

OPP LEGAL TRAINING



R v Velkoski [2014] VSCA 121 and
Tendency evidence under s.97 in
multiple complainant cases
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Introduction

‘As Hodgson JA said in *BP v R*, ‘it is unusual for a parent or grandparent to do acts of the kind described by each witness’. We would therefore be inclined to hold that evidence that a person had **committed sexual offences against a child, stepchild or grandchild has significant probative value as evidence of a tendency to offend against other children in the family.** But in the circumstances of this case, it is not necessary to go so far.’
See DR v The Queen [2011] VSCA 440 at [88]

A statement by Nettle JA in *RHB* [2011] VSCA 295 that **it is a remarkable thing for a man to commit sexual acts against his female lineal descendants** has been applied by prosecutors and trial judges to support the proposition that commonality of relationship is sufficient or nearly sufficient to support tendency reasoning.



Velkoski has killed this approach: something more than commonality of relationship is required.



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Main Velkoski Principles

Commonality of Relationship Insufficient

- Perhaps one of the most significant propositions clarified in *Velkoski* is that commonality of relationship between offender and victim alone will not ordinarily be sufficient to support tendency reasoning. In the 'not so uncommon situations of parent and child or teacher and pupil', some other feature of similarity must be present. See [168]
- Commonality of relationship between offender and victim is a relevant factor.

See [166]-[168]



Main Velkoski Principles

Must be closely similar

- For the tendency to have ‘significant probative value’ there must be a tendency to engage in conduct which is ‘closely similar’

See [3] at [120]

- This assessment will be informed or guided by whether those features reveal ‘distinctiveness’, ‘underlying unity’, a ‘pattern of conduct’, or ‘modus operandi’. These are different (though overlapping) ways of giving expression to ‘significant probative value’. It is certainly not necessary that the evidence reveal ‘striking similarities’

See [3], [109]-[110], [169], [171]





Main Velkoski Principles

Sexual Misconduct and / or Surrounding Circumstances

- Where is that close similarity to be found if not in the commonality of relationship or setting?
- Some degree of similarity or commonality is required in either the nature of the sexual misconduct or in the surrounding circumstances or in a combination of both.

See [110], [113], [122], 163], [166], [184];
Consistent with Nettle JA at [71] PG v The Queen approved Velkoski [100]





Identifying Underlying Unity or Pattern by Reference to Three Considerations

Commonality of setting, offender/victim relationship, victim features:

- Commonality of relationship between offender and victims (teacher / pupil; father / children; carer /child; therapist / patients; medical / patients)
- Commonality of setting (school, boarding house, institution, family domestic setting, therapist's rooms)
- Commonality of abuse of authority
- Commonality of abuse of trust
- Commonality of sex and/or ages of victims
- Temporal connection





Identifying Underlying Unity or Pattern by Reference to Three Considerations

Surrounding circumstances and manner in which A takes advantage of victim:

- Method used
- Presence or absence of others
- Brazen or secretive
- Grooming
- Inducements
- Rewards
- Threats
- Specific or immediate location
- Time of day
- Props
- Isolated or repetitive abuse
- Duration of abusive relationship
- Number of complainants (the fewer the number the greater degree of similarity is required)
- Violence / Non violence



Identifying Underlying Unity or Pattern by Reference to Three Considerations

Particularised and immediate sexual activity

- Particulars of sexual abuse
- Touching / fondling / molesting / massaging (over clothes, under clothes)
- Oral sex upon victims
- Oral sex upon offender
- Digital penetration
- Penile–vaginal / anal penetration
- Identify if reasons for more grave activity or progressive activity



Identifying Underlying Unity or Pattern by Reference to Three Considerations

Commonality of setting, offender/victim
relationship, victim features

Particularised and immediate sexual
activity

Surrounding circumstances and manner in which
A takes advantage of victim





Identifying Underlying Unity or Pattern by Reference to Three Considerations

Dissimilarities not incompatible with tendency reasoning

- Dissimilarity in the nature of the sexual misconduct does not necessarily preclude tendency reasoning.
- Similarly variation in the surrounding circumstances in which the alleged offences are committed will not automatically disqualify the evidence as admissible tendency evidence. Again, it will be a question of fact and degree.





