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Accused damned by bad behaviour: the case for Robert Hughes' appeal

John Elder
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Damning evidence of ingrained predatory behaviour - or unfair character assassination? That's the heart of the contentious legal strategy of introducing evidence of a pattern of incidents, or "signature" bad behaviour, that has been a feature of both the recent prosecution of Robert Hughes in Australia and the Rolf Harris trial in Britain, both on child sex offences.

And it's a practice that Hughes' lawyer, Greg Walsh, will appeal all the way to the High Court. He believes most of the "tendency evidence" heard at the trial, and which ultimately proved devastating to Hughes' defence case, should never have been admitted.

This involved a number of witnesses who said they were subject to Hughes' predatory behaviour - but weren't in themselves seeking to prosecute their claims. They were called to tell their stories to establish that Hughes had a tendency to behave in a sexually inappropriate and disturbing fashion.

Greg Walsh said there were, in fact, twice as many tendency evidence witnesses as actual complainants (four). Speaking from Honolulu by phone yesterday, Walsh said that if he failed at the Court of Criminal Appeal in New South Wales, he intends to take Hughes' case to the High Court - which has a much higher threshold for admissibility of tendency evidence than the states, including Victoria and NSW, which operate under the Uniform Evidence acts.

On May 16, when he sent Hughes to jail for a minimum of six years, Judge Peter Zahra said the tendency evidence witnesses had satisfied him that Hughes' sexual malfeasance was not isolated instances, but spanned "some 20 years from 1984 to 2004".

These weren't simply character witnesses and the question of a defendant's character generally cannot be raised in a criminal trial unless the accused has raised it first - along the lines of "there's no way I could be guilty because I'm such a great citizen".

'There will be increasing numbers of miscarriages of justice because of the way tendency evidence is being applied' said lawyer Greg Walsh. *Photo: Wolter Peeters*

Under the Uniform Evidence Act (legislated by the Commonwealth in 1995, and by Victoria in 2008), tendency evidence goes to prove not simply that the accused is a bad egg, but that he or she "has or had a tendency (whether because of the person's character or otherwise) to act in a particular way".

If it's said an accused person had done a certain kind of crime several times, with a particular method and set of behaviours, then it can be argued he has a system or a signature that matches the evidence.

"If you know a person has a signature way of committing a crime, that might elevate a pathetically weak case into one that a jury will accept," says Peter J. Morrissey, a senior counsel in criminal matters and chairman of the Criminal Bar Association of Victoria.

At the Hughes trial, where the accused was facing multiple charges from multiple complainants, further supported by tendency witnesses, the signature was established when many witnesses told similar stories of Hughes exposing himself. The jury came to believe this was his signature behaviour because they'd heard it so many times from so many people. It probably became almost impossible not to believe he did it.

Rolf Harris, being prosecuted using similar strategies in Britain, kicked an own goal in admitting he had a dark side, while he steadfastly denied that he has a signature pattern of groping. But will the jury have made up its mind?

Says Morrissey: "Tendency reasoning is viewed as potentially seductive. It leads to the identification of an accused or a witness as being of bad character and likely to commit the offence. And that reasoning is unfair. The concern is it becomes a trial about character and

