Other misconduct evidence in appeals against conviction in child sexual abuse trials

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Child sexual abuse (CSA) trials may feature evidence relating to behaviours beyond the charges laid. This ‘other misconduct’ evidence can add context to the offending and may relate to more than one complaint or victim, indicating a pattern of thinking and behaviour, or that multiple incidents are unlikely to be coincidental. Directions to the jury regarding such evidence are complex and error prone, giving grounds for appeal. This study investigates successful appeals against conviction based on other misconduct evidence by analysing child and adult sexual assault cases listed in the Supreme Court of Appeal (Victoria) between 2004 and 2014. The appeals were equally successful in child and adult cases and equally likely to result in retrial. Specific errors in directions were identified and explanations are presented. Jury directions continue to be a source of error in sexual assault trials and can result in further attrition from the criminal justice system.

Key words: appeal; child sexual abuse; context evidence; other misconduct evidence; tendency evidence; uncharged acts.

The dynamics of child sexual abuse (CSA) create difficulties for the criminal justice system that are less apparent in the prosecution of other criminal offences (Quadara, 2014). In Australia, for example, studies on attrition in sexual assault cases have revealed that, of the cases reported to police, approximately two thirds are not authorised for prosecution (Fitzgerald, 2006; Wundersitz, 2003). In fact, only 15% of allegations of CSA made to police result in criminal charges – and even if the alleged offender is convicted, this does not mean that attrition cannot occur; if he or she makes a successful appeal against conviction, there are a number of potential outcomes. One important outcome is the conviction being set aside and an order for a new trial being made. However, an order for retrial does not mean that the matter will

proceed further; it is then left to the director of public prosecutions to evaluate and decide whether or not the matter should be taken to a new trial (Donnelly, Johns, & Poletti, 2011).

In Australia, few studies have examined the rate of successful appeals against conviction and their outcomes (Cashmore, Taylor, Shackel, & Parkinson, 2016; Donnelly et al., 2011; Hazlitt, Poletti, & Donnelly, 2004). For example, one study examined data from the state of New South Wales (NSW) between 2001 and 2007 (Donnelly et al., 2011), finding that appeals against conviction for CSA were significantly more likely to be successful (50.3%) than appeals for all offences (35.5%). Appeals against conviction for CSA were also more successful than appeals in adult sexual assault cases (32.4%), which suggests that the complexity of CSA trials

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leads to potentially more errors than in adult sexual assault trials.

Successful appeals were found to lead to a number of different outcomes (Donnelly et al., 2011). A new trial was significantly more likely to be ordered in CSA cases (57.3% compared to 22.7% in adult sexual assault cases). There was also a high acquittal rate for the CSA appeals (42.7% compared to 27.3% in adult sexual assault cases). A retrial was significantly less likely to proceed in CSA cases (58.1%) compared to adult sexual assault cases (22.7%), and the reconviction rate following a new trial was just 30.2% in CSA cases compared to 63.6% in adult sexual assault cases. These results suggest that despite the order of a retrial following a successful appeal against a CSA conviction in NSW, it was often the case that no further action was taken. Even where the matter did proceed to retrial, the low reconviction rate illustrates that post-conviction attrition is an important feature in CSA trials in NSW.

One feature that results in many of the appeals against conviction for CSA is errors made in the provision of directions to the jury (Cashmore et al., 2016; Donnelly et al., 2011; VLRC, 2009). Donnelly et al. (2011) found that misdirection of the jury forms the grounds for appeal in 53.8% of all the cases they surveyed. Directions on delay are the most common form of misdirection, accounting for 46.4% of the cases. In the state of Victoria, it was found that in 52.0% of the 486 appeals against conviction for any offence, misdirection of the jury is cited as part of the grounds for appeal. However, the number of successful appeals does not indicate which grounds were successful. Further, no research has been published which reports the percentage of CSA appeals that rely on grounds relating to misdirection in Victoria. However, as part of the report for the Royal Commission into Institutional Responses to Child Sexual Abuse (Cashmore et al., 2016), Shackel (2016) provides data on the grounds relating to CSA appeals in NSW for the period 2005 to 2013, finding that 62.2% of

appeals relate to the misdirection of the jury. Directions on delay were found to be overrepresented, while errors in direction on context and relationship evidence and on tendency and coincidence evidence also account for a substantial proportion of the grounds, although the numbers are small (Shackel, 2016).