Example one

There were allegations by **four** students at a private school of sexual offences by **A**, a music teacher and later a principal. The sexual misconduct alleged took different forms, including rubbing the thighs of one complainant while playing the piano, touching another while lying with him on a bed, fully clothed, and, with another complainant, mutual fellatio.





Example one

Case and result:

Held: admissible in NSW. [R v PWD \(2010\) 205 A Crim R 75; \[2010\] NSWCCA 209](#) at [87] – [88]. Evidence that **A** was a person who was sexually attracted to young male students who were "vulnerable" and acted upon that predilection in various ways and at different times had significant probative value in proving that **A** acted in the way alleged in respect of each particular complainant. That is so despite the very different sexual activity involved and despite there being little else in the nature of pattern or unity.

Comment

Unlikely to have been admissible under *Velkosksi* in Victoria.



Example two

A was arraigned on 38 counts alleging sexual offences against five different male complainants, during different periods ranging from 1980 until 2003. The Crown alleged that each of the complainants, with the exception of one, had been boys who had been befriended by **A** while he was the proprietor of a cinema. Some of the offences were said to have been committed in the projection booth of the theatre where some of the complainants worked, while others were said to have taken place at **A**'s unit, in his swimming pool and en route to the unit in **A**'s car. The offending involved very different and varied acts: sexual intercourse, mutual masturbation, fondling, posing for photographs and watching pornographic films.



Example two

Case and result:

Doyle v The Queen [2014] NSWCCA 4. Trial Judge's ruled that the Crown could rely upon the evidence of each complainant as tendency evidence, thereby making all of the counts cross-admissible. On appeal **A** did not elect to challenge the ruling.

Comment

Would not have been admissible in Victoria see *Velkosksi* at [152]



Example three

X(18), attended a barbeque at **A's** home in January 2007. She got drunk and went to bed. Awoke sometime during the night to discover **A** was lying on top of her having penile/vaginal intercourse. **X's** friend was asleep on a mattress on the floor.

Y(28), attended a party at **A's** home in May 2007. She decided to go to sleep soon after 3:00 am, drunk. She woke to find **A's** hand inside her underpants, rubbing her vagina. Her hand was also taken and placed on **A's** penis. Another male was sleeping nearby.

Z(20), also attended the party at the **A's** home in May 2007. She went and slept on the bottom bunk whilst drunk. She awoke to find **A** stroking her hair and kissing her face, and touching her breast between her outer clothing and her underwear. **A** then grabbed her hand and placed it on his penis. Other people in the house at time of offence.



Example three

Case & Result

Admissible in NSW. See *Ford* (2009) 273 ALR 286. Evidence revealed a *modus operandi* that to sexually assault young women who: (1) had stayed over at the **A**'s house after attending a party there, (2) had consumed a significant amount of alcohol, (3) were asleep, and (4) where there was a risk of **A**'s offending being discovered by others. The *modus operandi* was capable in itself of being sufficiently probative of the offending in issue despite differences in *the various sexual activities*.

Comment

Would likely be admissible in Victoria. Result and reasoning approved of in *GBF* [2010] VSCA 135 at [27], [36], [45] and *Velkoski* at [83]-[84].



Example four

A was charged with 16 counts of sexual assault involving various complainants (including **X** (daughter), **Y** (grand-daughter) and **Z** (grand-daughter)), between 1956 and 2006 when they were aged between four and seven years.

Some of the sexual activity in relation to each was substantially similar, in that **A** would place his hand inside their panties and penetrate or massage their vaginas.

