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# Patterns of Sexual Behaviour: The Law of Evidence: Back to the Future in Australia and England

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**Abstract:** A recent Victorian Court of Appeal ruling<sup>1</sup> [in Australia] has sparked concerns that a clamp down on the way child abuse cases are handled could thwart convictions. The Court of Appeal justices ruled only cases that are “remarkably” similar would go before the same jury, making it harder for allegations from multiple complainants to be heard together. There are concerns that this will reduce the number of convictions for sexual offences, especially for those against children.<sup>2</sup> This article explores the approach in England and Wales, and Australia to evidence of a pattern of behaviour, focussing on when it is adduced in cases involving sexual abuse. We first consider the shared common law history of the two jurisdictions before exploring how common law and legislative changes have led to surprisingly different positions in the two countries. We conclude by suggesting a simpler and more rational approach which has started to emerge and could be adopted in both countries, and indeed should be considered in any jurisdiction.

**Keywords:** child abuse, court of appeals, sexual behaviour

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1 *Velkoski v The Queen* [2014] VSCA 121 (18 June 2014).

2 Farnsworth, S., *Tendency evidence: Concerns Court of Appeal ruling could thwart child abuse convictions* (3 October 2014). <http://www.abc.net.au/news/2014-10-03/concerns-child-sex-ruling-could-thwart-convictions/5789952> accessed on 25 February 2015.

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## Introduction

This article concerns evidence of patterns of behaviour and its use in criminal cases. A pattern of behaviour can be a legitimate basis for drawing inferences about the likelihood of behaviour in conformity with that pattern.<sup>3</sup> This reasoning relies on inductive rather than deductive logic: such evidence does not directly prove or disprove guilt; it is circumstantial evidence that tends to support guilt by means of inference but cannot, alone, prove it. Its probative value rests entirely on the validity of the inferences drawn with respect to the matters in issue, both the relevance of the inferences and their strength. Thus, for the pattern of behaviour to be relevant it must make it *more likely* that the defendant did the crime now alleged. If the pattern of behaviour does not make commission of the offence in question more likely, then it cannot be relevant. There must then be consideration of *how much* more likely it is that the defendant committed the crime in question on the basis of the pattern of behaviour evidence. Passage of time, intervening events and a lack of distinctive features in the behaviour can all weaken an inference. The combination of the inference with other evidence in the case can also strengthen or weaken it.

The drawing of such inferences from pattern of behaviour evidence is widely referred to as “tendency”<sup>4</sup> or “propensity”<sup>5</sup> reasoning, and for many years it was the “*forbidden reasoning*”.<sup>6</sup> The reason for this epithet is nicely summed up in this 1841 case:<sup>7</sup>

Place a man’s bad record before the jury and it is almost impossible for them to take an impartial view of the case brought against him. Slight evidence becomes magnified. Every defence is liable to appear suspicious. Every defendant, when all else has failed him, is entitled to stand before a jury unprejudiced by incompetent evidence and appeal to them to spare his life. It is impossible to say what they would have done had not the incompetent evidence been admitted.

The concern is that the inference may be given undue weight, or an inference may be drawn by the jury despite no party at the trial relying upon it, which risks prejudice to the defendant.

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<sup>3</sup> *Social Norms Stanford Encyclopaedia of Philosophy* (2011). <http://plato.stanford.edu/entries/social-norms> accessed on 25 February 2015.

<sup>4</sup> The term usually used in Australia.

<sup>5</sup> The term usually used in England.

<sup>6</sup> Lord Hailsham coined this phrase in the House of Lords decision in *DPP v Boardman* [1975] AC 421 at 453.

<sup>7</sup> *R v Farris* (1841) 1 QB 129, 131 cited in *Admissibility of Evidence of Prior Crimes in Murder Trials* Ind LJ Vol. 25, Iss. 1, Art. 5 (1949).

The rule excluding pattern of behaviour evidence is commonly referred to<sup>8</sup> as dating back to *R v Cole*<sup>9</sup> cited in the 1814 work *A Treatise on the Law of Evidence*<sup>10</sup> where it was stated that,<sup>11</sup>

... in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be admitted.

This was not a rule that evidence which showed prior offending could never be admitted in a trial of a later offence.<sup>12</sup> Cases of uttering a false bank note often involved evidence that the defendant knew of the falsity because he had passed false notes before.<sup>13</sup> Beyond this there were other situations where pattern of behaviour evidence was admitted under cover of not being used to show “a tendency to such practices” but, for example, to explain motives or intention,<sup>14</sup> to establish identity,<sup>15</sup> to disprove an allegation that a witness is lying,<sup>16</sup> or to rebut a defence of accident<sup>17</sup> or innocent association.<sup>18</sup> Later cases relaxed the rule against avowedly propensity/tendency evidence to the extent of allowing its admission if the pattern of behaviour was particularly unusual.<sup>19</sup> The exclusionary rule and the exceptions to it which developed are examined at length below, first in the shared history of England and Australia and then separately as the two systems diverged.