The current study focuses on misdirection relating to ‘other misconduct evidence’, which refers to evidence of conduct that goes beyond the actions with which the accused is charged (Hamer, 2016). Details of other misconduct may demonstrate the true and realistic context of the offending and show that it did not occur in isolation (Hamer, 2008). ‘Grooming’ behaviours, for example, include the establishment of power and control, and are aimed at preparing the victim for sexual abuse (Craven, Brown, & Gilchrist, 2006). Grooming can include the offering of friendship and special treats, and the subtle removal of the victim from a protective environment (Sas & Cunningham, 1995). However, introducing such evidence into a trial is difficult, as there is a danger that the jury may decide the guilt of the accused based on conduct that occurred on other occasions, rather than on the evidence presented in relation to the charged conduct (Williams, Anderson, Marychurch, & Roy, 2015). The judge must therefore direct the jury that they must not decide the guilt of the accused based on prejudice arising from evidence of other misconduct (Judicial College of Victoria, 2016). The current study focuses on two types of direction relating to other misconduct evidence: context and relationship evidence, and tendency and coincidence evidence.

Context and relationship evidence

In CSA trials, there may be evidence of other alleged misconduct that while not sexual in nature can be used to provide the context in which the offending occurred. Such misconduct may not necessarily attract criminal charges (that is, it consists of ‘uncharged

acts') but can be used to demonstrate the type of relationship orchestrated by the accused and may thus be used as circumstantial evidence of the accused's guilt (Judicial College of Victoria, 2016). Providing information about the relationship and the context in which the offending took place is important, as jurors lack understanding of the complex dynamics of CSA and often have misconceptions about how victims of sexual abuse should react (Shackel, 2009). Evidence of other misconduct can be admitted into evidence for different purposes, but in each case clear directions from the judge are necessary to ensure that the jury understands how the other misconduct can, and cannot, be used in evaluating the evidence. For example, the judge must direct the jury that they can use the evidence only for the purpose indicated, and cannot rely on it to prove a criminal propensity (VLRC, 2009).

Tendency and coincidence evidence

An additional layer of complexity may arise in CSA trials where the accused has committed offences against more than one complainant and a joint trial is held. A high proportion of sexual offenders commit offences against more than one victim (Cossins, 2011), and a jury should hear all the complaints together (Shead, 2014). Such evidence may indicate that the accused had a tendency to act in a particular way (Evidence Act 2008, s. 97). The court must decide whether or not the evidence is cross-admissible – that is, whether or not the other misconduct is similar in nature to that alleged by other complainants in the case – before it is admitted into evidence (Cossins, 2011).

There may be sufficient similarities between the evidence from multiple complainants to indicate the improbability of the events having occurred coincidentally with regard to the circumstances in which they took place (Evidence Act 2008, s. 98). Tendency and coincidence are examples of other misconduct evidence that may appear similar

in nature but rely on different inferential reasoning processes; for tendency evidence, the jury relies on the fact that the accused has shown a tendency to act in a particular way, whereas for coincidence evidence, the jury relies on the improbability of the events occurring in any way other than that suggested (Judicial College of Victoria, 2016). When other misconduct evidence in the form of tendency or coincidence evidence is relied upon in a trial, the judge must provide clear directions to the jury on how it can and cannot be used.

