in the public toilets of the St Michael and St John's Cathedral in Bathurst, where the appellant was an acolyte. Before trial, the prosecution served written notice on the appellant of its intention to adduce tendency evidence from two men ('B' and 'C') pursuant to s 97(1)(a) of the *Evidence Act 1995* (NSW). In 1985, B and C were both 13 year-old borders at St Stanislaus' College, Bathurst, while the appellant was an assistant housemaster at the school. Their evidence was that in 1985, after feeling homesick and upset, they had separately visited the appellant's bedroom where he sexually assaulted them ('Tendency Evidence').

District Court Judge King SC admitted the Tendency Evidence, but failed to provide reasons after the voir dire. At trial, the prosecutor outlined to the jury the use to be made of the Tendency Evidence, namely that is showed 'that the [appellant] had a sexual attraction or interest in young teenage males' and that he 'acted on it in his dealings with [B and C] when he was alone with them…[which he did] with [A] too'. The trial judge gave a jury direction that 'If you find that [the appellant] had a sexual interest in male children in their early teenage years, who were under his supervision, and that he had such an interest in [A], it may indicate that the particular allegations are true.' The appellant was subsequently convicted on each count.

The NSW Court of Criminal Appeal decision

By majority, Harrison and RA Hulme JJ dismissed the appeal contesting the admission of the Tendency Evidence. Their Honours concluded that the Tendency Evidence strongly supported the prosecution case (at [128]) and that any difference between the circumstances of the alleged conduct in 1985 to the present offences did not detract from the 'overriding similarity' of the conduct on each occasion (at [127]). In dissent, Meagher JA held that while the 1985 conduct manifested a sexual interest in young teenage boys, it did not show the appellant's preparedness to act on that interest in the circumstances alleged by A (at [115]-[117]). Accordingly, his Honour concluded that the evidence did not meet the threshold test under s 97(1)(b) – that the Tendency Evidence had significant probative value.

The High Court decision

In a joint judgment, Kiefel CJ, Bell, Keane and Nettle JJ (Edelman J agreeing separately) allowed the appeal. It was held that the evidence of B and C was capable of establishing that the appellant had an interest in young teenage boys, which is a tendency to have a particular state of mind that would endure for more than a decade (at [26]). This, however, was not enough to meet the requirement of significant probative value. Instead, 'it is [generally] the tendency to *act* on the sexual interest that gives tendency evidence in sexual cases its probative value' (at [27]). As had been identified by Meagher JA, the Tendency Evidence did not go towards establishing that the appellant *acted* in the way A alleged, which meant that the probative value of the alleged tendency was weak (at [30]).

In addition, the Court restated at [31] the proposition outlined at [58] in *Bauer* – where the tendency evidence concerns sexual misconduct with a person or persons other than the complainant, there 'must ordinarily be some feature of or about the offending which links the two together' for the evidence to be significantly probative. Such a feature was not present in the Tendency Evidence, since taking advantage of young teenage boys who sought out the appellant as the assistant housemaster in the privacy of his bedroom had little in common with A's account that the appellant, as an acolyte, twice followed A into a public toilet and molested him before church.

The Tendency Evidence thus failed to satisfy the test of significant probative value, as it was not capable of affecting the assessment of the likelihood that the appellant committed the offences against A to a significant extent (at [32]). As s 97(1) had not been satisfied, the Court did not address the next admissibility test prescribed by s 101(2).

In separate additional reasons, Edelman J at [34] restated the two stages explained in *Hughes* for assessing the probative value of tendency evidence: (1) the extent to which the evidence is capable of proving the tendency and (2) the extent to which proof of the tendency increases the likelihood of the commission of the offence (*Hughes v R* (2017) 92 ALJR 52; 344 ALR 187 at [41]). His Honour distinguished *Hughes*, noting that the Tendency Evidence was given by only two witnesses alleging incidents that occurred a decade before the alleged offences (at [35]). His Honour also explained that, at trial, the tendency was expressed at a level of generality that overlooked the specific differences (identified in the joint judgment) between the contexts of the Tendency Evidence and the alleged offences against A (at [36]).

Overall, the High Court's repeated interest in clarifying when tendency evidence will be admissible has illustrated that the analysis in each case will depend upon the nature of the alleged offending and the nature of the tendency evidence in question. Like *Bauer*, this decision will also be applicable for non-uniform evidence law jurisdictions: see *Johnson v The Queen* (2018) 92 ALJR 1018; 357 ALR 1 at [17] and *R v K*, GA [2019] SASCFC 2 at [59].