The desire to avoid prejudicing the defendant, particularly in felony cases where the defendant’s life was at stake, led to the exclusionary rule, and then

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**8** See, for example, in *R v Bond* [1906] 2 KB 389. If earlier reports (prior to 1810) are examined it is clear that courts were already of the view that allegations of misconduct not on the indictment should be excluded if not relevant directly connected to a matter in issue, for example, *R v Wylie* (1804) B & P (NR) 92, 127 ER 393.

**9** *R v Cole* (1810) unreported save in Phillips’ book which refers to the case being heard in the Michaelmas Term of 1810 “by all the Judges”.

**10** Phillips, S. M., *A Treatise on the Law of Evidence* (London: Butterworth, 1814).

**11** *R v Cole* as quoted in Tapper, C., *Cross and Tapper on Evidence*, 12th edn. (Oxford: Oxford University Press, 2010).

**12** *R. v. Clewes* (1830) 4 C & P 221, 172 ER 678.

**13** See cases listed in Phillips, S. M., *A Treatise on the Law of Evidence* (London: Butterworth, 1814) and in particular *R v Wylie* (1804) B & P (NR) 92, 127 ER 393 which refers to the 1801 case of *R v Tattershall* as having decided the point in favour of admission.

**14** *R v Oddy* (1851) 2 Den 264, 169 ER 499.

**15** *R v Thompson* [1918] AC 221.

**16** *DPP v Boardman* [1975] AC 421.

**17** *R v Geering* (1849) 18 LJ (MC) 215.

**18** *R v Ball* [1911] AC 47.

**19** *DPP v Boardman* [1975] AC 421 (UK) and *R v Perry* (1982) 150 CLR 580.

exceptions emerged and solidified into categories which enabled the rule to be circumvented. As they have hardened into principles this rule and its exceptions have served to obfuscate the real factors at play when pattern of behaviour evidence is considered for admission. Lord Griffiths recognised the issue in the House of Lords in the case of *R v H*<sup>20</sup> in 1995 in which he suggested a clearer future for this area:<sup>21</sup>

[I]n the past when jurors were often uneducated and illiterate and the penal laws were of harsh severity, when children could be transported, and men were hanged for stealing a shilling and could not be heard in their own defence, the judges began to fashion rules of evidence to protect the accused from a conviction that they feared might be based on emotion or prejudice rather than a fair evaluation of the facts of the case against him. The judges did not trust the jury to evaluate all the relevant material and evolved many restrictive rules which they deemed necessary to ensure that the accused had a fair trial in the climate of those times. Today with better educated and more literate juries the value of those old restrictive rules of evidence is being re-evaluated and many are being discarded or modified.

Unfortunately, his Lordship's optimism about reform in this area has not proved entirely well founded over the following 20 years. Although many of the old rules have been swept away, mainly by legislation in both England and Australia, the perceived safety of the old rule and categories has led to reliance upon them continuing. The 2014 Victorian Appeal Court decision in *Velkoski v The Queen*<sup>22</sup> in particular shows a concerning return to unnecessary rules involving counter-productive categorisation of "types" of pattern of behaviour evidence.

It is no surprise that *Velkoski* is a case concerning multiple complainants alleging sexual offending by the same defendant. It has tended, in recent years, to be these types of case which have driven reconsideration of the law at legislative and appellate levels. States and their criminal justice systems have increasingly recognised that there are special difficulties often inherent in such cases where convictions are sought on a complainant's testimony alone (the "he said/she said" problem) and have sought to address low conviction and high attrition rates through reform of the general rules of procedure and evidence that otherwise apply in legal proceedings.<sup>23</sup> An example is the reform of evidence rules relating to "*bad character*" under the *Criminal Justice Act (CJA) 2003*

<sup>20</sup> [1995] 2 AC 596.

<sup>21</sup> *R v H* [1995] 2 AC 596 at 613.

<sup>22</sup> *Velkoski v The Queen* [2014] VSCA 121.

<sup>23</sup> Fitzgerald, F., *The Attrition of Sexual Offences from the New South Wales Criminal Justice System*, Crime and Justice Bulletin No. 92 (Australia: Bureau of Crime Statistics Research, 2006). <http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/cjb92.pdf> accessed on 25 February 2015.

(England and Wales (E&W)) enacted along with the *Sexual Offences Act 2003* (E&W). This reform marked a significant divergence from the previous common law position. In Australia, where a mixture of common law and statutory provisions applies across the states and territories, there are still significant barriers to the admission of pattern of behaviour evidence against a criminal defendant. Nonetheless, the strict common law position has arguably been somewhat relaxed in those states/territories that have adopted the Uniform Evidence Law (UEL).<sup>24</sup> There has thus been a gradual though cautious shift towards greater acceptance of managed admission of such evidence, especially in sexual offence cases. The decision in *Velkoski* threatens to reverse that trend.

