Admissibility of propensity evidence in criminal proceedings

Stubley v Western Australia [2011] HCA 7; (2011) 85 ALJR 435
Roach v The Queen [2011] HCA 12; (2011) 85 ALJR 558

These two recent High Court decisions dealt with the admissibility of propensity evidence in criminal proceedings. Although they were on appeal from Queensland and Western Australia respectively, these cases may provide some guidance regarding concepts familiar under the *Evidence Act 1995* (NSW).

Stubley v Western Australia

The decision in *Stubley v Western Australia* [2011] HCA 7 concerned the admissibility of evidence of uncharged acts of sexual misconduct under the *Evidence Act 1906* (WA). Section 31A of the Act provides that '[p]ropensity evidence or relationship evidence' is admissible if it would have 'significant probative value' and, in light of that probative value, 'fair-minded people would think that the public interest in adducing all relevant evidence of guilt [had] priority over the risk of an unfair trial.'

The case involved allegations of sexual activity without consent against a psychiatrist by two former patients. The offences were alleged to have occurred in the appellant's consulting rooms during psychotherapy appointments. The evidence at issue in the appeal was given by two other former patients of the appellant and the appellant's former receptionist, who each stated that they had had sexual relations with the appellant in his consulting rooms. At the conclusion of the hearing of the High Court appeal in October 2010, orders were made setting aside the conviction and directing a new trial. The court's reasons were published in March 2011.

The question on the appeal was whether the evidence of the non-complainant witnesses had 'significant probative value' in a context in which the appellant admitted to having sexual relations with the complainants but contended that they were consensual. The majority judgment of Gummow, Crennan, Kiefel and Bell JJ stated that the evidence of the non-complainants was capable of proving that the appellant had a tendency to engage in sexual relations with his patients during consultations, and could have affected the assessment of the complainants' evidence on that issue.[1] However, 'evidence of sexual misconduct not charged in the indictment committed against other women led in order to prove an issue that was not live in the trial' would not outweigh the risk to a fair trial.[2] The evidence 'could not rationally affect' the assessment of the remaining issues: (1) whether the complainants did not consent to sexual contact charged in the indictment;[3] (2) the plausibility of the reasons the complainants did not make earlier complaints;[4] and (3) whether the appellant had an honest and reasonable but mistaken belief that either complainant had consented to the sexual activity.[5]

For these reasons, the majority held that the evidence of the non-complainants 'did not have significant probative value', and thus 'should not have been admitted into evidence at the appellant's trial.'[6] The Court set aside the convictions and ordered a new trial, noting that the appellant's age and poor health would be matters for the Director of Public Prosecutions to take into account in the exercise of his discretion.[7]

Heydon J dissented on the basis that 'the occurrence of the acts of sexual intimacy remained a live issue' in the case.[8] Heydon J stated that 'an allegation that a psychiatrist was engaging in sexual intercourse with a female patient suffering from a mental disturbance which it was his duty to treat would seem so serious and inherently unlikely as to be startling, outlandish and far-fetched to the point of being bizarre'.[9] In contrast, 'a prosecution supported by the evidence of three other women giving similar testimony about the tendency of the accused to engage in acts of sexual intimacy with patients during consultations would be a prosecution backed up by evidence of so high a degree of probative value that the public interest had priority over the risk of an unfair trial.'[10] For this reason, Heydon J would have allowed the similar fact evidence.[11]

Roach v The Queen

The decision in *Roach v The Queen* [2011] HCA 12 considered the relationship between two sections of the *Evidence Act 1977* (Q) and the common law rule in *Pfennig v The Queen* (1995) 182 CLR 461. Section 132B of the Act provides for the admissibility of '[r]elevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed'. Section 130 states that nothing in the Act 'derogates from the power of the court in criminal proceedings to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit the evidence'. The High Court in *Pfennig* imposed a stringent rule that only if there is no rational view of the evidence consistent with the innocence of the accused can a trial judge

safely conclude that the probative force of propensity evidence outweighs its prejudicial effect.[12]

The case concerned a charge of assault occasioning bodily harm in circumstances where there had been previous assaults in the course of the relationship between the appellant and the complainant. Evidence of these previous assaults was admitted pursuant to s 132B and not excluded under any discretion preserved by s 130. On appeal to the Queensland Court of Appeal and the High Court, the principal issue was whether the trial judge should have applied the rule in *Pfennig*. Both courts dismissed the appeal.

As to whether *Pfennig* affects the application of s 132B, the joint judgment of French CJ, Hayne, Crennan, and Kiefel JJ emphasised that the provision should be read on its terms and understood in the context of its introduction into the Act. Their Honours held that '[r]elevance is the only requirement stated for admissibility' and that '[i]t may be assumed that that legislative choice was made with knowledge of the decision in *Pfennig*, which had been made some two years earlier and which effected an important change.' [13] In a separate judgment, Heydon J agreed that the clear language of s 132B had abolished the common law rule.[14]

On the question of whether *Pfennig* should be imported into s 130, the joint judgment stated that although 'the concern in *Pfennig* was as to the highly prejudicial effect that similar fact evidence of propensity may have for an accused' and 'the rule in *Pfennig* addresses that problem … it does so in a way quite different from the exercise of a discretion.'[15] French CJ, Hayne, Crennan, and Kiefel JJ stated that '[i]f the rule applied, it would not be possible for a trial judge to test for unfairness in a manner consistent with that discretion' since '[t]he rule operates in such a way that there would be no room for the exercise of any discretion'.[16] Heydon J agreed that the 'criterion of admissibility' represented by the rule in *Pfennig* could not be 'incorporated into s 130 to regulate its operation as a 'discretion''.[17]

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Endnotes

1. [2011] HCA 7 at [64].
2. Ibid at [65].
3. Ibid at [74].
4. Ibid at [80].
5. Ibid at [83].
6. Ibid at [84].
7. Ibid at [85]-[86].
8. Ibid at [141].
9. Ibid at [143].
10. Ibid.
11. Ibid.
12. (1995) 182 CLR 461 at 483 per Mason CJ, Deane and Dawson JJ.
13. [2011] HCA 12 at [31].
14. Ibid at [56]-[57].
15. Ibid at [34].
16. Ibid at [37].
17. Ibid at [63].