Multiple Allegations of Child Sexual Abuse and the application of the Uniform Evidence Act 1995 – Tendency Evidence – S97 (1) (a)

The following paper regarding the application of S 97 (1) (a) of the Evidence Act (1995) NSW[1] was prepared in 2007. Accordingly, the case law and literature referred to is now dated. Nonetheless, the principles involved, and the difficulty of having tendency evidence adduced in child sexual assault matters remain relevant - as evidenced by a 2015 NSW case. The author of this paper was a complainant against the focal case study of this paper – catholic priest James Patrick Fletcher - and was a potential tendency evidence witness in that matter.

In 2015, Catholic Marist Brother John Denis Maguire was convicted of sexually assaulting an 11 year old male boarding student at St Joseph's College Hunters Hill. (Sydney) The offences against the student were said to have occurred while Maguire was a "dorm master" during the period 1978 – 1985. Maguire's conviction occurred at the ninth and final trial involving nine separate boys – all of whom had made complaints to NSW Police of sexual abuse by Maguire in very similar circumstances. None of the juries at the trials were aware of the existence of any other victims and none were called as "tendency" witnesses at the trial owing to defence counsel successfully arguing that each complainant should be heard at separate trials.[2]

James Patrick Fletcher – Conviction and Appeals.

James Patrick Fletcher, a Catholic Priest based in the Hunter Valley of NSW, was charged in May 2003 with one count of indecent assault and eight counts of sexual abuse of a child aged between 10 and 16 years. (The child will hereafter be referred to as DF.) Further details of the charges are included elsewhere in this report. Prior to the District Court trial, which commenced in November 2004, the

[1] The NSW Evidence Act mirrors that adopted in other states and can equally be referred to as "*The Uniform Evidence Act*".
[2] Paul Bibby, Sydney Morning Herald. 27 February 2015.

Prosecutor, in compliance with S97(1)(a) of the *Evidence Act 1995* (NSW) notified the defence legal team of his intention to introduce "Tendency" evidence at the trial.[3]

According to the later NSW Court of Criminal Appeal judgement, the notice gave elaborate detail of the tendency to be established. The tendency evidence was said to rely on nine witness statements including that of DF, and six other witnesses including the author of this paper and went to issues of "grooming", inappropriate sexual behaviour with young boys and inappropriate sexual contact. Simpson, J noted that '… that notices were accompanied by an extremely comprehensive series of schedules … identifying plainly the manner in which the Director of Public Prosecutions (DPP) proposed to use the evidence. Put shortly, the statements documented what could reasonably be termed a pattern of behaviour attributable to James Patrick Fletcher'.[4]

The tendency evidence notice provided by the DPP to the defence detailed the tendency to be established as "… the tendency of the accused to behave in the following ways …

1. Meet the family of the subject (child) through his (Fletcher) position in the Church;
2. Involve the family of the subject child in the activities of the Church;
3. Develop a special relationship with the family of the child;
4. Develop a special relationship with the children in the family;
5. Develop a relationship over and above the other children with the subject child;
6. Introduce the child to sexual material encouraging sexual activity and normalising it and encouraging secrecy;
7. Inappropriate sexual behaviour towards the subject child.'[5]

[3] *Evidence Act 1995* (NSW) S97(1)(a)
[4] Simpson, J. NSW CCA R v Fletcher [2005] 338 at paras 12, 13 and 14
[5] DPP Notice of Tendency Evidence as reproduced in NSW CCA R v Fletcher [2005] 338 para 24

The defence legal team subsequently notified the DPP of their intention to object to the introduction of this evidence, with the result that a Voir Dire was held (in accordance with S189 of the *Evidence Act 1995* (NSW)) immediately prior to the trial and before the jury was empanelled.

Section 189 "The Voir Dire" relevantly reads:

'(1) If the determination of a question whether:

(a) evidence should be admitted (whether in the exercise of a discretion or not) or

(b) evidence can be used against a person or

(c) … depends on the Court finding that a particular fact exists, the question whether that fact exists is, for the purposes of this section, a preliminary question'.

S189(4) 'If there is a jury, the *jury is not to be present* at a hearing to decide any other preliminary question unless the Court so orders'.