## Pattern of behaviour evidence and propensity/tendency

Evidence can only be admissible if it is relevant to a matter in issue; that it is “logically probative or disprobative of some matter which requires proof”.<sup>25</sup> If it is relevant, the court must consider whether to admit it at trial, that is whether there is some legal reason to exclude the evidence. A factor to be considered when determining admissibility is, if the decision is made to admit the evidence, how the jury should be directed to use it.

It is important to examine first how pattern of behaviour can be relevant. As discussed above, the relevance of pattern of behaviour evidence rests on inferences of propensity/tendency (D did X and this makes it more likely that D did Y). To use a concrete example: E is a child who has been sexually assaulted. It is reasonable to assume that the assailant was sexually interested in children. If D is sexually interested in children (as demonstrated by his previous convictions for sexually assaulting children) that makes it more likely that D sexually assaulted E. The exclusionary principle does not tend to be rationalised on the basis that such

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<sup>24</sup> Australia’s uniform evidence legislation has its origins in an Australian Law Reform Committee (ALRC) inquiry commencing in 1979. The ALRC was charged with reviewing “the laws of evidence applicable in proceedings in Federal Courts and the Courts of the Territories with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements and to report (a) whether there should be uniformity, and if so to what extent, in the laws of evidence used in those Courts and (b) the appropriate legislative means of reforming the laws of evidence and of allowing for future change in individual jurisdictions should this be necessary (ALRC 26 Terms of Reference).” See also: Evidence (Interim) (ALRC Report 26).

<sup>25</sup> Per Lord Simon in *DPP v Kilbourne* [1973] AC 729 at 756.

inferences are not valid, that is, on the basis of probative value, but on the basis that such inferences will be given undue weight by the jury, that is, have unfairly prejudicial effect. In our example, the risk is that the jury will convict E because he is “the kind of person who does this sort of thing” or “if he didn’t do this, he will have done something else which merits punishment” or “he deserves to be punished for being sexually attracted to children”. The court excludes relevant evidence because of concerns about undue prejudice to the defendant. There is also the risk of a jury being distracted. In our example, if D denies the evidence of his sexual interest in children there is the risk of the jury being side tracked into dealing with whether the pattern of behaviour evidence is true rather than whether he sexually assaulted E. The evidence might be excluded because of this risk. Although pattern of behaviour evidence can sometimes simply not be relevant, it more often falls at this hurdle of whether the court should exclude it despite its relevance. The grounds for the exclusionary principle are eloquently made above, as are the grounds for lifting the exclusion, by two judges 185 years apart. It is only right to say that not everyone agrees with Lord Griffiths; the concerns raised in *Farris* remain alive even now. However, it should be the aim of any criminal justice system to put as much relevant evidence as possible before the triers of fact. Case management can and should evolve to enable that to happen.

The categories into which the exceptions to the exclusionary rule coalesced (proving identity, rebutting claims of accident or innocent association) are based on the premise that admission of evidence falling into these categories does not rely upon propensity/tendency reasoning. However, that almost always involves a misunderstanding of why this evidence is relevant. Take the example of *R v Robinson*<sup>26</sup> where the pattern of behaviour evidence was admitted as establishing identity. A man had committed gross indecency with two boys who identified the defendant as being the man in question. Upon his arrest he was found to have two powder puffs on him and when his rooms were searched photographs of naked boys were found. The defendant denied being the offender and said the photographs “came into his possession for the purposes of artistic study”. The House of Lords upheld the decision to admit the powder puffs<sup>27</sup> and photographs into evidence saying that they went to proving identity by supporting the

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<sup>26</sup> *R v Thompson* [1918] AC 221.

<sup>27</sup> Those who wonder what role the powder puffs played are informed by Lord Atkinson that “... powder puffs are some of the things with which persons who commit abominable and indecent crimes with males furnish themselves for the purpose of carrying out their criminal designs.” (*R v Thompson* [1918] AC 221, 230) and it is on this basis that this aspect of the case is discussed. An argument on the grounds of basic relevance could properly be mounted to the admission of the powder puffs, but that is not the focus of this article.

boys' identification of the defendant. This is frankly disingenuous. The pattern of behaviour indicated by the powder puffs and photographs was of a man with a sexual interest in boys, a tendency or propensity to engage in sexual activity with them. That was what made it more likely that he had committed an offence which involved sexual activity with boys. The strength of the evidential inference is increased by two factors. First, most adult men do not want to engage in sexual activity with boys. Second, the boys had identified this man as the one who engaged in sexual activity with them.

