CITATION:	*The Queen v Ferguson* [2019] NTSC 81
PARTIES:	THE QUEEN
	v
	FERGUSON, Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21757719
DELIVERED EX TEMPORE:	5 February 2019
HEARING DATE:	1 February 2019
JUDGMENT OF:	Hiley J

CATCHWORDS:

EVIDENCE – Coincidence evidence – Criminal proceedings – whether the evidence has significant probative value to be admitted under s 98 of the *Evidence (National Uniform Legislation) Act* (NT) – evidence of prior incident not admissible.

EVIDENCE – Tendency evidence – Criminal proceedings – whether the evidence has significant probative value to be admitted under s 97 of the *Evidence (National Uniform Legislation) Act* (NT) – evidence of prior incident not admissible.

Evidence (National Uniform Legislation) Act 2011 (NT) ss 97, 98, 101

HML v The Queen [2008] HCA 16; 235 CLR 334; *Hughes v The Queen* [2017] HCA 20; 264 A Crim R 225; *Hoch v The Queen* [1988] HCA 50; 165 CLR 292; *IMM v The Queen* [2016] HCA 14; 257 CLR 300; *Martin v Osborne* [1936] HCA 23; 55 CLR 367; *McPhillamy v The Queen* [2018] HCA

52; 92 ALJR 1045; *MWL v The Queen* [2016] NTCCA 6; *R v Bauer* [2018] HCA 40; 92 ALJR 846, referred to.

M Saks and B Spellman, *The Psychological Foundations of Evidence Law* (NYU Press, 2016).

REPRESENTATION:

Counsel:

Crown:	T Grealy
Accused:	T Berkley

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	Darwin Family Law

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Ferguson [2019] NTSC 81
No. 21757719

BETWEEN:

THE QUEEN

AND:

MICHAEL FERGUSON

CORAM: HILEY J

EX TEMPORE REASONS FOR JUDGMENT

(Delivered 5 February 2019)

Introduction

[1] Counsel for the Crown served tendency and coincidence notices dated 14 January 2019 (the **notices**).

[2] Each of them foreshadows an intention to adduce evidence about an incident on 5 July 2007 that resulted in Mr Ferguson pleading guilty and being found guilty of two offences at the Melbourne Magistrates Court on 1 November 2008. The Crown seeks to adduce this evidence as tendency evidence under s 97(1) of the *Evidence (National Uniform Legislation) Act* (the **Act**) and or as coincidence evidence under s 98(1) of the Act.

Crown Case

[3] Counsel for the Crown outlined the relevant parts of the Crown case in paragraphs 2 to 6 of her written outline of submissions (**Crown's Submissions**). This includes allegations that the accused became irrationally angered when he heard the ATV being driven near his property, got into his Toyota Land cruiser and chased after the ATV yelling at the complainants, used the Land cruiser to ram into the ATV several times while all six complainants were inside, chased after RP and drove into him with his Land cruiser, threatened KAK with a knife and punched two of the complainants to the face. He also used abusive and threatening language including: "I'm going to kill you all …" and "if you don't come out, I'll take [KAK] back to the house and start hurting her."

The evidence sought to be led

[4] The offences to which Mr Ferguson pleaded guilty in 2007 were "Criminal Damage (Intent Damage / Destroy)" and "Throw Missile Injure / Danger / Damage Property". No conviction was entered in relation to either offence. The Court made a Community Based Order for a period of 12 months, placed Ferguson under supervision of a community corrections officer, required him to perform 10 hours of unpaid community work over three months, to undergo assessment for programs to reduce reoffending and participate in such programs as

directed by a community corrections officer, and to "enrol in and undertake a six-week program … to reduce road rage."

[5] The conduct relied upon in the notices is that at approximately 5:15 pm on 5 July 2007:

> On the Westgate Freeway, Melbourne, the accused drove up to the victim who was in another vehicle and threw a beer bottle at the victim's vehicle. The accused also verbally abused the victim and prevented the victim from changing lanes by blocking the victim's vehicle with his own. When the victim pulled over, the accused also did so and got out. While the victim was pulling back into the traffic, the accused threw a hammer at the victim's moving vehicle, striking the windscreen. The hammer was lodged in the windscreen.

[6] The notices stated that the circumstances in which the conduct occurred were that:

> The accused was driving behind the victim and was frustrated by the victim's style of driving.

[7] With the notices the Crown provided certified extracts from the Magistrates Court of Victoria, a Summary of Charges prepared by Victoria Police, a statement by the victim dated 5 July 2007, and four photographs which show damage to the windscreen of the vehicle and the hammer.

