

Uniformity and similarity? Tendency evidence under the Uniform Evidence Law[^]

- 1 The adoption of the Uniform Evidence Law by the Parliaments of the Commonwealth, New South Wales, Victoria, Tasmania, the Australian Capital Territory and Norfolk Island was driven by the desire for the harmonisation of the law of evidence across jurisdictions.¹ The attempts by the various jurisdictions to apply the provisions relating to tendency evidence appear to have confounded that desire.
- 2 Some insight into this can be demonstrated by the sheer number of times the tendency provisions have been the subject of consideration in the case law. The New South Wales Court of Criminal Appeal has considered tendency and coincidence evidence under the Act over 340 times; the Victorian Court of Appeal has considered the same provisions over 50 times since the *Evidence Act 2008* (Vic) was introduced.²
- 3 Important differences have emerged in the jurisprudence as between New South Wales and Victoria.³ The issue has been brought into sharp focus by the decision of the Victorian decision of *Velkoski v R*.⁴

[^] I express my thanks to my Researcher, Myles Pulsford, for his extensive research and invaluable assistance in the preparation of this paper.

¹ See Australian Law Reform Commission and New South Wales Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102 (2006) [1.1]-[1.16].

² *Velkoski v R* [2014] VSCA 121, [89].

³ This is so despite the constraint imposed on intermediate courts of appeal by the principle that the decisions of intermediate appellate courts in other jurisdictions should be followed where the interpretation of uniform national legislation is involved unless the court is convinced that the interpretation is “*plainly wrong*”: *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485, 492; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89, [135].

Velkoski v R

- 4 *Velkoski* reveals a potential ‘fault line’ between the jurisprudence of New South Wales and Victoria regarding the question whether, and to what extent, similarity is required for the admission of tendency evidence. As described by the Court, that ‘fault line’ is as follows:

“Where there is an absence of remarkable or distinctive features in the manner in which the offences are committed, the difference in the law as stated by this Court and the New South Wales Court of Criminal Appeal has left the law in a state of uncertainty as to the degree of similarity in the commission of the offences or the circumstances which surround the commission of the offences that is necessary to support tendency reasoning. One line of authority has held that some degree of similarity in the acts or surrounding circumstances is necessary before it will be sufficient to support tendency reasoning: *RHB* [2011] VSCA 295; *DR v The Queen* [2011] VSCA 440; *CEG* [2012] VSCA 55. Another line of New South Wales authority, that has not been followed in Victoria, has emphasised that tendency reasoning is not ‘based upon similarities,’ and evidence of such a character need not be present: *PWD* [2010] NSWCCA 209; (2010) 205 A Crim R 75 [79]; *BP* [2010] NSWCCA 303; *KRI* [2011] VSCA 127; (2011) 207 A Crim R 552. These lines of authority within each Court are not readily reconcilable.”⁵

- 5 Although the Court did not declare that this apparent line of New South Wales authority was ‘plainly wrong’, it declined to follow it. The Court observed:

⁴ [2014] VSCA 121. The Court observed, at [33]: “... the entire subject broadly encompassed by the term ‘similar fact evidence’, has become exceedingly complex and extraordinarily difficult to apply. The situation is not helped when, as will be demonstrated, appellate courts fail to speak with one voice on this topic”.

⁵ *Ibid* [163].

“Section 97(1)(b) is intended to address the risk of an unfair trial through the use of tendency reasoning by ensuring a sufficiently high threshold of admissibility. We consider the approach currently taken by the New South Wales Court of Criminal Appeal to tendency and coincidence goes too far in lowering the threshold to admissibility. To remove any requirement of similarity or commonality of features does not in our respectful opinion give effect to what is inherent in the notion of ‘significant probative value.’ 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. This view, we think, clearly represents the present position of our Court reflected in the long line of authority to which we have referred.”⁶

- 6 The Court stated the principles for the admission of tendency and coincidence evidence under the Uniform Evidence Act in Victoria.⁷ In relation to tendency evidence, the Court stated that the task was to:

“... identify and assess the strength of the features of the acts relied upon as supporting tendency reasoning.”⁸

- 7 Importantly, the Court recognised that ‘*striking similarity*’ is not a condition of admissibility for tendency evidence⁹ and held:

“In order to determine whether the features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal ‘underlying unity’, a ‘pattern of conduct’, ‘modus operandi’, or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely. It is the degree of similarity of the operative features that gives the tendency evidence its relative strength.”¹⁰

⁶ Ibid [164].

⁷ See *ibid* [165]-[179].

⁸ Ibid [166].

⁹ Ibid [169].

¹⁰ Ibid [171].

8 In *Velkoski*, the Court recorded the Crown's contention that there was "*uniformity to the applicant's conduct in both the mode in which the offences were committed and the circumstances in which they took place which gave the complainants' evidence significant probative value*".¹¹ The common circumstances were that:

"... during the course of the day at the day-care centre, when the applicant was assisting his wife in supervising and caring for young children, and whilst occupying a position of authority, the applicant opportunistically exploited the trust reposed in him to pursue and act upon a sexual interest in these young children."¹²

9 The common distinctive features of the offending related to seven charges of 16, in which the appellant "*encouraged each complainant to touch his penis or exposed it to the complainant*".¹³ The Court of Appeal in *Velkoski* accepted that "[i]n respect of those charges there was a distinct pattern of behaviour committed in similar circumstances that could attract coincidence and tendency reasoning".¹⁴ The position was different in respect of the other charges.

10 During the appeal, the appellant sought leave to add a new ground of appeal to the effect that tendency reasoning was not available in respect of the remaining charges because the evidence of the complainant lacked those particular distinctive features, being the touching or exposure of the accused's penis, and the similarities in the surrounding circumstances would not by themselves be sufficient to support tendency reasoning.¹⁵

¹¹ Ibid [180].

¹² Ibid.

¹³ Ibid [181].

¹⁴ Ibid.

¹⁵ See *ibid* [182].

The remaining charges may be generally characterised as relating to the actions of the appellant in touching the genitals or bottom of complainants. The Court of Appeal appeared to accept the appellant's new ground of appeal and held in respect of those charges that the:

“... manner of the applicant's offending conduct did not possess any distinctive or similar feature of the kind necessary to satisfy tendency reasoning. Applying the principle we have discussed above, we do not think there are present such features of similarity as show a pattern of conduct or modus operandi concerning either the previous acts, or the circumstances in which they were committed that logically and to a significant degree implies that it is more probable that he committed the act or acts in issue.”¹⁶

- 11 The decision in *Velkoski* has already attracted public criticism¹⁷ and the attention of the New South Wales Court of Criminal Appeal.¹⁸ It raises, so far as is presently relevant, the role of similarity in the admission of tendency evidence. This, in turn, leads to a consideration of the difference of approach to that issue between New South Wales and Victoria. It is convenient to begin by examining the nature of the reasoning process involved in similar fact evidence before turning to the provisions of the *Evidence Act*.

Similar fact reasoning

¹⁶ Ibid [184].

¹⁷ See Sarah Farnsworth, 'Tendency evidence: Concerns Court of Appeal ruling could thwart child abuse convictions', *ABC* (online), 3 Oct 2014 <<http://www.abc.net.au/news/2014-10-03/concerns-child-sex-ruling-could-thwart-convictions/5789952>>.

¹⁸ See, for example, *Saoud v R* [2014] NSWCCA 136.

- 12 Associate Professor David Hamer has explained that similar fact evidence has “*three basic elements*”.¹⁹ The first is “*similarity, unity or **singularity** between the charged offence and the other Acts. This suggests that the person who committed those other acts also committed the charged offence*”.²⁰ The second is “*the defendant’s **connection** with the other events*”.²¹ The third element is that “*the similar fact inference must be viewed in the context of the other evidence, ie the **primary evidence** implicating the defendant in the charged offence*”.²²
- 13 Hamer states that “*the components of the similar fact inference can be put together differently so as to produce two variants – the tendency (or propensity) inference and the coincidence inference*”.²³ Hamer explains:

“The tendency inference begins with the proposition that the defendant committed the other misconduct. From this it may be inferred that the defendant has a tendency to commit misconduct of that kind. And then, given that the other misconduct and the charged offence share a high degree of singularity, it may be inferred that the defendant also committed the charged offence. This inference is then added to the primary evidence to form the prosecution’s overall case.

The coincidence inference is more holistic. It is based on the recognition that the defendant has some connection with both the other events and the charged offence. Given the singular features shared by the different events, it may be considered improbable that the defendant’s connections to them are innocent, leading to an acceptance that the defendant was responsible for all. It should be noted that coincidence reasoning, like tendency reasoning,

¹⁹ David Hamer, ‘Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious’ (2007) 30(3) *UNSW Law Journal* 609, 619.