To take a less emotive example, where a defendant claims self-defence when charged with an assault, evidence of his previous convictions for violence which the prosecution might argue go to whether he was genuinely acting in self-defence really are admissible because they show that the defendant has a propensity for violence. The argument that propensity reasoning often lies at the heart of admissibility arguments on pattern of behaviour evidence is made with admirable clarity and force by Professor Redmayne in his article *Recognising Propensity*<sup>28</sup>: coincidence reasoning is really based on relative possibilities and the defendant's propensity for a particular kind of behaviour changes the relative possibility of his having engaged in the particular behaviour in the instance alleged in the case. To continue with the *Thompson* case as an example, the fact that the defendant was picked out by the boys was evidence going to his guilt. Whoever committed the offences against the boys could be presumed to have a sexual interest in boys. The assertion that he had a sexual interest in boys (inferred from the photographs and powder puffs) made it more likely that the boys' identification of him was right *because* it made it more likely that he had committed the offences.

There were cases where avowedly propensity/tendency reasoning has been the basis upon which evidence is admitted, but these have been severely limited to where there is "striking similarity"<sup>29</sup> or the possibility of coincidence is "an affront to common sense".<sup>30</sup> This desire only to admit pattern of behaviour evidence in these extreme cases is the desire for a "silver bullet" – evidence which has features that kill off any prejudice argument, evidence which can offer absolute certainty. This is a truly mythical quest. Circumstantial evidence cannot support this kind of deductive logic; its value is inductive. To illustrate the point we can return to our example of D and E above. The value of the

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<sup>28</sup> [2011] Crim LR 117. For a different view on whether such evidence is in truth propensity evidence, see Fortson, R., and Ormerod, D., *Bad character evidence and cross-admissibility* [2009] 313.

<sup>29</sup> *DPP v Boardman* [1975] AC 421 (UK).

<sup>30</sup> *Markby v R* (1978) 140 CLR 108 (Australia).

evidence is not in the form of a syllogism, which it would be if it were a matter of deductive logic:

E was sexually assaulted by a man with a sexual interest in children.

D has a sexual interest in children, as demonstrated by his sexually assaulting C in the past.

Therefore D sexually assaulted E.

The conclusion does not follow, at least deductively. It may be true that D sexually assaulted E, but it is not true *just because* D has sexual interest in children; the syllogism is invalid, but that does not mean that the evidence of D's sexual interest in children is irrelevant. Evidence, including pattern of behaviour evidence, can be relevant to an issue without necessarily determining it; the fundamental issue is relevance. The history and development of the common law in this area, particularly in Australia has arguably lost sight of the essential question: "What is the ultimate fact in issue and what bears upon it?"<sup>31</sup> and focussed on the narrow question "How can each separate fact be proved?"

The desire to find a way to avoid propensity/tendency reasoning has an important effect on the last of the three points made at the start of the section: how the jury is directed about the evidence. Relevant evidence need not be excluded if it can be used properly by the jury. This requires them to be directed frankly and clearly about the use of pattern of behaviour evidence. A failure to recognise that the evidence shows a propensity/tendency is a problem because it means that the jury is not directed about how to use this reasoning. Lord Griffiths had faith that a jury could use such evidence properly, and that is surely right, but only if it is assisted with how to use the evidence. This is most difficult in the situation where the defendant is accused of a number of similar offences. Here there is no pattern of behaviour already proved, the jury must consider all of the allegations at the same time. There are competing arguments about how this should be done. Should it be sequentially (i.e. consider the first count alone and if that is proved it can be used as pattern of behaviour evidence on count two) or should the evidence be pooled (i.e. consider all of it together when determining guilt on all the counts)? Although the sequential approach is initially attractive, it ignores the inference provided by independent similar allegations made against the same person, i.e. that it is more likely that the complainants are telling the truth than that they have all, independently, falsely accused the same innocent person. This article will not examine this issue at length as it merits an article of its own. Instead we focus on the primary question of admissibility of pattern of behaviour evidence.

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<sup>31</sup> *R v Makin* [1894] AC 57.

We now turn to examine how the English and Australian jurisdictions have treated pattern of behaviour evidence, before concluding with proposals for a clearer and fairer method for dealing with such evidence than those used in these two common law jurisdictions currently.

## Shared history

The common law story for both England and Australia always starts with the Makins<sup>32</sup> who were tried for murder of a baby where evidence was admitted that 12 other dead babies were found on their premises. It was a Sydney, New South Wales, case that was appealed to the Privy Council in London on a matter of law. It could not have been a more emotive topic:<sup>33</sup>

Sarah and John Makin murdered the babies of unmarried mothers as a public service... To the Sydney couple, John and Sarah Makin, the coded message in this newspaper advertisement from the late 1890s was clear. It meant “child for sale”. The fate of children entrusted to the Makins through “adoption” became horrifyingly evident when the body of a one-month-old boy was discovered in a shallow grave in their backyard in 1892. Twelve more tiny bodies were later found buried around houses where the Makins had lived in Macdonaldtown, Chippendale and Redfern. One of the most chilling secrets of the 19th century – the trade in the life and death of children... Hidden in the slums of Sydney, baby farmers effectively operated as kennels for babies to be “put down”... The Makins were the most infamous of the “baby farmers”. Their case – dubbed the “trial of the century” at the time – provides a sobering insight into the social and economic reality of life in the 1800s... It’s a slice of Australian history that most people don’t know about.