The current study

It is evident that trials involving CSA can be very complex and may create challenges for the judiciary in crafting directions that cover all aspects of the evidence. Consequently, the errors and omissions that occur when giving directions to the jury are used as the basis for many appeals against conviction in CSA trials. The aim of the current study is to further the current knowledge on appeals against conviction in Victoria and, in particular, the errors in directions to the jury that form the grounds for appeal. The appeals against conviction for sexual assault involving child and adult complainants listed in the Supreme Court of Appeal (Victoria) for the period 2004 and 2014 were examined. It was hypothesised that, consistent with NSW data, appeals against conviction for CSA cases would be found to have a higher rate of success than appeals against conviction for adult sexual assault cases. It was also hypothesised that a substantial proportion of the grounds in CSA appeals would relate to other misconduct evidence.

Method

Overview

A brief overview of the criminal appeals process in Victoria is useful. The Court of Appeal hears appeals against convictions and

sentences imposed by county and supreme courts; all appeals by defendants convicted or sentenced require leave of the Court. Defendants must file an application for leave to appeal within 28 days of the date of sentencing. The application for leave to appeal is initially heard by a single judge, who may grant leave to appeal on all grounds, grant leave to appeal on some grounds but refuse others or refuse leave to appeal. If leave is granted, the appeal is considered by three judges of the Court of Appeal. During the appeal, legal and technical discussions on the law are undertaken. In relation to an appeal against a sentence, if the appeal is dismissed, the sentence may stand as is or may be increased. If successful, the sentence may be reduced.

If an appeal against conviction is successful, the Court has a number of alternatives available. The accused may be acquitted of some charges and resentenced on the remainder. A lesser charge may be substituted for any like charge and the accused resentenced. There may be a recommendation for a retrial on all or some of the charges, with the accused resentenced or acquitted of the remainder. Finally, the Court can set aside the conviction and enter an acquittal. It is a matter for the Director of Public Prosecutions, on further consideration, as to whether a retrial results or the matter is taken no further. If an appeal against conviction is dismissed, the conviction stands.

Identification of cases and inclusion criteria

Appeal cases from jury trials that involve a sexual assault or sexual abuse matter heard in the County Court of Victoria between February 2004 and December 2014 were identified using the Australian Legal Information Institute (AustLII) database, which contains the Court of Appeal reasons for decisions from cases heard since 1998 to the present day. Every case listed between the relevant dates was downloaded from the database and examined. The 3653 cases listed include 475 involving the sexual abuse of a child (that is,

a person under the age of 18 years when the offending commenced). Of these, 204 (43%) are appeals against the sentence only and are excluded from the current analysis. Of the remaining 271 appeals against conviction (or conviction and sentence combined), 24 (9%) interlocutory appeals are excluded, as only 1 interlocutory appeal decision recommends an ultimate outcome to the trial. A further 9 cases are also excluded, as they are not appeals against conviction (2 are appeals against the refusal of an application; 1 is an application for extension of time in which to appeal; 1 is leave to abandon an appeal; 1 is an appeal against a Detention and Supervision Order; 2 are cases Unfit for Trial; 1 is an appeal against the refusal of bail; and 1 is a case of legal argument only). Therefore, 238 CSA cases and 78 adult cases were identified for analysis, making a total of 316 appeals against conviction.

A total of 634 cases were identified as involving sexual assault, 159 (25%) of which involve adult victims. Of these adult victim cases, 75 (47%) are appeals against sentence only and thus are excluded from the analysis. Of the remaining 84 cases, 6 are identified as not being appeals against conviction (4 are interlocutory appeals; 1 is an appeal against a Detention and Supervision Order; and 1 is seeking leave to appeal out of time). The remaining 78 appeals against conviction (or conviction and sentence combined) were retained for analysis.

Procedure

The data for all cases were entered into (IBM SPSS Statistics for Windows, Version 20.0) and subjected to statistical analysis. Each appeal against conviction was considered as a separate case and coded according to a number of categories. First, whether the appeal was against conviction for CSA or adult sexual assault was coded (child, adult). Next, whether the appeal was allowed or dismissed was coded (allowed, dismissed) and, if allowed, whether or not the appeal was

successful was coded (successful, unsuccessful). Each grounds for appeal relating to misdirection regarding other misconduct evidence was coded (context and relationship, cross-admissibility, propensity, tendency and coincidence, uncharged acts). These grounds were then combined into two main categories: 'total other misconduct' (context and relationship, propensity, uncharged acts) and 'total tendency and coincidence' (tendency and coincidence, cross-admissibility).