²⁰ *Ibid* (emphasis in original).

²¹ *Ibid* (emphasis in original).

²² *Ibid* (emphasis in original).

²³ *Ibid*.

ascribes to the defendant a 'constancy or uniformity of action and, in that sense, necessarily involves reasoning from propensity'.²⁴

- 14 Hamer states that the "*tendency inference may appear more natural where the defendant's commission of the other misconduct is clear-cut*" whereas the coincidence inference "*may appear more natural where the defendant denies responsibility for any of the events*".²⁵ Hamer believes that "[t]he two types of inference are sharply distinguished in their ideal forms, but in practice the distinction may be less clear and, in a given case, either variant may be open".²⁶ Hamer has observed that:

"Classification is rarely straightforward, and most cases will present the possibility of either or both forms of reasoning. Even where cases appear susceptible to clear classification the significance of the distinction is questionable; coincidence reasoning involves the recognition of the defendant's propensity, and the operation of propensity reasoning can be described in terms of the rejection of a coincidence."²⁷

- 15 Although Hamer's exposition of the tendency inference identifies similarity, or singularity as he refers to it, as a central aspect of tendency evidence, he recognises that the role it plays varies according to the fact in issue. Hamer observes:

"It is with regard to singularity that cases suggest the need for evidence of a 'system', a 'striking similarity' or 'underlying unity' between the charged offence and the other misconduct. However, these and other similar expressions must only be used as guides to principle' rather than as statements of principle. No single expression could do justice to the 'numerous and complex' factors

²⁴ Ibid.

²⁵ Ibid 619-620.

²⁶ Ibid 620.

²⁷ David Hamer, 'The Structure and Strength of the Propensity Inference: Singularity, Linkage and the Other Evidence' (2003) 29(1) *Monash University Law Review* 137, 159.

involved in the singularity assessment, many of them ‘a matter of degree’. All should be taken into account, and ‘it is the overall effect that counts’.”²⁸

- 16 Hamer observes that other incriminating evidence “*can lessen the demand placed on the singularity and linkage steps of the propensity inference, at both the admissibility and proof stages*”.²⁹
- 17 Hamer’s language, is, of course, the language of the common law. Thus, in *Hoch v The Queen*³⁰ Mason, Wilson and Gaudron JJ observed that “*the fact the evidence reveals ‘striking similarities’, ‘unusual features’, ‘underlying unity’, ‘system’ or ‘pattern’ such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution*”. *Pfennig v The Queen*³¹ applied *Hoch*. (It should be noted that the language of *Hoch* and *Pfennig* is closer to the statutory requirements for coincidence evidence. The importance of this will be explained later.)

The Uniform Evidence Law

(A) The Law Reform Commission Proposals

- 18 Reflective of Hamer’s understanding of tendency/propensity reasoning, the provisions relating to tendency evidence as initially proposed by the Australian Law Reform Commission contained an explicit requirement of

²⁸ Ibid 151 (citations omitted).

²⁹ Ibid 185.

³⁰ [1988] HCA 50; 165 CLR 292, 294-5.

³¹ [1995] HCA 7; 182 CLR 461.

similarity. Proposed s 86 established an exclusionary rule for tendency evidence as follows:

“Exclusion of tendency evidence

86. Evidence of the character, reputation or conduct of a person, or of a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way or to have a particular state of mind.”

- 19 Proposed s 87 established an exception to the exclusionary rule when the tendency, the *other* act or state of mind, is “*substantially and relevantly similar*” to the act or state of mind in question and the circumstances in which they were done or existed. Section 87 provided:

“Exception: conduct (including of accused) to prove tendency

87 Where there is a question whether a person did a particular act or had a particular state of mind and it is reasonably open to find that -

- (a) the person did some other particular act or had some other particular state of mind, respectively; and
- (b) all the acts or states of mind, respectively, and the circumstances in which they were done or existed, are substantially and relevantly similar,

the tendency rule does not prevent the admission or use of evidence that the person did the other act or had the other state of mind, respectively.”

(B) The Evidence Act provisions

- 20 The explicit requirement of similarity was not, however, carried through to the Uniform Evidence Law as passed by Parliament.³² As Odgers notes, “[n]either the *Second Reading Speech for the Evidence Bill 1993 (Cth)* nor

³² See *Evidence Act 1995 (NSW)*, s 97.

the Explanatory Memorandum sheds light on the reason for the changes."³³

21 Rather, in criminal proceedings, evidence of the character, reputation or conduct of a person, or a tendency that a person has or had is **not admissible** to prove that a person has or had a tendency to act in a particular way or to have a particular state of mind unless three conditions are satisfied:

(1) The party seeking to adduce the evidence gave reasonable written notice;³⁴

(2) The Court thinks that the evidence, either by itself or having regard to other evidence adduced or to be adduced, has significant probative value.³⁵ In that regard:

(a) The probative value of evidence means "*the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue*".³⁶

(b) "*Significant*" means "*important*" or "*of consequence*".³⁷ In *BP v R*³⁸ Hodgson JA described "*significant*" in s 97 as "*meaning (at least) an extent greater than required for mere relevance*",

³³ Stephen Odgers, *Uniform Evidence Law* (Lawbook Co, 11 ed, 2014), [1.3.6660].

³⁴ *Evidence Act 1995* (NSW), s 97(1)(a).

³⁵ *Evidence Act 1995* (NSW), s 97(1)(b).

³⁶ *Evidence Act 1995* (NSW), Dictionary, Pt 1.

³⁷ *R v Lockyer* (1996) 89 A Crim R 459, 459; *DAO v R* [2011] NSWCCA 63; 81 NSWLR 568, [149] (or [147] in the medium neutral citation).

³⁸ [2010] NSWCCA 303.

a proposition for which his Honour cited *Zaknic Pty Limited v Svelte Corporation Pty Limited*³⁹ to which Simpson J also referred in *DAO v R*.⁴⁰ However, *Zaknic* was not only a civil case, but Lehane J sought to explain what he meant by “*more than mere relevance*” by reference to concepts from the criminal law such as ‘striking similarities’, ‘underlying unity’ and the like.⁴¹ It is not apparent that Hodgson JA had those concepts in mind, otherwise, his decision in *BP* is likely to have been different.

- (3) That probative value substantially outweighs any prejudicial effect it may have on the defendant.⁴² In *R v Ellis*⁴³ Spigelman CJ (Sully, O’Keefe, Hidden and Buddin JJ agreeing) explained that:

“The words ‘substantially outweigh’ in a statute cannot, in my opinion, be construed to have the meaning which the majority in *Pfennig* determined was the way in which the common law balancing exercise should be conducted. The ‘no rational explanation’ test may result in a trial judge failing to give adequate consideration to the actual prejudice in the specific case which the probative value of the evidence must substantially outweigh.

Section 101(2) calls for a balancing exercise which can only be conducted on the facts of each case. It requires the Court to make a judgment, rather than to exercise a discretion. (See *R v Blick* (2000) 111 A Crim R 326 at [20] per Sheller JA; F Bennion ‘Distinguishing Judgment and Discretion’ [2000] *Public Law* 368.) The ‘no rational explanation’ test focuses on one only of the two matters to be balanced - by requiring a high test of probative value -

³⁹ (1995) 61 FCR 171, 175-6.

⁴⁰ [2011] NSWCCA 63; 81 NSWLR 568.

⁴¹ See *ibid* at 176.

⁴² *Evidence Act 1995* (NSW), s 101(2).

⁴³ [2003] NSWCCA 319.

thereby averting any balancing process. I am unable to construe s101(2) to that effect.”⁴⁴

- 22 The absence of an explicit requirement of similarity in the words of the section raises the question whether, and to what extent, the alleged tendency must be similar to the act or state of mind the subject of the proceedings. The answer to that question must be answered by reference to the role that tendency evidence plays in establishing the guilt of an accused. As Simpson J observed in *Gardiner v R*:⁴⁵

“Underlying s 97 is an unstated but obvious premise. That is that proving that a person has a tendency to act in a particular way or to have a particular state of mind in some way bears upon the probability of the existence of a fact in issue. The fact in issue is the conduct, or state of mind, on a particular occasion relevant to the issues in the proceedings, of the person whose tendency is the subject of the evidence tendered. That is, evidence that a person has or had a tendency to act in a particular way or to have a particular state of mind is not tendered in a vacuum. It is tendered for the purpose of further proving (or contributing to proving) that, on a particular occasion, that person acted in that way or had that state of mind. Proof of the tendency is no more than a step on the way to proving (usually by inference) that the person acted in that way, or had that state of mind, on the relevant occasion.”⁴⁶

- 23 This understanding of s 97 has been quoted with approval: *R v Alexander Cittadini*;⁴⁷ *KJR v R*;⁴⁸ and *DAO v R*.⁴⁹ Simpson J in *Cittadini* observed:

⁴⁴ *Ibid* [94]-[95].