[8] In her written outline of submissions counsel for the Crown identified the substance of the evidence the Crown seeks to adduce:

> 7. The evidence sought to be relied on by the Crown on a tendency and / or coincidence basis relates to a prior finding

of guilt against the accused. The accused was found guilty in Melbourne, Victoria on 25 January 2008 of criminal damage, throwing a missile and recklessly endangering serious injury.

8. The substance of the evidence sought to be admitted is that on 5 July 2007 at 5.15pm the accused was driving a vehicle on the Westgate Freeway and became enraged at DB (**victim**) who was in a vehicle driving ahead of him. The accused threw an empty beer bottle at the victim's vehicle (who was unknown to the accused), then drove his car up to the victim's window to verbally abuse him. The victim weaved out of the lanes to try to get away but was blocked by the accused. The accused yelled "**pull over and I'll fucking smash you**" and "**yeah, pull over and I'll fucking kill you**". The victim pulled over and called 000. The accused stopped as well and got out of his vehicle. The victim started to drive off and the accused threw a hammer through the front windscreen of the victim's vehicle. The head of the hammer was lodged in the windscreen, but the victim continued to drive off.

9. If the evidence is admitted the Crown will tender a certificate of conviction (as proof of the finding of guilt) and will call DB to give evidence (an application will be made to do that by videolink from Melbourne). There are also four photographs of the damage which it is proposed will be tendered through DB. This is a matter where there is no transcript available of the plea proceedings and no copy of the agreed facts available on the Court file.

10. The Crown submits that, were this evidence to be admitted, it would rationally affect the probability of the above facts in issue to a significant extent and that it is clear that the probative value of the evidence is high.

[9] I interrupt to note that contrary to the last part of paragraph 7 of the Crown's Submissions, Mr Ferguson was not found guilty of recklessly endangering serious injury. The police summary refers to this and several other possible offences, including unlawful assault, but it seems that they were not proceeded with. When police asked him why he did the criminal damage he said "I have no excuse. Stupidity."

When they asked him why he threw the hammer he said: "I was frightened because I didn't know what his next move was going to be. It was basically a reaction."

Facts in issue, and tendency and coincidence sought to be proved

[10] The relevant facts in issue are set out in [13] of the Crown Outline. They include the accused's irrational state of mind, chasing after the victims in his motor-vehicle, using his motor vehicle as a weapon, getting out of his vehicle and continuing to act in an aggressive manner, verbally threatening the victims, using a knife as a weapon and punching two of the victims.

[11] The Crown contended that the evidence about the 2007 incident proves both a tendency to act in a particular way, namely to:

(a) irrationally overreact to perceived issues;

(b) confront people who are unknown to him;

(c) use verbal abuse in confrontations with others;

(d) use a vehicle in confrontations with others; and

(e) use weapons in confrontations with others

and a tendency to have a particular state of mind, namely:

(a) a willingness to act on irrational overreactions to perceived issues;

(b) a willingness to confront people previously unknown to him; and

(c) a willingness to use a vehicle and other items as weapons.

[12] The Crown also seeks to adduce the same evidence to prove on a coincidence basis that the accused engaged in the conduct alleged.

[13] Further the Crown submits that the evidence is relevant to rebutting any explanations consistent with innocence that might be proffered for any conduct which is admitted by the accused (for example if a defence is raised).

Relevant legal principles

[14] Assuming the evidence is relevant and that appropriate notice has been given, the admissibility of evidence as tendency and coincidence evidence is controlled by ss 97(1)(b) and 98(1)(b) respectively. Each of those provisions require that:

> *the court thinks* that evidence will, whether 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.*

[15] Section 101(2) imposes further restrictions on such evidence being adduced by the prosecution. It provides that such evidence

> cannot be used against the defendant unless the probative value of the evidence *substantially outweighs* any prejudicial effect it may have on the defendant.

[16] These provisions, particularly the requirement in s 97(1)(b) that the evidence have significant probative value, have been the subject of much judicial consideration both in the High Court (in *IMM*,[1] *Hughes*,[2] *Bauer*[3] and *McPhillamy*[4]) and by Courts of Criminal Appeal including the NTCCA in *MWL*.[5] In particular, the High Court discussed the scheme of these parts of the *Evidence Act* in *Hughes*, particularly at [13] – [18] and [39] – [42].