Where more than one offender was involved in a single trial and only one appeal arose from the matter, only one case was counted. Where more than one offender from a single trial appealed separately, each appeal was regarded as an individual case. For each case, data were extracted about whether or not leave was granted to appeal, whether or not the appeal was successful, and – if so – whether or not a new trial was ordered.

To extract the grounds for appeal, data for all cases were extracted from the Court of Appeal decisions. Each appeal against conviction was regarded as an individual case. These cases were read by the first author and examined for grounds relating to other misconduct evidence. These appear in several forms, including grounds on context and relationship evidence, cross-admissibility, propensity, tendency and coincidence and uncharged acts. The grounds relating specifically to misdirection regarding other misconduct evidence were identified. Any reference made by the Court of Appeal to other misconduct evidence, or the inclusion of the narrative from the original trial transcript, was noted. Comments on the direction provided by the trial judge, and details that might clarify the actual error in the direction, were identified.

Results

Figure 1 shows the number of appeals against conviction for CSA and adult sexual assault. The appeals were more likely to be granted

leave for child than adult complainants, $\chi^2(1, n = 316) = 9.48, p < .01$. However, the age of the complainant did not affect the success of the appeals; there is no significant difference in the success of the appeals between the child and adult complainants, $\chi^2(1, n = 316) = 1.72, p = .195$. Successful appeals resulted in an order for a new trial in the majority of cases. There is no difference in the number of new trials ordered for child and adult complainants, $\chi^2(1, n = 150) = 0.10, p = .820$.

Misdirection was raised as grounds for appeal in 231 of the 316 cases (73.1%). There is no difference in the number of appeals where grounds relating to misdirection were raised between child complainants (170 of 231 cases; 73.6%) and adult complainants (61 out of 78 cases; 78.2%), $z = 0.81, p = .417$.

Table 1 shows the types of misdirection raised as grounds for appeal in cases involving child and adult complainants. The first two columns show the number of times each type of misdirection was raised. Comparisons using z -tests for proportions were made between cases involving child complainants and cases involving adult complainants. For the total number of times misdirection regarding other misconduct evidence was raised, more grounds were raised in cases involving child complainants (31.9%) than in cases involving adult complainants (12.8%), $z = 3.29, p < .001$. For the total number of times misdirection regarding tendency and coincidence was raised, marginally more grounds were raised in cases involving child complainants (13.0%) than in cases involving adult complainants (5.1%), $z = 1.93, p = .054$.

The second two columns show the number of cases that were successfully appealed. Comparisons using z -tests for proportions were made between successful appeals of cases involving child complainants and adult complainants. For the total number of times misdirection regarding other misconduct evidence was raised, there is no significant difference in the number of successful appeals

Figure 1. Success of appeals against conviction for sexual assault cases involving child and adult complainants.

between child complainants (34.2%) and adult complainants (30.0%), $z = 0.26$, $p = .794$. Similarly, there is no significant difference in the total number of successful appeals based on grounds relating to misdirection regarding tendency and coincidence between child complainants (35.5%) and adult complainants (25.0%), $z = 0.41$, $p = .674$.

Next, a closer examination of the errors in the directions that gave rise to the grounds for appeal was undertaken. For successful appeals involving both child and adult complainants, three main errors were identified. First, a partial direction regarding other misconduct evidence was provided but the jury members were not warned that they could not

Table 1. Types of misdirection raised as grounds for appeal in sexual assault cases.

