***R v Grant* [2016] NTSC 54 (31 October 2016) – Northern Territory Supreme Court**

'Relationship evidence' – 'Tendency evidence' – 'Unlawfully causing harm' – 'Unlawfully causing serious harm'

Charge/s: Unlawfully causing serious harm or unlawfully causing harm.

Hearing: *Voir dire* hearing.

Facts: The accused was charged with the offence of unlawfully causing serious harm to his female partner, the complainant, or, in the alternative, unlawfully causing harm to the complainant. The Crown sought the admission of tendency evidence related to the following fact in issue: whether the accused applied physical violence to the complainant in the early morning of 26 January 2016 and/or caused injuries to the complainant. The tendency sought to be proved was the tendency of the accused:

(a) To act in a particular way, namely engaging in verbal abuse and physically violent behaviour towards the complainant; and/or

(b) To have a particular state of mind, namely a violent and controlling disposition towards the complainant which he sometimes acted upon when he had been consuming alcohol.

If the evidence (detailed at [5]) was not admissible as tendency evidence, the Crown sought to have it admitted as relationship evidence.

Decision and Reasoning: The rulings on the *voir dire* hearing were –

1. Evidence of incidents on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013 and 18 June 2015 were admissible in the trial as tendency evidence (see [61]-[72]).

   In order to be admitted for tendency purposes, the evidence had to satisfy the requirements in ss 97 and 101 of the *Evidence (National Uniform Legislation) Act 2011* (NT) ('ENULA'). Two questions arose in determining the admissibility of the evidence: (1) did the evidence have significant probative value? The relevant test is whether 'the features of commonality or peculiarity which are relied upon are significant enough logically to imply that because the offender committed previous acts or committed them in particular circumstances, he or she is likely to have committed the act or acts in question': *CEG v The Queen* [2012] VSCA 55 (see [30]-[60]); (2) did the probative value of that evidence substantially outweigh any prejudicial effect it may have on the accused? As per the Court, '[t]he test of a danger of unfair prejudice is not satisfied by the mere possibility of such prejudice. There must be a real risk of unfair prejudice by reason of the admission of the evidence' *R v Lisoff* [1999] NSWCCA 364.

2. Evidence of incidents on 25 May 2013, 7-8 June 2013, 12 July 2013, 10 December 2013 and 18 June 2015 were admissible as 'relationship' or 'context evidence' (see [73]-[82]).

Evidence may also be admitted for non-tendency purposes. One example of non-tendency purpose is 'relationship' or 'context' evidence that is not relied on for a tendency inference. The High Court in *HML v The Queen* is authority for the proposition that evidence of other conduct by an accused may, depending upon the circumstances, be admissible for non-tendency purposes, including the following purposes (see [75]):

(a) as affecting the plausibility of other evidence or to assess the credibility and coherence of the complainant's evidence (at [6], [155]–[156]);

(b) as essential background against which the evidence of the complainant and the accused necessarily falls to be evaluated, to show the continuing nature of the conduct and to explain the offences charged (at [425], [431]);

(c) to overcome a false impression that the event was an isolated one, that the offence happened "out of the blue", where the acts are closely and inextricably mixed up with the history of the offence (at [500], [513]);

(d) to ensure that the jury are not required to decide issues in a vacuum (at [428], [498]); and

(e) as negativing issues raised such as accident or mistake (at [430]).

Although *HML* was a case involving sexual offences, relationship evidence may also be admissible in cases involving violence, including assault-type offences (see examples at [76]).

The admissibility of relationship evidence is governed by the general test of relevance in s 55 of the ENULA and the directions and obligations contained in Part 3.11 (especially ss 135 and 137). The Crown contended that the evidence was relevant and admissible as relationship or context evidence because it was necessary to:

(a) Avoid the circumstances of the alleged offence appearing inexplicable or being misunderstood in isolation; see *Roach v The Queen* [2011] HCA 12 at [45]

(b) Negative the defence case of self-inflicted injury; *R v Quach* [2002] NSWCCA 519; (2002) 137 A Crim R 345 at [15], [22]-[45]; *Bryant v The Queen* [2011] NSWCCA 26 at [92]; *McDonald v The Queen* [2014] VSCA 80 at [28]- [29]

(c) Show the state of mind of the accused at the time of the alleged offence. *R v Atroushi* [2001] NSWCCA 406 at [33], [45], [47]; *Boney v The Queen* [2008] NSWCCA 165 at [29]

The relationship evidence here was both relevant ([79]-[80]) and not excluded (its probative value was neither outweighed by the danger of unfair prejudice to the accused nor substantially outweighed by the danger that the evidence might be unfairly prejudicial to the accused) ([81]-[82]).