S189(5) 'Without limiting the matters that the Court may take into account in deciding whether to make such an order, it is to take into account:

(a) whether the evidence to be adduced in the course of that hearing is *likely to be prejudicial to the defendant* …

(b) … (c) …'[6]

On 24 November 2004, the Trial Judge – Armitage, G – ruled that much of the evidence proposed to be adduced by the Prosecutor was to be excluded because it lacked significant probative value. Other evidence was excluded on the basis that while it had significant probative value, such value did not outweigh the risk of prejudice to the accused. His Honour did not elaborate on which evidence fell into which category, nor did he give any reasoning for his decision.[7]

[6] *Evidence Act 1995* (NSW)
[7] District Court Trial Transcript R v Fletcher [2004] DCN1283KR-L provided by DPP December 2006, 21-22

Ultimately, two paragraphs of one witness statement (that of GG) was allowed in as tendency evidence with respect of all nine charges on the indictment.

At the close of evidence and during his directions to the Jury, Armitage, G said with respect of the tendency evidence given by GG:

> "The evidence given by GG … is evidence that has been put before you by the Crown in order to indicate that the accused does have a certain tendency. It is necessary that I give you very specific directions about that. … the accused is not charged with any offences against GG … the only use you may make of the evidence is to consider whether it demonstrates a tendency on the part of the accused to act in the way that he is accused of acting towards DF … In considering whether the evidence of GG shows any tendency on the part of the accused to do what DF alleges you must take account of the different circumstances in which the acts alleged by GG and the acts alleged by DF are said to have happened …"

Following 18 hours of deliberation, the Jury returned a guilty verdict on all nine charges in the indictment on 6 December 2004. A sentencing hearing, during which Mr Ian Barker QC for Fletcher lodged an appeal against the conviction, was held in Gosford District Court on 29 March 2005.

On 11 April 2005, Armitage, G handed down a sentence totalling 10 years (7.5 years non-parole) describing the offences as "… a gross and inexcusable breach of trust".[8]

Grounds for the appeal against conviction were:

[8] Newcastle Morning Herald, 12 April 2005

'1. … Trial Judge erred in law by admitting … evidence of GG … not tendency evidence within the meaning of the *Evidence Act 1995* (NSW) and it did not have significant probative value … the probative value did not outweigh its prejudicial effect … there was no ground for its admission.

2. If the evidence of GG was admissible … the Trial Judge erred in law in directing the Jury that the evidence could be used as showing a tendency to commit each and all of the offences charged in the indictment'.[9]

Relevantly, S6 (1) of the *Criminal Appeal Act 1912* (NSW) says:

'The Court … shall allow the appeal if it is of the opinion that the *verdict of the Jury* should be set aside on the ground that it is *unreasonable or cannot be supported having regard to the evidence* or that the judgement of the Court of trial should be set aside on the ground of the *wrong decision of any question of law*, or that on any other ground whatsoever *there was a miscarriage of justice*". (Emphasis added.)[10]

Following a submission hearing in May 2005, the judgement of the NSW Court of Criminal Appeal was handed down on 23 September 2005. The majority decision of Simpson, J and McLellan, J was that the tendency evidence had been properly admitted and that the appeal be dismissed. In broad terms, the reasoning for the decision included:

- S97 of the Evidence Act is not rigid and cannot provide definitive scientific answers as to admissibility. Decisions to admit or reject evidence '… must … be based upon the information and material available to the Judge at the time'.[11]

[9] NSW CAA R v Fletcher [2005] 338 para 31
[10] *Criminal Appeal Act 1912* (NSW) S6(1)
[11] Simpson, J. NSW CCA R v Fletcher [2005] 338 at para 35

- The material available "at the time" included much more information (including the additional witness statements) than that which was ultimately presented to the Jury.
- Defence Counsel focused the appeal around the "divergences and distinctions" between the charges and the evidence given by GG. This '… deflected attention from the similarities and pattern of behaviour asserted' by the Prosecutor (as detailed above).[12]
- Had the Trial Judge better grasped the intention of the proposed tendency evidence – that is to establish a '… pattern of behaviour which was potentially probative of the criminal acts alleged', rather than establishing that the accused had a tendency to engage in sexual intercourse with young boys – '… it may well be that more of the proffered evidence would have been admitted'.[13]
- The strength of the prosecution tendency evidence (specifically the statement and subsequent testimony of GG) lay in its capacity to lend support to the evidence of DF. It did this by reason, of '… striking similarity, underlying unity, system or pattern'. Referring to R v Milton 2004 NSW CCA 195, Simpson suggests that the detail of the sexual activity is not important – rather it is the commonality of attempts to establish a relationship with boys which is conducive to sexual activity.[14]