⁴⁵ [2006] NSWCCA 190; 162 A Crim R 233.

⁴⁶ *Ibid* [124].

⁴⁷ [2008] NSWCCA 256; 189 A Crim R 492, [21] (per Simpson J, McClellan CJ at CL agreeing).

⁴⁸ [2007] NSWCCA 165; 173 A Crim R 226, [3] (per Simpson J, McClellan CJ at CL agreeing).

⁴⁹ [2011] NSWCCA 63; 81 NSWLR 568, [180].

“Proof of a tendency to act in a particular way of itself goes nowhere. Evidence that a person had a particular tendency is adduced in order to render more probable the proposition that, on a particular occasion relevant to the proceedings, that person acted in a particular way (or had a particular state of mind); **that is, to provide the foundation for an inference to that effect.** (emphasis added)

Put another way, tendency evidence is tendered to prove (by inference), that, because, on a particular occasion, a person acted in a particular way (or had a particular state of mind), that person, on an occasion relevant to the proceeding, acted in a particular way (or had a particular state of mind).⁵⁰

- 24 This was quoted with approval in *FB v R; R v FB*.⁵¹ Whealy JA (Buddin and Harrison JJ agreeing), observed:

“It is clear law that evidence that a person has or had a particular tendency is adduced in order to render more probable the proposition that, on a particular occasion relevant to the proceedings, the person acted in a particular way or had a particular state of mind. **The section proceeds on the basis of inferential reasoning that people behave consistently in similar situations. The evidence is used to provide a foundation for an inference to that effect.**”⁵²

- 25 In *R v Harker*⁵³ Howie J, Santow JA and Bell J agreeing, commented that:

“The simple fact is that tendency evidence is placed before the jury as evidence tending to prove the guilt of the accused. The jury are asked to reason that, because the accused acted in a particular way on some other occasion or occasions, he or she must have acted **in the same way** on another occasion.”⁵⁴

⁵⁰ *R v Alexander Cittadini* [2008] NSWCCA 256; 189 A Crim R 492, [22]-[23] (emphasis added).

⁵¹ [2011] NSWCCA 217, [23].

⁵² *Ibid* (emphasis added).

⁵³ [2004] NSWCCA 427.

⁵⁴ *Ibid* [57] (emphasis added).

- 26 However, Simpson J in *DAO*⁵⁵ with whom Kirby and Schmidt JJ and possibly the Chief Justice agreed, explained the difficulty with this formulation and its use of the words “*in the same way*”. Her Honour stated:

“Evidence of a tendency may cast light on the conduct or state of mind of a person without being evidence of conduct of the same kind: see *Fletcher* at [67], *Ford* at [38] and [41]-[44]. **Similarity or dissimilarity in the nature of the conduct alleged is relevant to the assessment of both whether the evidence has probative value, and, if so, whether it is significant.** If the evidence has significant probative value (and, in a criminal case, subject to s 101) it is admissible.”⁵⁶

- 27 As her Honour went on to observe:

“For the purpose of s 97, the real question is whether the evidence is capable, to a significant degree, of rationally affecting the assessment (by the jury) of the probability of the existence of a fact in issue.

That naturally calls for identification of the ‘fact in issue’, the assessment of the probability of the existence of which is said to be affected by the evidence.”⁵⁷

- 28 The view expressed by Simpson J in *DAO* is not controversial. As Campbell JA observed in *R v Ford*:⁵⁸

“The case law contains examples of the way in which a tendency to engage in a particular type of behaviour can be relevant to whether an accused has committed a particular crime charged, even though that tendency does not in itself involve performance

⁵⁵ [2011] NSWCCA 63; 81 NSWLR 568.

⁵⁶ *Ibid* [180] (emphasis added).

⁵⁷ *Ibid* [183]-[184].

⁵⁸ [2009] NSWCCA 306; 201 A Crim R 451.

of a contravention of the same provision of the criminal law as that charged, or closely similar behaviour.”⁵⁹

- 29 In *Regina v LI*⁶⁰ Dunford J, with whom Spigelman CJ agreed, observed “[s]ection 97 is not directed only at evidence showing a tendency to commit a particular crime but showing a tendency ‘to act in a particular way’”.⁶¹
- 30 The language used in these various formulations is important. First, it is important to recognise that the purpose of the admission of tendency evidence is to provide a foundation, one of one or more stepping stones, for the drawing of an inference – that the person acted in a particular way on an occasion that is relevant to the subject matter of the proceedings. Secondly, it is the strength of the inference that requires the evaluative assessment that leads to admissibility or rejection. The admissibility question is whether the evidence, alone or with other evidence, has “significant probative value”.⁶²

Nature of offending

- 31 Whether that test is satisfied in a particular case has been the major cause of disputation in the case law. In particular, the manner in which individual judges have expressed the degree of similarity required has been the subject of other judicial comment ranging from explanation to disapproval, as Simpson J’s admonition of the formula used in *Harker* demonstrates.

⁵⁹ *Ibid* [41].

⁶⁰ [2003] NSWCCA 407.

⁶¹ *Ibid* [11].

⁶² *Evidence Act 1995* (NSW), s 97(1)(b).

32 The explanations in *Ford* and *DAO* as to how s 97 operates will obviously have an impact on what evidence will satisfy the section. The following cases illustrate the point.

33 In *R v Milton*⁶³ one of the accused's grounds of appeal was that the primary judge had erred in ruling that certain evidence was cross-admissible between counts and that separate trials ought to have been ordered in respect of each complainant.⁶⁴ Hidden J, with whom Tobias JA and James J agreed, in finding that the rulings were open to the trial judge, observed:

"The detail of the sexual activity alleged by each of the complainants and the circumstances surrounding it is not to the point. True it is that evidence that the appellant had sexual contact with two boys in their early teens would not, of itself, be sufficient. However, that is not the only common thread in their evidence. What emerges from the testimony of each of them is an attempt by the appellant to foster a relationship with them conducive to sexual contact despite their youth and immaturity. This arises not just from his employing each of them. It is to be found in his encouraging them to drink and use drugs in a manner entirely inappropriate for boys of their age, and in his efforts, by word and deed, to loosen their natural sexual inhibitions. It is also to be noted that, on the account of both complainants, he was prepared to impose his will upon them in the teeth of their resistance."⁶⁵

34 In *R v Fletcher*,⁶⁶ the appellant relevantly challenged the admission of tendency evidence because of differences in the nature of the sexual conduct alleged and the date of its alleged perpetration.⁶⁷ Simpson J, with whom McClellan CJ at CL agreed, explained:

⁶³ [2004] NSWCCA 195.

⁶⁴ See *ibid* [23].

⁶⁵ *Ibid* [31].

⁶⁶ [2005] NSWCCA 338; 156 A Crim R 308.

⁶⁷ See *ibid* [57].

“In my opinion, the present appellant’s argument focused too narrowly upon a tendency to have sexual intercourse in a particular fashion. The DPP’s explanation, provided to the appellant’s legal advisors, shows that the ‘tendency’ which it sought to establish was wider, and more detailed. The DPP sought to establish a pattern of behaviour, or even a *modus operandi*, in the appellant’s behaviour. This included the use of his position as parish priest in meeting Catholic families and involving himself in their lives, developing a special relationship with the families, the children of the families, and in particular with a child the focus of his attention; and the introduction of the child to sexually explicit material and, eventually, inappropriate sexual behaviour.”⁶⁸

- 35 In *R v Smith*⁶⁹ the Crown sought to adduce tendency and coincidence evidence arising from sexual offences against two children in respect of which the accused was previously convicted. The primary judge ordered that the evidence was not admissible as tendency evidence because the nature of the offences committed was “*generally speaking different*”.⁷⁰ The Crown successfully appealed this ruling. Blanch J, with whom McClellan CJ at CL and Hislop J agreed, cited *Fletcher* and *Milton* with approval and held:

“In my view the virtually identical surrounding circumstances of all of these allegations and the similarities involved in carrying out the various activities involved in the allegations does lead to the conclusion that the evidence sought to be tendered by the Crown is admissible as tendency evidence. That conclusion is not frustrated simply by the fact that on some occasions the respondent went further than simply touching and fondling.

...

The evidence goes to establish the respondent’s sexual interest in young girls, his preparedness to carry out sexual acts with young girls where there were other people in the room where he

⁶⁸ Ibid [67].

⁶⁹ [2008] NSWCCA 247; 190 A Crim R 8.