Misdirection	Grounds raised		Grounds successful	
	Child ($n = 238$)	Adult ($n = 78$)	Child	Adult
Context and relationship	5 (2.1%)	1 (1.3%)	0 (0.0%)	0 (0.0%)
Propensity warning	28 (11.7%)	4 (5.1%)	13 (46.4%)	2 (50.0%)
Uncharged acts	43 (18.0%)	5 (6.4%)	13 (30.2%)	1 (20.0%)
<i>Total other misconduct</i>	<i>76 (31.9%)</i>	<i>10 (12.8%)</i>	<i>26 (34.2%)</i>	<i>3 (30.0%)</i>
Cross admissibility	9 (3.8%)	1 (1.2%)	4 (44.4%)	1 (100.0%)
Tendency and coincidence	22 (9.2%)	3 (3.8%)	7 (31.8%)	0 (0.0%)
<i>Total tendency and coincidence</i>	<i>31 (13.0%)</i>	<i>4 (5.1%)</i>	<i>11 (35.5%)</i>	<i>1 (25.0%)</i>

reason that because the accused was the kind of person to have committed the other misconduct he was also the kind of person to have committed the acts as charged (42.0% of cases involving child complainants; 6.3% of cases involving adult complainants). Second, the other misconduct evidence direction was completely omitted from the judge's charge (11.5% of cases involving child complainants; 66.6% of cases involving adult complainants). Third, the directions relating to tendency and coincidence evidence were deemed insufficient (23.0% of cases involving child complainants; 33.4% of cases involving adult complainants). [Table 2](#) provides examples of the types of evidence that occasioned errors in directions.

Discussion

The current study describes the outcome of appeals against conviction in CSA and adult sexual assault trials in Victoria where errors in the provision of directions to the jury in relation to other misconduct evidence were successfully raised as grounds. Previous research has shown that jury directions regularly feature as grounds for appeal in sexual assault trials and that many such appeals are successful (Cashmore et al., 2016; Donnelly et al., 2011; Shackel, 2016; VLRC, 2009). However, little research has examined whether or not using grounds relating to jury directions is a successful strategy, and specifically the grounds raised in CSA appeals in the state of Victoria. The current study reveals that grounds relating to misdirection regarding other misconduct evidence are frequently raised, particularly in CSA appeals, and often lead to successful appeals. This finding is important, as other misconduct evidence may be particularly salient in CSA trials (Hamer, 2016) due to a lack of physical or corroborative evidence (Kelly, Lovett, & Regan, 2005). In the current study, following a successful appeal, a new trial was ordered in a high percentage of the cases involving both child and adult victims. Retrials that are

ordered due to avoidable errors should be a cause for concern for the criminal justice system.

In the current study, over half of all appeals were allowed, but those for CSA cases were significantly more likely to be allowed than those for adult sexual assault cases. Contrary to expectations, once the appeal was allowed, it was equally likely to be successful regardless of the age of the victim. Just under half of the appeals against conviction in CSA cases were successful (49.6%), while 41.0% of appeals against conviction in adult sexual assault cases were successful. This finding contrasts that of Donnelly et al. (2011), who report that the success rate for CSA case appeals (50.3%) is significantly higher than adult sexual assault case appeals (34.2%). It is difficult to make direct comparisons between the studies due to differences in legislation and data collection, but it appears that the success rate of CSA appeals is declining in NSW and that the significant difference found by Donnelly et al. (2011) may no longer reflect the current position in that state.

According to Cashmore et al. (2016), when compared to all CSA appeals, appeals against conviction in NSW have declined over the past decade, from 54.3% in 2006 to 31.4% in 2013. Furthermore, the reported success rate of 28.1% in 2013 represents a marked decrease from the rate reported by Donnelly et al. (2011). In contrast, the current study's findings suggest a steadily increasing trend towards a higher success rate of appeals against conviction in CSA cases in Victoria between 2004 and 2014. A success rate of 62.5% is observed in 2010, which is considerably higher than the rate of 31.5% in 2004. Whilst there appears to have been a declining trend in the number of appeals since 2011, the data indicates a similar overall rate of appeal and success in 2014 to that found between 2005 and 2009. The relative stability of appeals in Victoria, coupled with an apparent decline in numbers in NSW, appears to have resulted in a widening gap in appeals

Table 2. Examples of the types of evidence in which errors in directions were made relating to other misconduct evidence in CSA and adult sexual assault cases.