[17] At [41] in *Hughes* the plurality (Kiefel CJ, Bell, Keane and Edelman JJ) said:

> The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters. The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters. By seeing that there are two matters involved it is easier to appreciate the dangers in focusing on single labels such as "underlying unity", "pattern of conduct" or "modus operandi". In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged.[6]
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> (Underlining added by me)

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1 *IMM v The Queen* (2016) 257 CLR 300.

2 *Hughes v The Queen* (2017) 264 A Crim R 225 (***Hughes***).

3 *R v Bauer* (2018) 92 ALJR 846 (***Bauer***).

4 *McPhillamy v The Queen* (2018) 92 ALJR 1045 (***McPhillamy***).

5 *MWL v The Queen* [2016] NTCCA 6 (***MWL***)

6 *Hughes* at [41].

[18] See too Gageler J at [70] – [71]:

> … it is necessary to be clear about the problem to which the tendency rule is directed. The problem arises from the cognitive process necessarily involved in using tendency evidence to assess the probability of the existence of a fact in issue. The cognitive process is that mapped out in the statement of the tendency rule itself. Tendency evidence – be it of character or reputation or of conduct other than an occasion in issue in a proceeding – is evidence that is used to prove to the tribunal of fact that a person has or had a tendency to act in a particular way or to have a particular state of mind. The tendency so proved to the tribunal of fact is then used by the tribunal of fact to predict or (to adopt terminology which describes the process of reasoning employed more accurately) to "postdict"[7] the action or state of mind of the person on the occasion or occasions in issue in the proceeding. Applied to evidence of past conduct, tendency reasoning is no more sophisticated than: he did it before; he has a propensity to do this sort of thing; the likelihood is that he did it again on the occasion in issue.
>
> Tendency reasoning, as courts have long recognised, is not deductive logic. It is a form of inferential or inductive reasoning. What it involves is "admeasuring the probability or improbability of the fact ... in issue ... given the fact or facts sought to be adduced in evidence"[8].
>
> (underlining mine)

[19] The Crown referred to the statement of DB of 5 July 2007 and asserted similarities between the circumstances referred to in that statement and those alleged in the present matter, by reference to each of the five acts set out by me in [11] (a) to (e) above.

[20] In short I do not consider that the proposed evidence has "significant probative value." Assuming, as I must, that a jury would accept the

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7 M Saks and B Spellman, *The Psychological Foundations of Evidence Law* (NYU Press, 2016) at 151.

8 *Martin v Osborne* (1936) 55 CLR 367 at 385,quoted in *Hoch v The Queen* (1988) 165 CLR 292 at 294.

evidence contained in DB's statement, I do not think that the evidence, even coupled with the evidence to be adduced at trial, shows a tendency to act in the ways alleged.

[21] At best, the evidence would show that on two occasions, more than 10 years apart, Mr Ferguson has lost his temper when annoyed by the conduct of someone else, and when driving a motor vehicle has acted in an aggressive and threatening manner towards the person or persons whose conduct annoyed him. These are two separate and distinct events. They are not capable of supporting proof of a tendency.[9]

[22] Even if (contrary to my opinion), and to the extent that, any of those acts was capable of proving the tendency of a relevant fact in the current matter, I do not consider that such tendency makes "more likely the relevant facts making up the charged offence(s)" let alone "strongly supports the proof of a fact that makes up the offence charged."

[23] Further, the type of offending involved in the present matter is substantially different to the kinds of conduct in cases where tendency evidence may readily satisfy the necessary tests, frequently cases involving sexual offending.

[24] In *Bauer* (at [51]) the High Court pointed out that the latter kind of evidence will often have very high probative value where it is

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9 cf the 1st limb in [41] of *Hughes*.

> evidence which results from ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity presents itself to do so again, he or she will seek to gratify his or her sexual attraction to that other person by engaging in sexual acts of various kinds with that person.

[25] The Court then quoted what Hayne J and others said in *HML v The Queen*,[10] at [109]:

> Generally speaking … there usually will be no reasonable view of other sexual conduct which would constitute an offence by the accused against the complainant, even if it is an isolated incident and temporally remote, which would do other than support an inference that the accused is guilty of the offence being tried.

[26] See too *Hughes*, where the plurality referred to an adult's sexual interest in young children as being a particular state of mind, proof of which may have the capacity to have significant probative value on the trial of a sexual offence against a young child.[11] In *MWL*, the NTCCA said that evidence of an adult's sexual interest in a child simpliciter should be treated as tendency evidence.[12]

[27] Even in some cases involving sexual offending against children, the tendency evidence may not satisfy the requirement of significant probative value. An example of that was in *McPhillamy* where there was a gap of some 10 years between the relevant conduct, different victims, and different circumstances. The features of the alleged

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10 (2008) 235 CLR 334.