⁷⁰ See *ibid* [10], [14].

performed his actions and where he ran a significant danger of being discovered and the nature of his actions in fondling both girls on the vagina were also the same in each instance.”⁷¹

Has similarity been abandoned by the New South Wales Court of Criminal Appeal?

36 There are a number of Court of Criminal Appeal authorities which have considered the importance of similarity and dissimilarity in the admission of tendency evidence and were the subject of comment in *Velkoski*. As will become apparent, I believe that the Victorian Court of Appeal erred in suggesting that this line of authority had abandoned a requirement of similarity.

R v Ford

37 The decision in *R v Ford*⁷² concerned a Crown appeal from a ruling that the evidence of two complainants, which had led to the accused being convicted of two counts of indecent assault, was not admissible as tendency evidence in the trial of the accused on a charge of sexual intercourse without consent. Although all of the offences were originally charged in the same indictment, the sexual intercourse without consent count was severed by pre-trial order.

38 The tendency relied on by the Crown was that the accused had:

“... a tendency to act in a particular way, namely to sexually molest young women who (1) have stayed over at his house after attending a party, (2) have consumed a significant amount of

⁷¹ Ibid [17]-[19].

⁷² [2009] NSWCCA 306; 201 A Crim R 451.

alcohol, (3) are asleep, (4) where there is a risk of being discovered by others in the house.”⁷³

- 39 On the appeal, Campbell JA (Howie and Rothman JJ relevantly agreeing), identified that one of the two serious flaws made by the trial judge was the:

“... judge’s apparent view that the tendency evidence must itself show a tendency to commit acts that are closely similar to those that constitute the crime with which a particular accused is charged. That is not so. All that a tendency need be, to fall within the chapeau to s 97(1), is ‘a tendency to act in a particular way’.”⁷⁴

- 40 After reviewing the relevant authorities, such as *Li* and *Smith*, regarding whether the tendency alleged must be similar to the crime charged, Campbell JA observed:

“In my view, if the respondent had a tendency of either the type identified by the Crown in its tendency notice, or of the type that the Crown ultimately came to rely upon in argument before Judge Sorby, that would be relevant to whether the respondent had engaged in the acts that are the subject of the charge concerning TL. For a man to sexually interfere with a female houseguest while she is still asleep is fairly unusual. If the evidence of AG and ZM were to be accepted [the complainants in the indecent assault trial], that would not suffice to make out the charge concerning TL, but a jury could justifiably take the view that it increased the probability of TL’s evidence concerning the elements of the crime charged being correct.

It follows from what I have said so far that in my view, the evidence is relevant, and is evidence of a tendency to act in a particular way, within the meaning of s 97(1). It is possible for a person to have a tendency to act in a particular way even if that tendency has not shown to be manifested on very many occasions. The forensic purpose of its tender is to prove that the respondent has a tendency to act in a particular way, namely that identified in the tendency notice or in Judge Sorby’s identification of the tendency in his judgment. Thus, the evidence falls within the chapeau of s

⁷³ See *ibid* [25], [27].

⁷⁴ *Ibid* [38].

97(1) and will be inadmissible unless the requirements of paras (a) and (b) of s 97(1) are met, and the requirements of s 101(2) are also met.”⁷⁵

- 41 As to whether the evidence possessed significant probative value as required by s 97(1)(b), Campbell JA held:

“The respondent accepts that the evidence in question has some probative value, but disputes that it has significant probative value. He submits that there is no striking pattern of similarity between the incidents. In my view there is no need for there to be a ‘striking pattern of similarity between the incidents’. All that is necessary is that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged. In my view, it meets that test.

The respondent submits that ‘the phenomenon of young women, who are drunkenly sleeping after a social event, being the subject of sexual interference is unfortunately not so compellingly rare or exceptional as to give the evidence significant probative value’. I do not accept that tendency evidence has to be of a tendency to do an act that is “compellingly rare or exceptional” before it can have significant probative value.

I am satisfied that the evidence in question has significant probative value, within the meaning of s 97(1)(b).”⁷⁶

R v PWD

- 42 In *R v PWD*,⁷⁷ the accused was charged with 10 counts of sexual misconduct against four boys.⁷⁸ The prosecution filed a tendency notice seeking to adduce the evidence of the four complainants, and a further two witnesses, describing sexual conduct by the accused as tendency

⁷⁵ Ibid [44]-[45].

⁷⁶ Ibid [125]-[127].

⁷⁷ [2010] NSWCCA 209; 205 A Crim R 75.

⁷⁸ Ibid [2].

evidence admissible on all counts.⁷⁹ The sexual conduct described by each complainant was different and, at first instance, the accused successfully sought an order that the counts on the indictment relating to each of the complainants be severed on the basis that, as the acts and surrounding circumstances were so different, the tendency evidence lacked significant probative value.⁸⁰

- 43 The Crown case was not one of striking similarities, but rather that there was a “*pattern of behaviour, modus operandi, system or pattern and common threads (the pattern) in the respondent’s conduct*”.⁸¹ The Crown

⁷⁹ Ibid [3].

⁸⁰ Ibid [4]-[6].

⁸¹ Ibid [35]. The pattern contended for by the Crown was as follows:

“(a) the respondent resided at the college at the time that all the alleged offences were committed;

(b) the respondent was the music master and then principal, both of which were positions of authority at the time of the alleged offences;

(c) the complainants and the two other witnesses were students at the school at the time of the alleged offences;

(d) the complainants and TD were boarders at the school at the time of the alleged offences;

(e) the complainants came from families who were devout Catholics;

(f) the complainants and other witnesses were young male students;

(g) the respondent developed a special relationship with all of the complainants (except BW) and with TD;

(h) other than for counts 1 and 2 in respect of IB, the offences were committed in the respondent’s private quarters. However, the incident between IB and the respondent referred to at [7] above, occurred in the respondent’s private room.

(i) The complainants and TD were young students of a similar class in that they did not easily adapt to boarding school, they did not fit in with the general body of students, they did not see their families regularly, they were homesick and came from devout Catholic families that regarded the Catholic Church in high esteem.”

case was that “*the respondent had a sexual interest in young boys and for the purposes of gratification of that interest, he preyed upon boys in his care in a variety of circumstances, but all of which it is alleged involved some vulnerability*”.⁸²

44 At [79], I observed, Buddin J and Barr AJ agreeing, that:

“The authorities are clear that for evidence to be admissible under s 97 there does not have to be striking similarities, or even closely similar behaviour. By contrast, coincidence evidence is based upon similarities ...”

45 This observation called for special criticism by the Court in *Velkoski*. The Victorian Court of Appeal commented that:

“It reduces the threshold for admissibility, in relation to tendency evidence, to behaviour that need not even be ‘closely similar’. Distinctiveness, underlying unity, and the need for a pattern of behaviour would, it appears, be put to one side.”⁸³

46 The language by the Victorian Court of Appeal is of interest. The reference to “*underlying unity and the need for a pattern of behaviour*” closely resembles the language used under the common law test relating to similar fact or propensity evidence. Although there may well be differences in the conduct so characterised on the approach I understand to have been taken in *Veloski*, those notions appear require some direct correlation with the conduct subject of the charge.

47 I will come back to that proposition.

⁸² Ibid [76].

⁸³ *Velkoski v R* [2014] VSCA 121, [120].

- 48 Secondly, with respect to the Victorian Court of Appeal, it is not correct to say that evidence of the type referred in that paragraph has been “*put to one side*”. If there is such evidence, the likelihood of a finding of “*significant probative value*” would be virtually inevitable. If their Honours were suggesting that evidence, to qualify as tendency evidence, needed to demonstrate those characteristics: *viz*, “*distinctiveness, underlying unity, and the need for a pattern of behaviour*”, I am of the view that that would involve a wrong approach to what, after all, is a question of statutory construction and the application of the statute to the facts.
- 49 The task set by s 97 is to assess whether evidence, proffered for a particular purpose, namely, to prove that a person has or had a tendency to act in a particular way or to have a particular state of mind, has significant probative value, either on its own or in conjunction with other evidence. The probative value of the evidence must be in relation to a matter in issue in the trial. That will often be, but is not necessarily, proof of an element of the offence charged.
- 50 It is also important to consider the context in which a particular statement is made. The primary judge in *PWD* had placed significant emphasis on the Victorian decision of *PNJ v R*, a case dealing with the cross-admissibility of complainants’ evidence, who had been allegedly sexually assaulted and or assaulted at a youth training centre, as coincidence evidence.⁸⁴ As I explained, the primary judge had rejected a number of the similarities alleged as being outside the respondent’s control and simply reflected the setting in which the alleged offending occurred.⁸⁵ This had been the reasoning in *PNJ* in respect of coincidence evidence.