Case	Type of error	Evidence led
R v Fotis (2004) (child complainant)	Nil direction provided	<p>Evidence of CJF that the applicant had engaged in a course of conduct over time grabbing her tightly, holding her in his arms and telling her how much he loved her and he was attracted to her; that the applicant had on between seven and ten occasions, of which only two were the subject of a charge, put his hands down her pants and placed his fingers in her vagina; and that the applicant had on between seven and ten different occasions, of which all but one were not the subject of a charge, rubbed against her in bed when she had her back to him and such that she could feel his penis.</p> <p>Evidence of JLS that the applicant had spoken to her and CJF about sexual matters such as about her masturbating and about what kind of penis she would like to suck, that he had run around the house naked on one occasion and looked in on CJF showering on another occasion; and that CJF usually slept in the applicant's bed, often very close to him cuddling.</p> <p>Evidence of CJF's brother (SF) that he had heard the applicant speaking by telephone to another child of similar age to CJF (LMB) asking LMB whether LMB had big breasts and making other 'suggestive sexy remarks' to LMB.</p>
WFS v R (2011) (child complainant)	Nil direction provided	<p>Q.96. Is there anything else you would like to tell me at the moment about what's happened that you think might be important?</p> <p>Answer: What he said about Mum. He said that when they were in bed that she always wanted to suck his dick and that he thought that when he had sex with her it felt like jumping on a jumping castle and then he said, I'm glad you're not fat like her and he said stuff like, I wish I didn't fuck your mum because then you wouldn't have been in this, fucking born in this world. And he's said stuff like that she's got a blow up doll but I know it's not true and she's called her Ca ... which is my half-sister and the blow up doll he said, I'm sorry but he said he saw her saying to it, do you want to go on top or do you want me to go on top and then he said, she saw that he saw her licking a hole in the doll.</p>
GVV v R (2008) (child complainant)	Direction lacked propensity warning	Comp: (in part) I was underage and I can't get over it because you won't admit that it happened. Everyone else thinks I am lying.

(continued)

Table 2. (Continued)

Case	Type of error	Evidence led
Velkoski v R (2014) (child complainant)	Inadequate direction	<p>Applicant: Yeah, but C. I've said to you that things happened.</p> <p>Comp: So it did happen.</p> <p>Applicant: I have said that.</p> <p>Comp: Why do you have trouble admitting that it happened?</p> <p>Applicant: I don't. I said that to you straight away.</p> <p>Shortly after that the applicant said:</p> <p>Applicant: Can you remember what happened C? Can you remember asking me about all that? Can you remember saying 'Oh (appellant) I want you to do that?'</p> <p>Comp: No. All I can remember is you touching me and stuff and – and I just think that – but even then, even if I said 'Okay, come and fuck me,' you still shouldn't have. I was still a child. I was still... .</p> <p>Applicant: C, I mean, I don't even know whether you remember what happened. I mean, when – like you were asking me to do – to touch you. That's what you were asking of me.</p> <p>Comp: I wasn't asking you to touch me (Applicant) I was a, like – a child.</p>
		<p>A considerable number of charges referred to behaviours such as grabbing the complainant's penis while play fighting, putting his hands down her pants and underwear and touching her vagina, or putting his hands down the back of her pants and touching her bottom. He also approached her and grabbed her from behind. He turned her around so that they were facing each other. He then pressed his body against hers and 'humped' her by moving back and forth with his body. On appeal the charges were not considered to have distinctive or similar features of the kind necessary to demonstrate a tendency towards particular behaviours. The direction provided was likely to have misled the jury as to how they could legitimately reason.</p>
Paton v R (2011) (adult complainant)	Nil direction provided	<p>In the course of her cross examination the complainant made a series of allegations of past acts of violence committed by the applicant. The evidence included allegations of the applicant 'beating her up'; 'beating her every time she had a drink with him'; 'assaulting her on a weekly basis'; 'bashing her and giving her black eyes every week'. She</p>

(continued)

Table 2. (Continued)