A would often assault them in their beds at night; **A** would warn them not to tell anyone or he would go to gaol; **A** told some complainants to keep a look out for people coming; **A** would encourage some complainants to sit on his legs enabling him to penetrate/massage their vaginas; **A** would commit sexual assaults on them when others were present.



Example four

Case and result

Admissible in NSW. [BP v The Queen \[2010\] NSWCCA 303](#), Hodgson JA (Price J and Fullerton J agreeing) Held at [112] that:

- ‘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 A having an unusual sexual interest in his daughter and granddaughters and having a tendency to give effect to that interest in assaulting them.’ Para [112].
- ‘The nature of the alleged offending was similar, the complainants were a daughter and granddaughters of the accused and of similar ages when the offending commenced, **and there were other features such that the evidence as a whole did suggest a pattern of conduct.**’ Para [114] (emphasis added).



Example four

Comment:

- Would likely have been admissible in Victoria because of a combination of these above factors especially the conclusion reached in para [114].
- But the second point relied upon in *BP* at para [112] concerning commonality of relationship would not be sufficient or nearly sufficient under *Velkoski* (whereas in NSW it is at least much weightier and past Victorian judgments suggested that it might be sufficient – see *DR*).



Example five

A indecently assaulted his two daughters **X** and **Y** in the late '70s and '80s (pleaded guilty). Charged with indecently assaulting his 9 year-old grand-daughter **Z** in 2003 (pleaded not guilty) when those children were young at the time (**X** was six and 12 years' of age; **Y** was five years' of age; and **Z** was 10 years' of age). Each offence occurred in the same family home while the victim was in the applicant's care. Each offence was committed at a time when there were other adults present in the house.

The offending included forcing his hand into the genital area of the three children but in the case of **X** this touching included touching her on the vagina with his penis and also touching her breasts. In the case of **Y** he also licked her vagina.



Example five

Case and result

Admissible: *RHB v The Queen* [2011] VSCA 295

Comment

- Offending done in a particular way, albeit perhaps that it was not particularly striking;
- RHB cited in *Velkoski* at [108]-[110] without disapproval. The court said the significance of *RHB* lies in Nettle JA's analysis of the combination of the unusual and distinctive features associated with a tendency to be attracted to the applicant's young female descendants, and his having acted upon that attraction in similar ways, and in similar circumstances
- Contrast with *CEG v The Queen*, [2012] VSCA 55



Example six

A stood trial in relation to 16 charges of Indecent Act. The charges were alleged to have been committed against three children under 10 whilst they were being cared for at a child day care centre operated by **A**'s wife. Seven charges involved **A** asking **X** and **Y** to touch his penis and exposing himself/placing the complainant's hand on his penis. The remaining charges involved various acts of inappropriate touching of the complainants (grabbing **Z**'s penis; touching **Y**'s vagina bottom & humping her from behind).



Example six

Case and result

Velkoski [2014] VSCA 121

The charges involving **A** exposing his penis and having complainants touch his penis were held to be cross admissible. Balance not.

Comment:

The outcome it is explained by:

- The commonality of the relationship and setting not by itself being sufficient to support tendency reasoning;
- The absence of other sufficient common features in the surrounding circumstances which revealed a pattern or unity between the offending;
- In those circumstances the differences in the nature of the charged sexual activity was a matter of real importance.



Velkoski and Tendency to have state of mind (paragraphs [22], [173(b)] [233])

What was the conflation problem in Velkoski?

- The conflation vice in the *Velkoski* Notice and in the directions to the jury was highlighted by the Court.
- The phrase **‘and that the accused was willing to act on that sexual interest by engaging in sexual acts with the complainants’** was conclusionary. That willingness or preparedness assumed the guilt of the accused.





Velkoski and Tendency to have state of mind (paragraphs [22], [173(b)] [233])

What was the conflation problem in Velkoski? (cont)

- The jury should have been directed that if they had concluded that ‘the accused had a sexual interest in young children attending the day-care centre run by his wife’ (from an act other than the charged under consideration) this permitted them to consider whether this rendered more probable that he committed the charges.
- Instead they were effectively (and wrongly) directed that ‘if the accused had a sexual interest in young children attending the day-care centre run by his wife’ then it effectively followed that ‘**the accused was willing to act on that sexual interest by engaging in sexual acts with the complainants**’. Therein lies the conflation and circular reasoning.