11 *Hughes* at [31].

12 *MWL* at [71].

tendency conduct with the different victims some 10 years earlier "were not sufficiently linked to the alleged offending with the complainant." Further, Edelman J pointed out that the tendency alleged was expressed at a high level of generality and thus made it difficult to satisfy the 2nd limb in [41] of *Hughes*, namely that the tendency makes more likely the facts making up the charged offence.

[28] There is a big difference between a person who engages in serious sexual offending, particularly against a single complainant who was a child, and a person who might on two occasions some 10 years apart get annoyed with another person and use his motor-vehicle to threaten and attack that other person.

[29] I agree with counsel for the accused that the tendencies or coincidences sought to be proved are very general in nature. The facts involved in the 2007 incident and those in the 2017 conduct are so different as to not allow an inference of a tendency to act in the ways alleged, or to have the states of mind alleged.

[30] The allegations of "irrational overreactions" to "perceived issues", confronting people who are unknown to him, and using verbal abuse in confrontation with others, are so general as to be of no probative value, particularly in the circumstances where the relevant conduct only occurred twice in that space of more than 10 years. Indeed none of these are actions that are particularly unusual or unexpected in normal

everyday life.[13] Nor is the fact that the accused used a vehicle when he was confronting one or more other people who were in another vehicle so unusual as to demonstrate a tendency to act in that way, or even if it was, to be of significant probative value. Similarly, the use of an item such as a hammer or knife which he just happened to have in his vehicle at the time of being annoyed.

[31] Further, the 2007 incident was a single act of road rage by the accused against another road user with whom he got angry, presumably because of the other driver's manner of driving on a public street. The December 2017 conduct was significantly different in numerous respects. The accused only got into his motor-vehicle when he decided to chase the people who he had thought were trespassers upon his private property and then embarked upon various kinds of threatening and aggressive conduct towards those people and the vehicle in which they had been travelling.

[32] I have similar concerns about the use of the 2007 evidence for coincidence purposes. There is no, or at best very little, relevant similarity between the facts and circumstances involved in the two incidents. I do not consider that evidence of the 2007 conduct would have significant probative value as coincidence evidence.

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13 Compare for example sexual conduct by an adult with a child.

[33] Accordingly, I do not consider that the evidence of the 2007 incident will, either by itself or having regard to other evidence to be adduced, have significant probative value for either purposes.

[34] Counsel also contended that the tendency and or coincidence evidence would also rebut any innocent explanation which might be given for the accused's conduct or any defence raised. I have some difficulty in seeing how this would be so.

S 101(2)

[35] In light of the above conclusions it is unnecessary for me to spend much time considering the application of s 101(2). In relation to s 101(2) the plurality in *Hughes* said, at [17]:

> The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. The jury may fail to allow that a person who has a tendency to have a particular state of mind, or to act in a particular way, may not have had that state of mind, or may not have acted in that way, on the occasion in issue. Or the jury may underestimate the number of persons who share the tendency to have that state of mind or to act in that way. In either case the tendency evidence may be given disproportionate weight. In addition to the risks arising from tendency reasoning, there is the risk that the assessment of whether the prosecution has discharged its onus may be clouded by the jury's emotional response to the tendency evidence. And prejudice may be occasioned by requiring an accused to answer a raft of uncharged conduct stretching back, perhaps, over many years.

[36] It is difficult to assess the likely prejudicial effect of the evidence. On the one hand some members of the jury might reason that he is a man of bad character and has always been so and therefore must have

engaged in this threatening and aggressive conduct in December 2017. On the other hand the jury should be expected to follow and apply appropriate directions about the use of such evidence. The last of the examples set out in the passage above is relevant to part of the discussion during the hearing of this voir dire concerning the difficulties that might be faced by the accused if he wished to challenge DB's evidence about the 2007 incident. I consider that the adducing of that evidence may have some prejudicial effect on the accused.

[37] Not only have I concluded that evidence of the 2007 incident would not have "significant probative value", I consider that it is unlikely to have any probative value. In other words it would not be of probative value that "substantially outweighs any prejudicial effect it may have on the defendant."

[38] In conclusion, evidence of the 2007 incident is not admissible either as tendency evidence or coincidence evidence.