⁸⁴ [2010] VSCA 88; 27 VR 146.

⁸⁵ *R v PWD* [2010] NSWCCA 209; 205 A Crim R 75, [41], [78].

Having rejected that evidence, the trial judge rejected any other feature of the tendency evidence on the basis of insufficient similarity.

51 The Crown case in *PWD* was that the accused had used the particular surroundings as part of his modus operandi. Thus a feature of the Crown's tendency evidence "*was an element of selection and encouragement of the boys to whom he directed his sexual attention: only boarders were involved, all of whom reported feelings of isolation, homesickness and not fitting in, although this exhibited itself variously...*"⁸⁶

52 After examining the relevant differences between the Crown case advanced in *PWD* and that in *PNJ*, I observed that:

"The issues at trial in this case will essentially be twofold: first, whether the appellant engaged in the conduct alleged at all; and secondly, whether any conduct in which he did engage was innocent: this being particularly relevant in the case of IB and ND."⁸⁷

53 I went on to hold that:

"... the evidence of the four complainants and the other two tendency witnesses is capable of rationally affecting the assessment of the probability of the respondent having engaged in the conduct alleged and had a sexual interest in doing so. So much was found by the trial judge. That evidence has significant probative value in the determination of the question whether the individual allegations should be accepted. The likelihood that such conduct occurred in relation to the other complainants and tendency witnesses would make it more likely that the respondent acted in the way alleged in respect of each particular complainant. It is evidence which also has significant probative value in

⁸⁶ Ibid [83].

⁸⁷ Ibid [86].

rebutting the suggestion that the respondent's relationship with each of the complainants was innocent."⁸⁸

- 54 As Basten JA, with whom Fullerton and R A Hulme JJ agreed, observed in *Saoud v R*,⁸⁹ that passage at [79] of *PWD*, “(when read in context) does not ‘remove any requirement of similarity or commonality of features’, as suggested in *Velkoski* at [164].”⁹⁰ So similarity was not just thrown by the wayside.
- 55 There are two cases discussed in *Velkoski* to which it is appropriate to make reference. The first is the New South Wales decision of *Fletcher*,⁹¹ to which reference has been made. The second is *GBF v The Queen*,⁹² a Victorian decision. In *Velkoski*,⁹³ the Court referred to Simpson J's remarks in *Fletcher* where her Honour, after observing that the terminology used in *Hoch* was more apposite to admission of coincidence evidence under s 98, stated that the evidence of the tendency witnesses in that case was “capable of lending support to the allegations made by the complainant by reason of striking similarities, underlying unity, system or pattern”.⁹⁴ The Court in *Velkoski* noted that her Honour considered that those notions were also relevant to the admissibility of tendency evidence.⁹⁵

⁸⁸ *Ibid* [88].

⁸⁹ [2014] NSWCCA 136.

⁹⁰ *Ibid* [46].

⁹¹ [2005] NSWCCA 338; 156 A Crim R 308.

⁹² [2010] VSCA 135.

⁹³ See *Velkoski v R* [2014] VSCA 121, [80].

⁹⁴ [2005] NSWCCA 338; 156 A Crim R 308, [60].

⁹⁵ *Velkoski v R* [2014] VSCA 121, [80]. See *ibid*.

56 The only rational reaction to that observation is “*of course*”. To say as much merely demonstrates that evidence of that nature would satisfy the test of “*significant probative value*” and would be unlikely to be excluded by s 101(2). The difficulty for the prosecutor or the judge will be in cases where the evidence is not of that obvious strength.

57 In *GBF*, the Court approved Campbell JA’s statement in *Ford* and commented that *Ford* was a case in which the evidence revealed a modus operandi that was substantially probative of the offence charged. The Court also accepted, as was said in *Ford*, that there did not have to be “*striking similarities*” between the tendency evidence and the acts the subject of the charge. However, the Court in *GBF* went on to state:

“... one is loath to accept that offending on one occasion is significantly probative of offending on another unless there are significant or remarkable similarities as between previous acts and the act in question, or as between the circumstances in which previous acts were committed and the circumstances in which the act in question was committed or, more compendiously, unless the evidence reveals a pattern of conduct, modus operandi or some other underlying unity, which logically implies that, because the accused committed the previous acts or committed them in particular circumstances, he or she is likely to have committed the act in issue.”⁹⁶ (citations omitted)

58 The Court in *Velkoski*⁹⁷ noted that these considerations were referred to in *RR v The Queen*.⁹⁸ In that case, Redlich JA, with whom Hansen JA agreed, observed:

“[R]elevant similarities must be present otherwise the evidence would be ‘pure propensity evidence’ and would not demonstrate

⁹⁶ *GBF v The Queen* [2010] VSCA 135, [27]

⁹⁷ *Velkoski v The Queen* [2014] VSCA 121, [86].

⁹⁸ [2011] VSCA 442.

‘underlying unity’ or a ‘common modus operandi’ or a ‘pattern of conduct’ which would justify cross-admissibility.”⁹⁹

59 These observations were, of course, co-ordinate with the view of the Court in *Velkoski*, as follows:

“The requirement of ‘underlying unity’, ‘modus operandi’, ‘pattern of conduct’ or ‘commonality of features’ applies to similarities that cannot be described as ‘striking’. These concepts continue to be regularly used to provide guidance as to the strength of the tendency evidence. They are to be found in the preponderance of authority from this Court and permeate its decisions. They remain, in our view rightly, a primary guide to the resolution of questions of admissibility. Because each of these concepts rests upon the existence of some degree of similarity of features between the previous acts and the offences charged, the law in Victoria now follows a somewhat different path to that currently followed by the New South Wales Court of Criminal Appeal.”¹⁰⁰

BP v R; R v BP

60 In *BP v R; R v BP*,¹⁰¹ the accused faced eleven counts of sexual assault upon three complainants relating to alleged acts of indecent assault, aggravated indecent assault and sexual intercourse. The Crown served both tendency and coincidence notices, with the tendency notice stating that the Crown sought to prove the “*appellant’s tendency to have a particular state of mind, namely an unusual sexual interest in his daughters SP and JS, his niece VP and his granddaughters TM and TP, and to act in a particular way as evidenced by his acts*” and identified features of the evidence in support of that tendency.¹⁰²

⁹⁹ *Ibid* [40].

¹⁰⁰ *Velkoski v The Queen* [2014] VSCA 121, [82].

¹⁰¹ [2010] NSWCCA 303.

¹⁰² *Ibid* [23]. The notice alleged:

“(a) The persons in question were related to the appellant;

61 On the appeal, the accused submitted:

“... that the real assertion made by the tendency and coincidence notices was that the appellant had a sexual interest in young children, and as *O’Keefe v R* [2009] NSWCCA 121 and *CGL v DPP* [2010] VSCA 26 showed, this was insufficient for the probative value necessary for tendency or coincidence evidence. The limitation to family members did not significantly change the position, and in any event was artificial, because originally there were non-family complainants. Many of the further particulars were just matters of opportunity and how things allegedly happened to occur, and many applied only to some or only one of the complainants. The probative value of the evidence as tendency or coincidence evidence was small, and the prejudicial effect enormous.”¹⁰³

62 Hodgson JA, with whom Price and Fullerton JJ relevantly agreed, rejected the appellant’s submissions and held:

“106 Evidence with which s 97 is relevantly concerned is evidence that a person has a tendency to act in a particular way or have a particular state of mind; and the probative value of the evidence will depend both on its probative value in establishing the tendency and on the probative value of the tendency (if established) in relation to an issue in the case: *R v Li* [2003] NSWCCA 407 at [11], *R v*

-
- (b) They were under his authority at material times;
 - (c) Abuse on them commenced when they were aged between four and seven years;
 - (d) The modus operandi in relation to each was substantially similar, in that the appellant would place his hand inside their panties and penetrate or massage their vaginas;
 - (e) The appellant would often assault them in their beds at night;
 - (f) The appellant would warn them not to tell anyone or he would go to gaol;
 - (g) The appellant told some complainants to keep a look out for people coming;
 - (h) The appellant would encourage some complainants to sit on his legs enabling him to penetrate/massage their vaginas;
 - (i) The appellant would commit sexual assaults on them when others were present.”

¹⁰³ Ibid [100].

Cittadini [2008] NSWCCA 256; (2008) 189 A Crim R 492 at [22] – [23].

107 To be admissible as tendency evidence, the evidence must have significant probative value. It must be capable of rationally affecting the probability of the existence of a fact in issue to a significant extent, **meaning (at least) an extent greater than required for mere relevance**: *Zaknic Pty Limited v Svelte Corporation Pty Limited* (1995) 61 FCR 171 at 175-6, *R v Ford* [2009] NSWCCA 306 at [50] and [51], *R v PWD* [2010] NSWCCA 209 at [66]. The question of probative value (and also the possibility of prejudicial effect) must be assessed having regard to the issues in the case: *PWD* at [63].