The fact that there were so many other bodies in the garden is obviously emotive evidence but logically it was relevant to rebut any suggestion of accident or misfortune or coincidence and that was the court’s conclusion:<sup>34</sup>

It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to

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<sup>32</sup> *R v Makin* [1894] AC 57.

<sup>33</sup> Extracts from book review *The Baby Farmers*, written by criminologist Annie Cossins (online). <http://uniken.unsw.edu.au/regulars/arts-baby-farmers> accessed on 16 March 2015.

<sup>34</sup> *R v Makin* [1894] AC 57 at 65.

constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and decide whether a particular piece of evidence is on one side or the other.

It was held that the evidence was correctly admitted, and the Makins were hanged.<sup>35</sup> What is clear, despite the assertion in the first sentence in the above quote, is that such reasoning in the context of rebutting coincidence always involves an inference based on actual or alleged patterns of behaviour. The importance is for a jury not to assume guilt but to be directed on how to apply the evidence to the task in hand. It is of course inevitable that pattern of behaviour evidence usually falls to be considered in the most difficult and emotive of cases. Largely the shared history of England and Australia starts with murder trials, generally involving women and girls. It has to be remembered that the requirement for corroboration was not removed in England until 1988 for children<sup>36</sup> and 1994 for accomplices and complainants in sexual cases,<sup>37</sup> and in Australia under the UEL provisions from 1995 onwards.<sup>38</sup>

It is also worth noting that the development of precedent has to wait until the issue reaches the courts in any particular case. Around 22 years after the decision by the Privy Council regarding the Makins, the English Court of Appeal considered the case of George Joseph Smith<sup>39</sup> in what became known as the “Brides in the bath” case, where the defendant was tried for the murder of his wife and evidence was admitted of the deaths of two other women (after the alleged murder) who had also gone through ceremony of marriage with Smith. The decision to admit the evidence was upheld on appeal:<sup>40</sup>

The case was reinforced by the evidence with reference to the other two cases for the purpose of shewing the design of the appellant. We think that that evidence was properly admitted, and the judge was very careful to point out to the jury the use they could properly make of the evidence.

Here the court focussed on the pattern of behaviour although in directing the jury the trial judge focussed on coincidence – the *design* became significant but the use to which it was to be put was for the jury to consider what logical

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<sup>35</sup> Barker, I., Tendency and Coincidence Evidence in Criminal Cases, Criminal CLE (online). [http://www.criminalcle.net.au/attachments/TENDENCY\\_AND\\_COINCIDENCE\\_EVIDENCE.FINAL.\\_25.11.11.pdf](http://www.criminalcle.net.au/attachments/TENDENCY_AND_COINCIDENCE_EVIDENCE.FINAL._25.11.11.pdf) accessed on 16 March 2015.

<sup>36</sup> CJA 1988, s. 34.

<sup>37</sup> Criminal Justice and Public Order Act 1994, s. 32.

<sup>38</sup> See s. 164 of the UEL Acts (note 8 above).

<sup>39</sup> *Smith* (1916) 11 Cr App R 229; [1914–15] All ER 262 (cited in *Velkoski* at note [7]).

<sup>40</sup> *Smith* (1916) 11 Cr App R 229 at 237 (emphasis original).

inferences could be drawn from the evidence. The importance of this decision is the focus on the available evidence to point to the defendant as the perpetrator of each alleged killing. The trial judge (Scrutton J) noted that there were no less than 13 points of similarity between the three deaths.<sup>41</sup>

This significantly contrasts with the case of *Noor Mohamed v The King*<sup>42</sup> where the appellant was convicted of the murder of his “wife” by poisoning her with cyanide. The trial court had focussed not on the content of the available evidence but on the fact that the defendant had been associated with more than one dead woman. At the trial evidence was admitted of the death of woman G (which had not been indicted) to rebut the possible defences that the wife had committed suicide or had taken poison accidentally. On appeal, it was held that the evidence in relation to woman G should not have been admitted. Importantly, there was no direct evidence in either case that the appellant had administered the poison. One similar event may or may not rebut coincidence. It depends on the level of evidence. The appeal court recognised that in *Noor Mohammed*, the prosecution was using one unproved allegation to prove another and both allegations were too weak to be safely left to a jury.<sup>43</sup>

[J]ust because it appears to demonstrate, in the words of Lord Herschell in *Makin*’s case “that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried,” and it is otherwise of no real substance, then it was certainly wrongly admitted.

Noor Mohammed’s successful appeal was closely followed by the case of *R v Straffen*.<sup>44</sup> The passage of only 2 years between appeals perhaps demonstrates the confusion in trial courts at the time on how to apply the evidence of “design” suggested in *Smith* to the principle of “rebuttal” applied in *Makin*. The courts’ difficulties highlight the problem caused by calling propensity evidence by a different name to avoid the exclusionary rule. Admitting the proper use of propensity reasoning makes these cases easier to understand. In *Makin* and *Smith* there was a strong inference which could be drawn from the pattern of behaviour evidence. In *Noor Mohammed* the inference could not be legitimately drawn because of the absence of evidence of the defendant’s involvement with either death.