Case	Type of error	Evidence led
R v Richardson (2009) (adult complainant)	Nil direction provided	<p>gave evidence that the applicant had ‘hit her whilst she had been holding the baby’; threatened to kill her and smashed a cheeseburger on a child’s head.</p> <p>The complainant gave evidence that the applicant had the reputation of being part of the mafia of Tasmania in Glenorchy and that she had seen a youth with a black eye who told her that the applicant had hit him with a barbell. The applicant’s friend said that he was in fear of the applicant because ‘he’s always going on about people he has hurt and the Glenorchy boys’.</p>

against conviction between the states that is worthy of further investigation.

Errors in the directions to the jury account for a considerable proportion of the successful appeals in NSW between 2001 and 2007 (53.8%; Donnelly et al., 2011), and continue to be a source of error in that state (Cashmore et al., 2016). As expected, the results of the current study suggest that a similar situation exists in Victoria, where grounds relating to misdirection account for 73.5% of all appeals against conviction. Almost one third (31.9%) of the CSA case appeals refer to errors in other misconduct evidence directions and a further 13.0% refer to tendency and coincidence directions, providing a total of just under half (44.9%) of all CSA case appeals. Appeals where adult victims are involved raised fewer grounds based on errors in other misconduct evidence directions; however, contrary to expectations, there is no difference in success rates according to age. This finding indicates that jury directions in CSA trials and adult sexual assault trials encounter similar difficulties, although the types of direction may differ.

A considerable number of appeals resulted in an order for a retrial, regardless of whether the victim was a child or an adult. A total of 89 retrials (75.4%) were ordered following successful appeals from CSA trials, and 25 retrials (78.1%) were ordered

following successful appeals from adult sexual assault trials. The percentage of retrials ordered was higher than that reported by Donnelly et al. (2011; 66.1% for CSA cases and 33.8% adult sexual assault cases), but similar to the figure reported by Cashmore et al. (2016) for CSA cases alone (76.9%). The figures represent a high proportion of retrials resulting from successful appeals against conviction in both CSA and adult sexual assault cases. This begs the question of the effectiveness of the legislative changes that were enacted over the decade in an effort to reduce the number of appeals and retrials that occurred due to avoidable error.

A close inspection of the successful appeals revealed that 37 CSA and 4 adult sexual assault cases succeeded on errors regarding other misconduct evidence (including tendency and coincidence evidence) directions, while 13 (11.0%) CSA cases and 2 (6.3%) adult cases refer to errors regarding the propensity warning. In 11 of the 13 CSA cases, the judge omitted one small – yet important – element of the other misconduct evidence direction to the jury. Specifically, the jurors were not told that even if they found that the accused had committed other misconduct, they were not to reason that he was the kind of person who may have committed the acts as charged. This misdirection occurred despite the jury being informed that

they were not to use this kind of reasoning in relation to the charged acts. Judges may have failed to provide this element of the direction for a number of reasons.

First, given the complexity of many CSA trials, it may simply have been an oversight on the part of the trial judge. However, it is also the responsibility of the prosecution and defence counsel to ensure that the court does not fall into error, yet with the exception of only one case no objections were raised in relation to the direction. It is also possible that a strategic decision was made by the defence to remain silent on the issue in order to avoid bringing the attention of the jury to the possibility of the accused having a tendency to act in a particular manner, although this was canvassed by the Court of Appeal in the review of the decision and found not to be the case.

Second, some of the evidence that was provided under the umbrella of other misconduct may have been sufficiently subtle to have not alerted the court as to the potential for propensity reasoning by the jury. For example, evidence of a conversation between the accused and the complainant, or between the complainant and the police about previous conversations with the accused, may not have overtly referred to other misconduct – but then on appeal, with the benefit of hindsight, it was found that the other misconduct evidence should have resulted in a warning to avoid propensity reasoning.