108 It is not necessary in criminal cases that the incidents relied on as evidence of the tendency be closely similar to the circumstances of the alleged offence, or that the tendency be a tendency to act in a way (or have a state of mind) that is closely similar to the act or state of mind alleged against the accused; or that there be a striking pattern of similarity between the incidents relied on and what is alleged against the accused: *Ford* at [38], [125], *PWD* at [64]-[65]. **However, generally the closer and more particular the similarities, the more likely it is that the evidence will have significant probative value.**

...

112 In my opinion, subject to the question of concoction, to which I will return, features of the appellant's conduct described by each complainant were sufficiently similar and sufficiently unusual for the evidence of each of them to have significant probative value in showing the specified tendencies; and the existence of those tendencies would have significant probative value in supporting other evidence that the appellant committed the offences charged. In my opinion, it is unusual for a parent or grandparent to do acts of the kind described by each witness, and the acts described by each, if accepted, would in my opinion to a very significant extent rationally affect the assessment of the probability of the appellant having an unusual sexual interest in his daughter and granddaughters and having a tendency to give effect to that interest in assaulting them; and the existence of those tendencies in turn would to a very significant extent rationally affect the assessment of the probability of the commission of the offences charged. In my opinion also,

the probative value of the evidence is such that it substantially outweighs any prejudicial effect it may have. The danger of the jury responding inappropriately to it, or giving it more weight than it truly deserves, is in my opinion small, particularly if appropriate directions are given."¹⁰⁴

FB v R; R v FB

63 In *FB v R; R v FB*¹⁰⁵ the accused was appealing his conviction upon indictment on one count of aggravated sexual assault, the circumstances of aggravation being that the complainant was under the age of 16. The Crown successfully applied for the evidence of another young woman, in respect of whom the accused had pleaded guilty to five counts of sexual intercourse contrary to s 73 of the *Crimes Act 1900*, as tendency evidence.¹⁰⁶ The trial judge found that that evidence "*discloses that [the accused] has a tendency for having a sexual desire for underaged girls who are his pupils or were his pupils and were under his care and he acted upon such sexual desire by providing them with drugs and thereafter taking advantage of them.*"¹⁰⁷ The trial judge observed:

"I have gone through in some detail the comparison between MD's evidence and that of the complainant's. In my view the vast majority of what is disclosed is, to use the old formula, a striking similarity between both accounts and accordingly in my opinion by reason of that similarity, there is a significant probative value to MD's evidence."¹⁰⁸

64 On the appeal, the accused contended that the two sets of allegations were not sufficiently similar to allow the admission of the tendency

¹⁰⁴ Ibid [106]-[108], [112] (emphasis added).

¹⁰⁵ [2011] NSWCCA 217.

¹⁰⁶ Ibid [13].

¹⁰⁷ See ibid [13].

¹⁰⁸ See ibid [14].

evidence. Whealy JA, with whom Buddin and Harrison JJ agreed, observed:

“More often than not, in a criminal trial, tendency evidence is placed before the jury as evidence tending to prove the guilt of the accused. However, evidence may be offered simply to show a tendency to act in a particular way, not necessarily in a criminal manner. Indeed, it is not necessary that the tendency to commit a particular crime or, for that matter, to commit a crime at all. Section 97 applies to both civil and criminal proceedings. It represents a fresh start in relation to the issues involved in the categories of evidence known historically as propensity evidence and similar fact evidence. To assess whether evidence is capable of being admitted as tendency evidence, it is first necessary to consider the issues at trial, and the likely probative force of the evidence, having regard to those issues (*Pfennig v R* (1995) 182 CLR 461).”¹⁰⁹

65 Whealy JA stated that the primary judge had “*recognised that the matter was not to be determined by applying the ‘old formula’, namely whether there was a ‘striking similarity’, but nevertheless found it useful to identify the similarities and differences*”.¹¹⁰ On the appeal, after noting the similarities,¹¹¹ which the primary judge thought were “*marked*”,¹¹² and the

¹⁰⁹ Ibid [24].

¹¹⁰ Ibid [28].

¹¹¹ Ibid. The similarities were:

- The age of the girls: MD was 16 years old; SE was fourteen;
- The timing of the offence in each case: MD in December 2007; SE in August 2006;
- The appellant was the principal at the school of both young girls;
- All the alleged offences occurred at the residence of the appellant;
- The appellant had in each case attempted some close contact with each girl on an earlier separate occasion before the occurrence of the offence;
- In both instances, the appellant gave the girls two tablets which looked like Panadol;
- Both MD and SE described falling asleep after consuming the tablets;
- Both MD and SE said that, when they woke up, the appellant was carrying out a sexual act upon them;

differences¹¹³ in the circumstances and nature of the offending identified by the primary judge, Whealy JA held:

“In my view, it was clearly open to his Honour to find, as he did, that the evidence of MD made it significantly more likely that the appellant had carried out the acts alleged by SE, as the Crown case asserted. Plainly, there will be cases (as his Honour recognised here) where the similarities are so overwhelming as to amount to what, in pre- Evidence Act days, was called ‘similar fact evidence’, that is evidence showing a ‘striking similarity’ between the acts alleged. It was open to his Honour in the present matter to conclude that the conduct described by MD was sufficiently similar to the allegation made by SE to have significant probative value in showing the relevant tendency. The tendency itself had a high level of probative force, in the sense that it could, to a significant extent, bear on the issue as to whether the alleged sexual assault, with all its particular features, had been carried out by the appellant upon the complainant. In my opinion, the first argument must fail.”¹¹⁴

Sokolowskyj v Regina

66 By contrast to the cases discussed above, *Sokolowskyj v Regina*¹¹⁵ was a case where the evidence was held not to satisfy the requirements of s 97. The appellant in *Sokolowskyj* was convicted of one count of assault with

•While the wording used was different in each case, the appellant prevailed upon each girl not to tell other people what had happened.”

¹¹² Ibid.

¹¹³ Ibid [29]. The differences were: “At the same time, the trial judge noted that there were differences. There was a difference, for example, in age between the two girls; MD had said that the appellant had not used a condom while SE said he had; the different type of sexual act the appellant was carrying out when each girl initially woke up. His Honour was alert to these differences, although in the case of the last one he noted that there was no need for identical sexual acts to be carried out in order for the evidence to be admissible as tendency evidence (see R v Smith (2008) 190 A Crim R 8 at [17]; R v Fletcher (2005) 156 A Crim R 308 at [67]).”

¹¹⁴ Ibid [30].

¹¹⁵ [2014] NSWCCA 55.

an act of indecency upon a person under the age of 10 contrary to s 61M(2) of the *Crimes Act 1900*. The Crown case was that the appellant took the complainant, aged 8 years at the time, into the parents' room at a shopping centre, pulled down pants and underwear and touched her vagina and threatened her not to tell anyone.¹¹⁶ The primary judge found that the Crown was entitled to rely upon tendency evidence, the tendency being that "*the accused had a tendency at the relevant time to have sexual urges and to act on them in public in circumstances where there was a reasonable likelihood of detection*".¹¹⁷ The primary judge held that this tendency was established by the appellant's convictions in 2000, 2001, and 2003.¹¹⁸ This evidence was by way of an agreed statement of facts which identified that the accused had variously exposed his penis in public to a 15 year old girl and masturbated in public in view of young women and other people.¹¹⁹ The Crown submitted that the tendency evidence had

¹¹⁶ Ibid [9].

¹¹⁷ Ibid [3].

¹¹⁸ Ibid.

