Criminal Justice report: Tendency and coincidence evidence and joint trials

Tendency and coincidence evidence

Where the only evidence of child sexual abuse is the complainant's evidence, it can be difficult for the jury to be satisfied beyond reasonable doubt that the alleged offence occurred. The jury is effectively considering a 'word against word' case. However, in some cases, there may be evidence available from other complainants or witnesses who allege that the accused also sexually abused them.

Evidence of other allegations – or convictions – of child sexual abuse against the accused may be admissible as:

- **Tendency evidence** ('propensity' evidence at common law): if the jury accepts the other allegations or convictions, the jury might be satisfied that they prove that the accused has a tendency or propensity to act in a particular way – for example, to be sexually attracted to young boys and to act on that attraction. The jury may then reason that this makes it more likely that the accused acted on this tendency or propensity and committed the particular offence of abusing a young boy whose complaint is the subject of the trial.

- **Coincidence evidence** ('similar fact' evidence at common law): if the jury accepts the other allegations or convictions, and they are sufficiently similar to the particular complaint that is the subject of the trial, the jury can then reason that it is improbable that the similar allegations are a coincidence or that the complainants are all lying or mistaken. This makes it more probable that the accused also committed the particular offences that are the subject of the trial.

Recommended reform

We are satisfied that the current law needs to change to facilitate more admissibility and cross-admissibility of tendency and coincidence evidence and more joint trials in child sexual abuse matters *(recommendation 44)*.

We include detailed recommendations for the test for admissibility of tendency and coincidence evidence and draft provisions to implement the recommended reforms *(recommendations 45-51)*.

We recommend a test for admissibility of tendency or coincidence evidence about the defendant in a child sexual offence prosecution that would allow tendency and coincidence evidence to be admitted in more child sexual abuse prosecutions. It would also allow more joint trials to be held where multiple complainants make allegations of child sexual abuse against the same accused.

The evidence would be admitted if it will be *relevant to an important evidentiary issue* in the trial – such as whether the alleged abuse happened, and whether it was committed by the accused. The court can exclude the evidence if admitting it is likely to result in the proceeding being unfair to the defendant and, if there is a jury, giving appropriate directions to the jury about the relevance and use of the evidence will not remove the risk of unfairness.

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Reform is still needed after the High Court's decision in *Hughes*

The High Court gave judgment in the *Hughes* appeal on 14 June 2017, as the criminal justice report was being finalised for printing. Robert Hughes, the former television star of *Hey Dad…!* was convicted by a jury in 2014 of 10 child sexual abuse offences against four victims. The prosecution relied on tendency evidence. Hughes unsuccessfully appealed his conviction to the New South Wales Court of Criminal Appeal. By a majority of four to three, the High Court rejected Hughes' appeal.

Although the High Court's decision in the *Hughes* appeal addresses the meaning of the current test for admissibility under the Uniform Evidence Acts and resolves the difference between New South Wales and Victoria in how it is applied, we do not consider that it has resolved all the difficulties we have identified with the test for admissibility of tendency and coincidence evidence.

It is not clear to us that the majority's statement of the test for admissibility provides sufficient guidance for trial and appellate courts, and it does not address the admissibility of tendency and coincidence evidence to the extent we consider is necessary in order to prevent injustice to victims of child sexual abuse.

Although the majority recognises that an adult engaging in sexual conduct with underage girls is unusual, the majority seems to require something more than this to allow evidence of other allegations to be admissible as tendency evidence. In *Hughes*, the majority found something more in the fact that the various occasions of abuse involved a substantial risk of discovery by others.

If there had been additional allegations of abuse the subject of charges or tendency evidence that did *not* involve this substantial risk of discovery, it is not clear that the majority's test would have allowed them to be admitted as tendency evidence or dealt with in the joint trial.

Why there should be greater admissibility

Courts have assumed for many years that tendency and coincidence evidence is likely to be highly prejudicial – that is, very unfair – to the accused. They have assumed that juries will place too much weight on this evidence, assuming that the accused must be guilty because he is the sort of person who commits offences.

A number of considerations have led us to conclude that these assumptions are wrong and that the current law in relation to tendency and coincidence evidence and joint trials must change to facilitate more admissibility of evidence and more joint trials in child sexual abuse matters.

Unwarranted acquittals should be reduced

There are unwarranted acquittals in prosecutions for child sexual abuse offences. This is demonstrated through particular examples we examined in our public hearings and more generally by the low conviction rate for child sexual abuse offences. Unless one believes that many complainants of child sexual abuse are lying or mistaken about the abuse they allege, it is clear that many perpetrators of child sexual abuse are being acquitted.

Tendency and coincidence evidence is highly relevant

Tendency and coincidence evidence will often be highly relevant in relation to child sexual abuse offences, and we consider that the probative value of tendency and coincidence evidence generally has been understated, particularly in child sexual abuse prosecutions where the complainant has identified the accused as the perpetrator of the abuse.

The courts and law reform bodies have relied on psychological studies to argue that evidence of 'bad character', such as the commission of another offence, is not a good predictor of future behaviour. However, tendency and coincidence evidence does not rely on *prediction* of behaviour.

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It relies on proven or alleged behaviour of the accused that has or is alleged to have already occurred.

If a complainant accuses a particular person of sexually abusing them as a child, this accusation is more likely to be true if the accused has sexually abused other children. *How much* more likely it is to be true, and *how much* it can assist a jury to reach its verdict in the particular trial, may depend on how similar the different allegations are.

The results of the Jury Reasoning Research we published in 2016 show that, where there was no tendency evidence, the juries thought that the accused probably did commit the charged offences. However, they could not be satisfied of the accused's guilt beyond reasonable doubt, so they acquitted. Where the tendency evidence was admitted, the juries were able to be satisfied of the accused's guilt beyond reasonable doubt on these offences, so they convicted. This is how tendency or coincidence evidence is intended to be used by juries and should be used by juries.

Tendency and coincidence evidence has only a minimal risk of unfair prejudice to the accused

The risk of unfair prejudice to the accused arising from tendency and coincidence evidence has been overstated and that, in fact, this risk is minimal. In particular:

- comparatively low conviction rates for child sexual abuse offences show that juries are not overwhelmed by emotion or horror at the nature of the offences charged
- data shows that juries regularly return different verdicts on different counts, suggesting that they can distinguish between different charges and the strength of the relevant evidence
- jurisdictions have moved away from the most restrictive common law approach – including Uniform Evidence Act jurisdictions, Western Australia and England and Wales – and their various approaches which allow more tendency and coincidence evidence are not suggested to be causing wrongful convictions
- the findings of the Jury Reasoning Research we published in 2016 found no evidence of unfair prejudice.

Excluding tendency and coincidence evidence is unfair to the complainant

Particularly where abuse is alleged in an institutional context by a number of complainants, the jury does not get a true picture of what is alleged and the trial can be quite misleading if each complainant's allegations are heard by a separate jury rather than in a joint trial.

Excluding tendency and coincidence evidence also unfairly risks undermining the credibility and reliability of the evidence given by some complainants in the eyes of the jury. If tendency or coincidence evidence is excluded, or a joint trial is not allowed, complainants may be restricted in the evidence they can give because their evidence would reveal that the accused has prior convictions or is facing other allegations. This may make the process of giving evidence more difficult for them and they may look uncertain or even dishonest in front of the jury.