not the facts."
Morrissey says it becomes an open question as to whether a pattern has been identified "or is it a pattern that's artificially produced by advocates".
But Associate Professor John Anderson of the University of Newcastle Law School, and a former senior solicitor/advocate in the Office of the Director of Public Prosecutions NSW, says "the courts have said there is no necessity for the events to be strikingly similar".
It depends which court you're talking about - and what threshold test is applied to admissibility.
Under the Uniform Rule of Evidence acts (applicable in NSW, Tasmania, the ACT, NT and Victoria) a judge has to decide whether the evidence has probative value that substantially outweighs the risk of the jury being prejudiced. Probative value is the extent to which this evidence affects the probabilities of guilt or innocence. Anderson says this is a "tough ask for the judges".
Morrissey concurs. "The judge has a heavy burden because he doesn't know how the evidence will affect the jury. Will the jury be able to handle the evidence and give the person a fair trial or the witness a fair hearing?"
Associate Professor David Hamer from the University of Sydney's Law School has researched the applications tendency evidence and notes: "There is no way of resolving the risk. If you let the evidence in, it will prejudice the jury. If you exclude, you deprive the jury of evidence that gives them a honest picture of things. A balance has to be achieved."
Greg Walsh argues that the Crown throughout Australia, particularly in states subject to the Uniform Rule of Evidence, is frequently applying a "dangerously low threshold test" and admitting tendency evidence that has little genuine probative value, particularly in sex abuse cases. He cited instances where such evidence offered little more than innuendo - such as when the accused sent a complainant a birthday card - rather than demonstrating a relevant pattern of predatory behaviour.
"I have no doubt there will be increasing numbers of miscarriages of justice because of the way tendency evidence is being applied," he said. "Because juries, in my opinion, are finding tendency evidence confusing and what I think happens is they use tendency evidence to say, 'He did it'."

Melbourne defence lawyer George Balot believes that since the introduction of the evidence act in Victoria, "defence lawyers [are] frequently choosing not to challenge the admission of highly prejudicial evidence because there is a prevalent view that it is almost impossible to resist such admission into evidence".

There is a good reason why Greg Walsh hopes to reach the High Court: in 2006, in a landmark decision, the court ordered Queenslander Daniel Phillips to be retried on multiple counts of rape and sexual assault he had committed as a teenager.
Phillips' initial trial had featured multiple complainants, cross-admissibility and accumulated tendency evidence - and ended with him sent to jail for 12 years. He appealed to the Queensland Court of Appeal on the basis of evidence admissibility and lost.
But the High Court, says Hamer, "upheld the appeal because it found the tendency evidence lacked sufficient probative value … [Phillips] was released on bail and soon after raped a 16-year-old girl."
Caught red-handed, he pleaded guilty. Hamer later wrote a paper that criticised the High Court's decision for setting "a very bad precedent", for the "pernicious effect it is likely to have on sexual assault prosecutions".
As a PR exercise, muddling up Robert Hughes with Daniel Phillips is unlikely to figure in Greg Walsh's public agitations. And legally, the Hughes appeal won't have the benefit of being heard under common law, which has a much more stringent admissibility test for tendency evidence than Rule of Evidence Law. It all comes down to the weird luck that Phillips was originally tried in Queensland under common law, because the rule of evidence act hasn't been adopted there. Hughes was tried in NSW, where the act was first legislated, in 1995.
If in fact the Hughes appeal was being heard under common law – that is, under the same rules as Phillips – victory would be pretty much assured. That's because under common law tendency evidence is ruled inadmissible "if there is a rational view of the evidence consistent with innocence".
What exactly does this mean? Apparently the High Court is still working it out.
Stephen Odgers, SC, specialises in criminal appeals. He is also Adjunct Professor, faculty of

law, University of Sydney and author of Uniform Evidence Law in Victoria 2e.
He says: "It's an extraordinarily demanding threshold. This evidence had to prove guilt beyond reasonable doubt on its own even before it is let in. The High Court has spent some years qualifying that … There is still some uncertainty of what the High Court test means."
For Greg Walsh and his client, the question is still open. Says David Hamer from the University of Sydney Law School: "The question is whether the High Court of Australia would take a more open approach to admissibility under Uniform Evidence Law, or whether they'd attempt to import the more stringent approach of the common law.''
It's worth noting the High Court ran an earlier test case where a murderer was convicted on tendency evidence that was purely circumstantial. We can't tell you the man's name or what he did. It's a compelling story. It will be told again soon when he faces trial on another old murder case. Tendency evidence will no doubt play a vital role in his trial. And many people will be thankful for that.
An earlier version of this story implied that the High Court would rule on tendency evidence admissibility in a Robert Hughes appeal under the common law. In fact, it would be heard under the Uniform Rule of Evidence Law.