¹¹⁹ Ibid [9]. The Agreed Facts were as follows:

"AGREED FACTS PURSUANT TO SECTION 191 EVIDENCE ACT 1995

For the purposes of these criminal proceedings, the abovenamed Accused upon the advice of his lawyer and the Crown have agreed upon the following facts pursuant to section 191 of the Evidence Act 1995 (NSW):

1. On 24 March 2000 a 15 year old girl was walking her dog along Koolang Road, Greenpoint near the Community Centre. The accused was standing near his motor vehicle having a cigarette. As the girl walked past the accused he pulled down the front of his tracksuit pants and exposed his penis to the girl.
2. On 2 May 2001 the accused was seen standing next to his motor vehicle parked about 10-15 metres away from the main entrance to the Gladesville Fitness Centre. At the time he was seen to have his fly to his trousers down and was masturbating his penis for about 30 seconds. At the time the accused was seen by a young female member of the gym and two female and one male employee.

significant probative value because if the accused had such a tendency, the evidence effectively negated the likely criticism of the circumstances alleged by the complainant on the basis that they were so unlikely or unbelievable that they should not be accepted.¹²⁰

- 67 On the appeal, one of the issues was whether this tendency evidence had significant probative value and whether that probative value would substantially outweigh any prejudicial effect the evidence might have.¹²¹ It should be noted at the outset that both parties accepted that there was no need for the acts the subject of tendency to be closely similar to those that constituted the crime charged.¹²² Hoeben CJ at CL, with whom Adams and Hall JJ agreed, observed that the Crown faced difficulties in the generality of the tendency relied on and the “*marked dissimilarity between the conduct relied upon to establish the tendency and the offence under consideration by the jury*”.¹²³ In this regard, his Honour identified that “[o]n the Crown case, key elements of the offence were a *prepubescent victim and no public exhibition*” and the assault itself was active as opposed to passive.¹²⁴ Hoeben CJ at CL held that the evidence did not satisfy the requirements of s 97(1)(b) of the Act.¹²⁵ His Honour explained:

3. On 16 September 2003 at about 6.15pm the accused was parked along a grass strip beside Townview Road, Mt Pritchard. His passenger side window was wound down. He had a sudden urge to masturbate, so he pulled down his tracksuit pants whilst still sitting in the driver's seat and started masturbating. At this time a 21 year old female who was walking her dog approached the vehicle. As she approached the vehicle the accused turned on the interior light. The female saw the accused was masturbating as she walked past the vehicle."

¹²⁰ Ibid [29].

¹²¹ Ibid [36].

¹²² Ibid.

¹²³ Ibid [40]-[41].

¹²⁴ Ibid [41].

"I have concluded that the tendency evidence in this case did not reach the standard required for it to have "significant probative value". There is a large qualitative distinction between on the one hand offences of exhibitionism, involving either public masturbation or exposure of one's genitals, and on the other, engaging in non-consensual, physical contact with the genitals of an underage complainant. In relation to the actions on which the tendency evidence was based, public display was an essential ingredient and the sexual gratification or thrill was apparently achieved by such public exposure of his genitals to women. The offence under consideration was very different. The appellant is said to have taken steps to prevent discovery by latching the change room door and by warning the complainant not to tell anyone, otherwise he would take retributive action against her family.

The flaw in the Crown case in support of the admission of the tendency evidence was that it failed to have regard to the fact that the evidence only had probative value if it increased the probability that the appellant committed the offence of indecently assaulting the complainant. In assessing the extent of the probative value of the evidence, the focus had to be on the fact in issue to which the evidence was said to logically relate. In that context, it was an error to generalise the conduct said to constitute the alleged offence in a way which removed the elements that made up the offence. In this case, the focus of the prosecution was on generalised sexual activity, which involved neither an assault nor a child. The focus of the tendency evidence should have been on the logical link to the elements of the offence charged, in this case involving both an assault and a child victim. The question was whether the evidence had "significant probative value" to prove the offence charged, i.e. indecently assaulting a young girl."¹²⁶

Consideration

68 In *Makin v Attorney-General for New South Wales*¹²⁷ Lord Herschell LC observed in relation to similar fact evidence that:

¹²⁵ Ibid [45].

¹²⁶ Ibid [43]-[44].

¹²⁷ [1894] AC 57.

“In their Lordships’ opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty ... The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.”¹²⁸

69 Although the Uniform Evidence Law represent a “*fresh start*” to the law of evidence,¹²⁹ this issue lingers. Contrary to the statement of the Victorian Court of Appeal in *Velkoski*, I do not consider that there is a line of authority in New South Wales that has abandoned a requirement of similarity in respect of tendency evidence. But to speak in terms of similarity, or at least only similarity, is to ask the wrong question.

70 Rather, for tendency evidence to be admissible:

- The evidence must therefore be relevant;¹³⁰
- The court must make an assessment that the evidence has “*significant probative value*”;¹³¹
- The evidence the subject of the assessment is evidence that a person has or had a tendency to act in a particular way or to have a particular state of mind;¹³²

¹²⁸ *Ibid* 65.

¹²⁹ *FB v R; R v FB* [2011] NSWCCA 217, [24].

¹³⁰ *Evidence Act 1995* (NSW), s 55.

¹³¹ *Evidence Act 1995* (NSW), s 97(1)(b).

¹³² *Evidence Act 1995* (NSW), s 97.

- There must then be, for the purposes of s 97, an assessment of “*the extent to which evidence could rationally affect the assessment of the probability of a fact in issue*”;¹³³ and
- In a criminal matter, the relevance is likely to be in respect of one or more of the elements of the offence charged but is not confined to that. The relevance must be to a fact in issue. The New South Wales authorities are clear that there does not have to be a similarity with the precise features of the offence charged. Simpson J made that clear in *DAO*, where her Honour stated: “*evidence of a tendency may cast light on the conduct or state of mind of a person without being evidence of conduct of the same kind*”.¹³⁴

71 The same point was made by Basten JA in *Saoud v R*.¹³⁵ Although Basten JA, with whom Fullerton and R A Hulme J agreed, did not consider it an appropriate occasion to consider the correctness of *Velkoski*, his Honour make a number of observations about tendency and coincidence evidence under the Act.¹³⁶ Relevantly, Basten JA commented:

“... ‘tendency’ evidence will usually depend upon establishing similarities in a course of conduct, even though the section does not refer (by contrast with s 98) to elements of similarity. That inference is inevitable, because that which is excluded is evidence that a person has or had a tendency to act in a particular way, or to have a particular state of mind. Evidence of conduct having that effect will almost inevitably require degrees of similarity, although

¹³³ *Evidence Act 1995* (NSW), Dictionary, Pt 1.

¹³⁴ [2011] NSWCCA 63; 81 NSWLR 568, [180].

¹³⁵ [2014] NSWCCA 136.

¹³⁶ See *ibid* [38]-[44].

the nature of the similarities will depend very much on the circumstances of the case".¹³⁷

- 72 His Honour, after considering *PWD* and *BP v R*, commented that "*where relevant and appropriate, a proper consideration of similarities will constitute an essential part of the application of s 97, as this Court has accepted on numerous occasions*".¹³⁸
- 73 As Simpson J in *DAO* observed that, after comparing *R v Barton*¹³⁹ and *PWD*, the "*divergence of facts and circumstances ... will inevitably result in different outcomes without any misapplication of principle*".¹⁴⁰
- 74 Again, it is important, when having regard both to the expression used in various cases and to the outcome to ascertain what was in issue in the matter. In *Barton* the Court found that evidence of less serious sexual conduct, adduced as tendency evidence, in respect of more serious charged conduct, failed the test in s 101(2), that is, the probative value of the evidence did not substantially outweigh its prejudicial effect.¹⁴¹ As Simpson J observed in *DAO*, although in *PWD* the tendency evidence displayed different levels of gravity, the matter had not been argued on that basis.¹⁴² Rather, the focus was on the different type of sexual conduct.¹⁴³ Simpson J expressed her view that more serious sexual

¹³⁷ *Ibid* [44].

¹³⁸ *Ibid* [48].

¹³⁹ [2004] NSWCCA 229.

¹⁴⁰ [2011] NSWCCA 63; 81 NSWLR 568, [198].

¹⁴¹ [2004] NSWCCA 229, [11]. See *DAO v R* [2011] NSWCCA 63; 81 NSWLR 568, [195].

¹⁴² [2011] NSWCCA 63; 81 NSWLR 568, [198].

¹⁴³ *Ibid*.

conduct could support allegations of less serious allegation and vice versa. Each case depended on its own facts.¹⁴⁴

75 As I have already indicated, the Court of Appeal in Victoria considered that, on current New South Wales authority, the threshold for the admissibility of evidence under s 79 was too low, suggesting that the need for a pattern of behaviour has been put aside. That is not so. However, taking *Velkoski* on its own, the Court appeared to require a similarity in the acts said to be admissible under s 97 and the acts constituting the offence(s) charged, with less regard placed on the surrounding circumstances.

76 There remains, however, in my view, a question whether *Velkoski* has been applied in Victoria on that basis. In *Rapson v The Queen*¹⁴⁵ Maxwell P, Nettle and Beach JJA stated that *Velkoski* was authority for the following propositions:

- “1. To be admissible, the other evidence [the evidence sought to be introduced as tendency evidence] must have significant probative value, which requires far more than ‘mere relevance’.
2. To satisfy that requirement, there must be sufficient similarity or commonality of features, between the other conduct [the conduct the subject of the other evidence] and the charged conduct [the conduct the subject of the charge in connection with which the tendency evidence is sought to be led], that the other evidence cogently increases the likelihood that the charged conduct occurred.
3. In deciding whether there is sufficient similarity or commonality between the features of the other conduct and the features of the charged conduct, it remains:

¹⁴⁴ Ibid [196].