Third, it may be difficult to distinguish between evidence that requires a warning against propensity reasoning and that which does not. For example, during the course of some of the trials, evidence of other misconduct was admitted not to establish a tendency but to provide some intelligibility to the offending, and a direction was perhaps not considered necessary. Whilst agreeing in principle with the proposition that a direction is not always required, the appellate court states that where there is a possibility that the jury may view the accused as a paedophile, the risk of propensity reasoning is increased,

and a direction should thus be given. It appears, therefore, that the requirement for the warning against engaging in propensity reasoning relies not only on the type of conduct alleged, but also on how the jury might perceive the accused.

Three CSA (11.5%) and two adult victim (66.6%) appeals were successful on the grounds that there was no direction provided at all on how to deal with other misconduct evidence. This finding is surprising, given that such directions are commonplace in sexual assault trials and that the evidence of the propensity towards violence is clear in the adult cases. However, the small number of cases in which it was observed suggests that it may have simply been overlooked. Unfortunately, due to the omission, a new trial was ordered in all five appeals.

In all cases where tendency or coincidence evidence was relied upon, more than one complainant gave evidence. It is not uncommon for sexual offenders to offend against more than one victim (Goodman-Delahunty, 2009; Smallbone & Wortley, 2000), but cases that involve multiple charges in relation to multiple complainants are complex, and pose the greatest difficulty for prosecutors (Cossins, 2011). They also appear to pose some difficulty for the judiciary due to the level of detail necessary to ensure that the jury engages in sound tendency reasoning. In five of the six CSA cases, and the sole adult sexual assault case, the directions on tendency and coincidence were deemed to have been insufficient because they did not clearly identify what evidence could or could not be used by the jury to establish an underlying unity or similarity in offending to allow them to employ improbability of coincidence or tendency reasoning with confidence. However, research using mock juries indicates that the provision of directions in relation to tendency evidence are of little benefit, regardless of whether the trial involves single or multiple complainants, and no support for the assumption that joint trials lead to impermissible jury reasoning has been found

(Goodman-Delahunty, Cossins, & Marschuk, 2016). Mock jurors have also reported that they find tendency directions difficult to understand and that the directions add to their cognitive load (Goodman-Delahunty et al., 2016). Grounds raised in relation to deficiencies in directions of tendency evidence presumably rely on the assumption that juries will engage in impermissible propensity reasoning unless the underlying unity or similarity is identified, or if the dissimilarity is not made apparent (Cossins, 2011). However, an alternative explanation posits that, logically, impermissible propensity reasoning is *more* likely where there is more similarity in the evidence of multiple complainants (Cossins, 2011). This therefore raises questions about the benefit of providing directions to the jury that focus on the similarities or underlying unity of the tendency evidence, and also raises questions regarding the upholding of a grounds of appeal that perhaps had little impact on the decision-making process.

Limitations

This study has several limitations. First, only successful appeals against conviction in CSA trials were examined, and the results may not be representative of those cases that were not appealed or that were not successful in their appeal, thus limiting their generalisability. Second, as there is no consistent language or format to the reporting of appeal judgements, the task of identifying the grounds for appeal and the outcome raised some challenges. It is possible that some grounds for appeal were not clearly distinguished and reported on in this study. Third, the amount of detail provided varies between judgements, thus limiting the comparability of the cases examined. Fourth, the number of cases examined represents only a small number of all successful appeals.

Conclusion

This study has identified that, in the state of Victoria, Australia, appeals against

conviction in CSA trials and adult sexual assault trials are equally likely to be successful as unsuccessful and equally likely to result in an order for a new trial. Jury directions continue to present challenges for the judiciary, and errors in the provision of directions regularly form successful grounds for appeal. Grounds citing errors in the directions on how to deal with other misconduct evidence constitute a considerable proportion of the successful grounds. New trials that are ordered due to avoidable error remain a cause for concern for the criminal justice system and continue to attract efforts by the government to reduce their number. The success of the reforms is yet to be determined.

Ethical standards

Declaration of conflicts of interest

Susan Mills has declared no conflicts of interest. Stefanie Sharman has declared no conflicts of interest.

Ethical approval

This article does not contain any studies with human participants or animals performed by any of the authors.

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