Velkoski and Tendency to have state of mind (paragraphs [22], [173(b)] [233])

Does Velkoski prohibit reliance upon a tendency to have a particular state of mind?

- The Court in *Velkoski* **is not** saying that it is always impermissible to rely upon a tendency to have a particular state of mind.
- Most of the time it is unnecessary (and apt to confuse the jury) for the prosecution to rely upon a tendency to have a particular state of mind in addition to a tendency to act in a particular way.



Velkoski and Tendency to have state of mind (paragraphs [22], [173(b)] [233])

Does Velkoski prohibit reliance upon a tendency to have a particular state of mind? (cont)

- If a tendency to have a particular state of mind is established by an act (other than the charged act under consideration) then it is axiomatic that that same act also establishes that the accused has a tendency to act in particular way.
- Thus, because the prosecution will have established, through this act, that the accused has a tendency to act in particular way, there is nothing to be gained by additionally alleging that the act establishes a tendency to have a particular state of mind.



Velkoski and Tendency to have state of mind (paragraphs [22], [173(b)] [233])

Does Velkoski prohibit reliance upon a tendency to have a particular state of mind? (cont)

- Further, a tendency to act in a particular way will usually be more probative than a tendency to have a particular state of mind.
- There will be cases where the tendency to have a particular state of mind (i.e. usually a sexual interest) is established by an act which has a distinctly different qualitative character from the charged acts (non-criminal behaviour or sexualised behaviour not involving credit of complainant) but is nevertheless significantly probative only by reason of the sexual interest it reveals.





Velkoski and Tendency to have state of mind (paragraphs [22], [173(b)] [233])

Does Velkoski prohibit reliance upon a tendency to have a particular state of mind? (cont)

- For example; the act of possessing child pornography of very young pre-pubescent children. The accused is charged with molesting very young pre-pubescent children (with some similarities to the abuse depicted in the pornography).
- In this example it might be appropriate to rely upon his tendency to have a particular state of mind (i.e. sexual interest).





Velkoski and Tendency to have state of mind (paragraphs [22], [173(b)] [233])

If the prosecution relies upon a tendency to have a particular state of mind in addition to a tendency to act in particular way, what directions are required?

- In *Velkoski* the jury was given the impugned direction.
- Further they were directed that the prosecution relied upon the tendency of the applicant's sexual interest, without first being told that tendency reasoning depended upon (1) acceptance by them of an act or acts other than the particularised charged act under consideration and (2) acceptance by them that this act or those acts (so established) revealed a pattern or similarities which made it more likely that the charge under consideration was committed.





Velkoski and Tendency to have state of mind (paragraphs [22], [173(b)] [233])

If the prosecution relies upon a tendency to have a particular state of mind in addition to a tendency to act in particular way, what directions are required? (cont.)

- Thus, because the trial judge failed to instruct the jury of this process of reasoning the directions given were too general (which compounded the bootstrap reasoning problem).
- That is, the instruction carried the risk of encouraging a reasoning process based upon an assumption that the accused had this sexual interest, without any need for there to be an accepted evidential foundation establishing that sexual interest.



Velkoski and Tendency to have state of mind (paragraphs [22], [173(b)] [233])

Does Velkoski mean that only previous convictions – or uncharged acts – are admissible as tendency evidence?

- The Court in *Velkoski* is also not saying that only previous convictions or uncharged acts are admissible as tendency evidence. Other charged acts can be relied upon.
- The Court's references to *previous* acts is no more than a reference to acts **on occasions other than the subject of the charge then under consideration**. Thus, those other occasions from which the tendency might be established might be uncharged acts or other charged acts. See [22].