John Straffen died in 2007 as the longest-serving prisoner in British history. In 1951, he confessed to the abduction and murder of two girls, but he never

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<sup>41</sup> (1915) *Notable British Trials*, p. 307, as cited by Evatt J in the Australian High Court case of *Martin v Osborne* (1936) 55 CLR.

<sup>42</sup> *Noor Mohamed v The King* [1949] AC 182.

<sup>43</sup> *Noor Mohamed v The King* [1949] AC 182 at 192–193.

<sup>44</sup> *Straffen* [1952] 2 QB 911.

went to trial, as he was found insane and unfit to plead. Instead, he was detained indefinitely “until His Majesty’s pleasure be known”, but managed to escape briefly from the Broadmoor mental institution, during which time a 5-year-old girl, Linda Bowyer, was killed nearby. Straffen was captured and reportedly told police “I did not kill the little girl on the bike” though his involvement in her killing had not at this stage been suggested. He was charged and this time found fit to stand trial, and was convicted of murder. The evidence of his confessions to the other girls’ killings was admitted in the trial, with the Court of Appeal noting five strong similarities:<sup>45</sup>

Each of the three killings had five similarities: (1) each victim was a young girl; (2) each was manually strangled; (3) none had been sexually assaulted; (4) in no case was there any evidence of a struggle; and (5) no attempt had been made to conceal any of the bodies although that could easily have been done.

Straffen was not rounded up as a “usual suspect” but had made a cogent admission to each death and could be linked by evidence of his availability and location. He also made a denial of the final killing when the fact of the killing would only have been known to the killer. The question essentially became not “Who did it?” but “In the context of the other evidence in the case, does his pattern of child-killing behaviour make it more likely that he killed the girl?” Essentially, the knowledge exhibited in his denial is the context for the pattern of behaviour evidence, and that knowledge makes the inference which can be drawn from the pattern of behaviour evidence that much stronger. There was no need to search for “striking similarity” in this case. Similarity is one way in which pattern of behaviour evidence becomes more probative, but is only one. Here the context of the comments made by the defendant adds much more weight.

It is perhaps worth noting that it was many decades after the *Makin* decision before serious consideration of patterns of behaviour was given in a case involving sexual offending. This is not so surprising when we consider the historical-legal context. In 1975 the maximum penalty for indecent assault on a female child was two years imprisonment and it was still lawful for a husband to rape his wife. As noted above, the corroboration requirement was in place in sexual cases until 1994. Sexual abuse was known but not dealt with routinely through prosecution, and it was only as concern grew over buggery of boys at school that the criminal justice system started to react to the crying need to prosecute cases of sexual abuse and to prosecute effectively having regard to how abusers behave. *DPP v Boardman*<sup>46</sup> involved sexual abuse by a

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<sup>45</sup> As cited by McHugh J in *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461 at [36].

<sup>46</sup> *DPP v Boardman* [1975] AC 421.

headmaster – getting boys to bugger him. Perhaps reflecting the naivety of the time, this was described by trial judge as a “*particularly unusual kind of behaviour*”. The appeal court found the facts demonstrated sufficient similarity to meet the test of admissibility, and the appeal was dismissed. Requirements for sufficiency varied on a theme in the speeches: “*of close or striking similarity*”,<sup>47</sup> “*striking similarity*”,<sup>48</sup> “*striking resemblance or unusual features*”,<sup>49</sup> “*very striking peculiarities*”,<sup>50</sup> “*be uniquely or strikingly similar*”.<sup>51</sup> Lords Cross and Hailsham referred to the need for it to be an “*affront to common sense*” to exclude the evidence, echoing the term used by Lord Simon in *R v Kilbourne*.<sup>52</sup>

Although the judgement deals with admissibility on the basis that the evidence of each boy logically rebutted the suggestion of fabrication, *Boardman* gave birth to the “strikingly similar” test and for the next few decades the courts incorrectly focussed on the level of similarity rather than the probative value of the evidence. The result was that cases where evidence could be probative were severed or not prosecuted, regardless of assertions by a defendant, even where the pattern of behaviour would rebut coincidence or the individual pieces of evidence would lead to a strong inference, solely because the behaviour was not “strikingly similar”. In the context of sexual abuse this is of course a logical nonsense as penetration or sexual touching can only be achieved in a limited number of ways, so to limit prosecutions to those perpetrators who have particular predilections inevitably means that the criminal justice failed many victims in a significant way. This approach also ignores the relative scarcity of sexual offenders. An otherwise honest person may eat a sweet from the pick and mix counter, but it is unlikely that most people will transgress sexually. Therefore, a pattern of criminally transgressive sexual behaviour is likely to be more relevant than a pattern of mildly dishonest behaviour.