¹⁴⁵ [2014] VSCA 216.

‘apposite and desirable to assess whether those features reveal ‘underlying unity’, a ‘pattern of conduct’, ‘modus operandi’, or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely. It is the degree of similarity of the operative features that gives the other evidence its relative strength’.

5. Commonality of relationship between offender and victims is a relevant factor, but will not ordinarily be sufficient to give the other evidence significant probative value. In the ‘not so uncommon situations of parent and child or teacher and pupil, some other features of similarity must be present’.
6. In such cases, commonality of relationship must be accompanied by some degree of similarity or commonality in either the nature of the sexual misconduct, or the surrounding circumstances, or a combination of both.”¹⁴⁶

77 However, the Court of Appeal recognised that an “*important corollary*” of these propositions was that “*dissimilarity in the nature of the sexual act(s) (as between the charged conduct and the other conduct) does not necessarily preclude tendency reasoning.*”¹⁴⁷ The Court endorsed the explanation in the Crown’s submissions on the appeal, which were as follows:

“This follows from the proposition that the underlying pattern can be found in either the offending or in the circumstances surrounding the offending. Of course, the more marked the dissimilarity in the sexual misconduct the greater the requirement for there to be a pattern of commonality or underlying unity elsewhere in the evidence;

Similarly variation in the surrounding circumstances in which the alleged offences are committed will not automatically disqualify the

¹⁴⁶ Ibid [16] (citations omitted).

¹⁴⁷ Ibid [17].

evidence as admissible tendency evidence. Again, it will be a question of fact and degree.”¹⁴⁸

- 78 The Court in *Rapson* observed that “*there can be no definitive prescription of the types of evidence which will satisfy the requirement of ‘sufficient similarity’*”.¹⁴⁹ The Court commented:

“Thus, there may be such similarity in the respective accounts of the alleged preparatory conduct that the other evidence would have significant probative value, notwithstanding that the sexual acts ultimately engaged in varied markedly as between one case and another. Conversely, there may be such similarity in the particular form of sexual activity engaged in with individual complainants that an absence of similarity in the surrounding circumstances would not deny the other evidence significant probative value.”¹⁵⁰

- 79 The difference between Victoria and New South Wales may well be based upon the question of the continuing relevance of the common law authorities. *Velkoski* found the common law authorities of continuing relevance for the purposes of the proper application of s 97. The last word on this in New South Wales is the decision of *Saoud* where Basten JA observed:

“First, the provisions of the *Evidence Act* have effected change to common law principles, which are no longer to be applied. It follows that, whilst there may be assistance to be derived from the common law cases with respect to the underlying principles which inform the exclusion of tendency and coincidence evidence, those cases provide limited guidance as to the circumstances in which such evidence may now be admitted.

Secondly, although there is no necessary harm in using concepts which became familiar in the common law cases, such as the fact

¹⁴⁸ See *ibid.*

¹⁴⁹ *Ibid* [18].

¹⁵⁰ *Ibid.*

that evidence reveals ‘unusual features’, ‘underlying unity’, ‘system’ or ‘pattern’, which are essentially neutral as to the level at which such features are demonstrated, 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’: Simpson J in *Fletcher* at [60], commenting on a passage from *Hoch v The Queen* [1988] HCA 50; 165 CLR 292 at 294-295.

Thirdly, reliance on such language may distract (by creating a mindset derived from common law experience) and may provide little guidance in applying the current statutory test.”¹⁵¹

Conclusion

80 The Victorian Court of Appeal in *Velkoski* identified what it perceived to be a divergence between Victorian and New South Wales authority in the interpretation and application of s 97 of the Uniform Evidence Law regarding the need for similarity in the admission of tendency evidence. I have endeavoured to identify the relevant principles in the authorities and emphasised that the question whether evidence has “*significant probative value*” will depend on the nature of the evidence, the fact in issue to which it is said to relate, and such other evidence as there is in the case. Only time will tell what the decision of *Velkoski* will be seen to stand for and what impact it will have on the uniformity of the interpretation of s 97 and the admission of tendency evidence. There are still decisions in the pipeline.

¹⁵¹ *Saoud v R* [2014] NSWCCA 136, [38]-[40].

Annexure A: Relevant Provisions of the Act

81 Part 3.1 of the *Evidence Act 1995* (NSW) relevantly provides:

“Part 3.1 Relevance

55 Relevant evidence

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

(a) the credibility of a witness, or

(b) the admissibility of other evidence, or

(c) a failure to adduce evidence.

56 Relevant evidence to be admissible

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible.”

82 Part 3.6 of the *Evidence Act 1995* (NSW) provides:

“Part 3.6 Tendency and coincidence

94 Application

(1) This Part does not apply to evidence that relates only to the credibility of a witness.

(2) This Part does not apply so far as a proceeding relates to bail or sentencing.

(3) This Part does not apply to evidence of:

(a) the character, reputation or conduct of a person, or

(b) a tendency that a person has or had, if that character, reputation, conduct or tendency is a fact in issue.

95 Use of evidence for other purposes

(1) Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose.

(2) Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.

96 Failure to act

A reference in this Part to doing an act includes a reference to failing to do that act.

97 The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note. The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98 The coincidence rule

(1) Evidence that 2 or more events occurred is not admissible 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 unless:

(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence, and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Note. One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

(2) Subsection (1) (a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note. Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

99 Requirements for notices

Notices given under section 97 or 98 are to be given in accordance with any regulations or rules of court made for the purposes of this section.

100 Court may dispense with notice requirements

(1) The court may, on the application of a party, direct that the tendency rule is not to apply to particular tendency evidence despite the party's failure to give notice under section 97.

(2) The court may, on the application of a party, direct that the coincidence rule is not to apply to particular coincidence evidence despite the party's failure to give notice under section 98.

(3) The application may be made either before or after the time by which the party would, apart from this section, be required to give, or to have given, the notice.

(4) In a civil proceeding, the party's application may be made without notice of it having been given to one or more of the other parties.

(5) The direction:

(a) is subject to such conditions (if any) as the court thinks fit, and

(b) may be given either at or before the hearing.

(6) Without limiting the court's power to impose conditions under this section, those conditions may include one or more of the following:

(a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party,

(b) a condition that the party give such notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence,

(c) a condition that the party give such notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

83 The Dictionary of the *Evidence Act*, Pt 1 relevantly provides:

“...
coincidence evidence means evidence of a kind referred to in section 98 (1) that a party seeks to have adduced for the purpose referred to in that subsection.

coincidence rule means section 98 (1).

...

probative value of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

...

tendency evidence means evidence of a kind referred to in section 97 (1) that a party seeks to have adduced for the purpose referred to in that subsection.

tendency rule means section 97 (1).

...”

84 The Evidence Regulation 2010, ss 5-6 provides:

5 Notice of tendency evidence

(1) A notice of tendency evidence must be given in accordance with the requirements of this clause.

(2) A notice of tendency evidence must state:

(a) the substance of the evidence of the kind referred to in that subsection that the party giving the notice intends to adduce, and

(b) if that evidence consists of, or includes, evidence of the conduct of a person, particulars of:

(i) the date, time, place and circumstances at or in which the conduct occurred, and

(ii) the name of each person who saw, heard or otherwise perceived the conduct, and

(iii) in a civil proceeding—the address of each person so named, so far as they are known to the notifying party.

(3) On the application of a party in a criminal proceeding, the court may make an order directing the notifying party to disclose the address of any person named in a notice of tendency evidence who saw, heard or otherwise perceived conduct or events referred to in the notice.

(4) The direction may be given on such terms as the court thinks fit.

(5) In this clause, notice of tendency evidence means a notice given under section 97 (1) (a) of the Act.

6 Notice of coincidence evidence

(1) A notice of coincidence evidence must be given in accordance with the requirements of this clause.

(2) A notice of coincidence evidence must state:

(a) the substance of the evidence of the occurrence of two or more events that the party giving the notice intends to adduce, and

(b) particulars of:

(i) the date, time, place and circumstances at or in which each of those events occurred, and

(ii) the name of each person who saw, heard or otherwise perceived each of those events, and

(iii) in a civil proceeding—the address of each person so named, so far as they are known to the notifying party.

(3) On the application of a party in a criminal proceeding, the court may make an order directing the notifying party to disclose the address of any person named in a notice of coincidence evidence

who saw, heard or otherwise perceived conduct or events referred to in the notice.

(4) The direction may be given on such terms as the court thinks fit.

(5) In this clause, notice of coincidence evidence means a notice given under section 98 (1) (a) of the Act.