Rothman, J dissenting, argued that the convictions should be overturned and that the case should be returned to the District Court for retrial. His Honour took this view on the basis that:

- There was an insufficient pattern of underlying unity, there was little if any striking similarity and there were no unusual features between the complaints of DF and the tendency evidence of GG.
- There was nothing in the evidence of GG that went beyond showing that the accused had a '… propensity to commit acts of this kind'. His Honour referred to "propensity" in the sense that would rule it inadmissible as articulated by the High Court in Pfenning. In summary, the High Court

[12] Simpson, J. NSW CCA R v Fletcher [2005] 338 at paras 38 and 43
[13] Simpson, J. NSW CCA R v Fletcher [2005] 338 at para 52
[14] Simpson, J. NSW CCA R v Fletcher [2005] 338 at para 64

held that propensity evidence is not admissible if it only shows that the accused is the 'type of person' likely to commit such a crime or that he/she has a "disposition to commit a crime". In short, there must be a degree of probative value which '… clearly transcends the prejudicial effect of mere criminality or propensity'.[15]

The appellant (James Patrick Fletcher) died in custody in the John Moroney Correctional Centre (Windsor NSW) on 7 January 2006. Six weeks prior to his death, Fletcher had indicated his intention to seek leave to appeal to the High Court. His will stipulated that his Executor, Father Desmond Stanley Harrigan, should pursue the case in the event of his death. The matter came before the High Court (Justices Gleeson, CJ and Hayne, J) on 10 March 2006, with Mr Barker QC seeking recognition from the Court (by way of an order) of Father Harrigan as the personal representative of the appellant. In this regard, Justice Gleeson stated: 'Well, that is an issue perhaps we can come to after we have considered what you have to say about the merits'.[16]

Mr Barker then went on to discuss the tendency evidence given by GG in the context of the evidence of the complainant DF. It was Mr Barker's contention that the evidence of GG could 'not have had significant probative value' as required by S97 of the *Evidence Act 1912* (NSW), nor could its probative value have possibly outweighed 'the prejudicial effect it undoubtedly had on the applicant' as stated in S101(2) of the *Evidence Act 1912* (NSW). Mr Barker's basis for this contention was that the evidence of GG related to sexual acts of a 'different sort against a different person in different circumstances'. These were dissimilarities he said which simply made the tendency evidence of GG inadmissible.[17]

[15] Rothman, J. R v Fletcher [2005] CCA 338 para 165
[16] Gleeson, CJ. High Court of Australia Transcripts. Fletcher v The Queen [2006] HCA Transcript 127, 10 March 2006, 2
[17] Barker, I. High Court of Australia Transcripts. Fletcher v The Queen [2006] HCA Transcript 127, 10 March 2006, 3

For their part, Justices Gleeson and Hayne questioned Mr Barker as to: the evidence given at trial by the appellant (the appellant did not give evidence but had taken part in a videotaped interview with Police); the defence case of the trial (that none of the alleged events happened); the reasons for the appellants assertion that the majority in the NSW CCA judgement had erred; the form that the evidence of GG took – particularly with respect of the context of his allegations; the manner by which the appellant was said to have secured sexual acts with both the complainant and the tendency witness; the relationship between the appellant and both the complainant and the tendency witness – Gleeson, CJ – '… was part of the context in which questions of similarity were to be considered, was it not?; and finally the relationship between the relevance of the evidence of the assessment of its value under the *Evidence Act 1912* (NSW).[18]

After indicating that the Court did not need to hear from the respondent, Justice Gleeson stated:

> 'We are of the view that the evidence in question was correctly admitted in the particular circumstances of this case and we are not persuaded that there has been any miscarriage of justice … The order that we make is that the application is dismissed'.[19]

[18] Justices Gleeson and Hayne. High Court of Australia Transcripts. Fletcher v The Queen [2006] HCA Transcript 127, 10 March 2006, 4-7
[19] Gleeson, CJ. High Court of Australia Transcripts. Fletcher v The Queen [2006] HCA Transcript 127, 10 March 2006, 6-7