Ironically, the Australian courts recognised the problem as early as 1978 in *Markby*,<sup>53</sup> which was a joint enterprise murder by drug dealers. The High Court held that evidence of involvement in previous “rip offs” should not have been admitted. The defendants had confessed to being present. The only issue was whether the death was an accident. Gibbs ACJ said<sup>54</sup> that the admission of

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<sup>47</sup> per Lord Morris at 441.

<sup>48</sup> per Lord Wilberforce at 444.

<sup>49</sup> per Lord Hailsham at 455.

<sup>50</sup> per Lord Cross at 460.

<sup>51</sup> per Lord Salmon at 462.

<sup>52</sup> *R v Kilbourne* [1973] AC 729 at 759.

<sup>53</sup> *Markby v R* (1978) 140 CLR 108.

<sup>54</sup> *Markby v R* (1978) 140 CLR 108 at 117.

similar fact evidence was the exception rather than the rule, and observed (citing *Boardman*) that it may not be going too far to say that it will be admissible only if it is “so very relevant that to exclude it would be an affront to common sense”.

The focus in *Markby* was firmly on the relevance of the evidence to the issues, not on the similarity of conduct. In all of the preceding cases, despite the differing judgements, the issue was always relevance: how strong is the inference from the pattern of behaviour evidence in the circumstances of the case. Unfortunately, post-*Boardman*, the focus on the use of the term “striking similarity” in that case led to a bleak period in both jurisdictions where pattern of behaviour evidence was routinely wrongly excluded. Meanwhile, the lack of protection for victims became manifest and in both England and Australia attention eventually turned to the creation of statute to provide a set of principles for judges to apply rather than continuing to leave the matter to an exercise of inconsistently regulated discretion. It did not, however, happen immediately and it is worth considering the different paths these two jurisdictions took from the 1980s up-and-until today.

## The law on “tendency” and “coincidence” in Australia

The “striking similarity” test in *Boardman* came to Australia in 1982 via *R v Perry*,<sup>55</sup> in which a female defendant was convicted of murdering her husband by arsenic poisoning and evidence of the deaths of other partners and her brother were admitted. The High Court recognised the importance of balancing probative value against prejudicial effect in the context of the presumption of innocence (thus avoiding presumptions of guilt):<sup>56</sup>

Despite protestations to the contrary, similar fact evidence has been admitted “for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried”. (See Piragoff, p. 14 and Ch. 3; Lord Cross in *Director of Public Prosecutions v. Boardman* (48); Hoffman, “Similar Facts After Boardman”, *Law Quarterly Review*, vol. 91 (1975), p. 193; Sklar, “Similar Fact Evidence-Catchwords and Cartwheels”, *McGill Law Journal*, vol. 23 (1977), p. 60.) In the present case, the prosecution alleges that the accused is an arsenic poisoner, that she has poisoned three other persons with arsenic, and that in these

<sup>55</sup> *R v Perry* (1982) 150 CLR 580.

<sup>56</sup> *R v Perry* (1982) 150 CLR 580 per Murphy J at 593–595.

circumstances the arsenic poisoning of her husband is explicable rationally only by her poisoning him. Although if his poisoning is considered alone there is an obvious explanation consistent with her innocence – the abundance of arsenic in his work environment and his evidence that he unwittingly exposed himself to arsenic in the course of his work, the prosecution claim is that his evidence should be disbelieved, and that even though the poisoning could have occurred without her participation, the earlier events make this an affront to common sense. There is no universal formula for proof of guilt by circumstantial evidence. The process of reasoning relied upon by the prosecution, that is proof of guilt by association with circumstances, is theoretically acceptable. If there is a sufficient accumulation of events which, according to human experience, would not occur unless the accused were guilty, the tribunal is entitled to act on this material in arriving at a guilty verdict even though each event standing alone would not itself justify an adverse finding. The other events need not be strikingly similar, but no doubt the conclusion that their occurrence is inconsistent with the accused's innocence will more usually be reached when they are. However, this is an extremely dangerous method of determining criminal guilt. For centuries it was regularly used in England, other parts of Europe and the American colonies “to convict millions of persons of the impossible crime of witchcraft”.

The presumption of innocence. One danger is that the presumption of innocence tends to be brushed aside. In the criminal justice system every person is taken to be innocent unless the contrary is legally proved. No one should be found guilty on appearances, suspicions, conjecture or anything but evidence establishing guilt beyond a reasonable doubt. In Mrs. Perry's case there is a very great temptation in weighing the evidence and more particularly in deciding admissibility, to ignore the presumption of innocence and to replace it with a presumption of guilt. The allegation that a number of the accused's relatives died or suffered from arsenic poisoning immediately conjures up a highly suspicious prejudicial atmosphere in which the presumption of innocence tends to be replaced with a presumption of guilt. The presumption of innocence and the strict standard of proof required in criminal cases tend to be indirectly and subtly undermined from the outset by reference to a sequence of events which according to common human experience would not occur unless the accused were guilty. By a backdoor this tends to reintroduce the standard rejected in *Thomas v. The Queen* (49) that guilt should be judged “in an ordinary common sense manner and in the way you would consider the more serious matters which come up for consideration and decision in your lives”. It is very easy to assume that in common experience a person is hardly ever associated with poisonings of four close relatives, and that if such an association occurs it is so remarkable that it is unlikely to be innocent. Common assumptions about improbability of sequences are often wrong. A suggested sequence, series or pattern of events is often incorrectly regarded as so extremely improbable as to be incredible. However highly improbable, as well as merely improbable, sequences and combinations are constantly occurring.

In random tossing the occurrence of a run of ten consecutive heads or tails is generally regarded as highly improbable. But this will occur on the average once in every 512 tosses, and the lesser sequences more frequently (2 runs of 9; 4 runs of 8; 8 runs of 7). If one randomly tosses a coin 257 times, more likely than not there will be a sequence of ten heads or tails. Although it is extremely improbable that any particular ticket will win a large lottery, it is certain that one will.

Circular reasoning. There is a danger of admitting and using evidence of collateral circumstances (the death of Haag, or of Montgomerie, or the sickness of Duncan) which not only standing alone, but taken together with the other evidence (including any which independently tends to establish the central issue), is insufficient to exclude a rational explanation of that circumstance consistent with the accused's innocence, and then using the supposed guilt in relation to that circumstance as proof of others and the central issue. For example, on the prosecution's theory the supposed poisoning of Duncan depended on acceptance that Haag, Montgomerie and Perry were poisoned by the applicant, but the proof of these poisonings depended on the acceptance that she poisoned Duncan. Legal proof is not limited to proof by syllogisms nor to other methods which depend upon precision. The solution of most legal problems are those of approximate reasoning, which deals with indeterminate or "fuzzy" factors. For this generation, even the simplest of mathematical formulae are unsuitable tools for use in ordinary trials. But some practical working rules can be adopted for a criminal case like the present. Evidence of any circumstance such as any of the alleged poisonings of Duncan, Haag or Montgomerie should be discarded when it appears on consideration of the whole of the evidence that there is reasonable doubt about the accused's culpability in relation to that circumstance. Otherwise the stage is being set for a miscarriage of justice.

To understand the application of principle, it is worth taking note that the Court assessed pieces of evidence individually, allowed the appeal and ordered a retrial (in summary) as follows:

- (a) All agreed that the death of a *de facto* husband was not admissible, because his death was not linked to arsenic poisoning but to an overdose of sleeping tablets that was consistent with both his physical and mental health at the time of his death.
- (b) Gibbs CJ, Wilson and Brennan JJ agreed (Murphy J dissenting) that evidence concerning a second husband's death was admissible; the poison, the method and the motive were all strikingly similar and of high probative value.
- (c) Gibbs CJ and Murphy J agreed (Wilson and Brennan JJ. contra) that the evidence concerning the brother's death was not admissible. Gibbs CJ stated that the issue was finely balanced<sup>57</sup>; however, the appellant was not living with him, not preparing his meals and did not stand to benefit financially from his death. As such there was no striking similarity and the evidence was not sufficiently cogent to be admitted.

Gibbs CJ, Wilson and Brennan JJ agreed that the pattern of behaviour evidence may only be admitted if it has strong probative force and "striking similarity" was an indicator as to whether such probative force was present. The use of

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<sup>57</sup> *R v Perry* (1982) 150 CLR 580 at 590.

“strong” and “striking” indicates a continuing focus on the level of similarity rather than the use to which a piece of evidence might be put having regard to the facts of the case in hand, in other words, ignoring the strength of inference to be drawn in the context of the case as a whole. The dangers of such an approach have been revealed over time as more cases of sexual abuse are tried and courts can consider how patterns of behaviour can be safely left to a jury to consider. The danger of the striking similarity test preventing admissibility of relevant evidence has been adverted to above. However, the problems of this approach do not just prejudice the prosecution. The emphasis on striking similarity also shifts the focus away from evidence which *weakens* the emphasis the inference which is sought which should lead to the evidence of “strikingly similar” behaviour being ruled inadmissible.

It is common in cases of alleged sexual abuse that the complainants will be accused to be concocting or fabricating evidence and/or unreliability. These issues were considered in Australia in *Hoch*.<sup>58</sup> Charges of sexual offences committed against three boys aged between 10 and 13 were tried together. Each boy gave evidence of an offence of indecent dealing in circumstances strikingly similar to the others and their allegations were tried together. On appeal the High Court held that there was a serious miscarriage of justice and the convictions were quashed on the basis that the evidence of the several complaints lacked the requisite probative force. The essential question was similar to that in *Noor Mohammed*, where the evidence of poisoning by the defendant had no reliable foundation. Here, the evidence from each child was so contaminated by collusion that it was insufficiently reliable to implicate the defendant. In those circumstances the alleged pattern of behaviour should not be left to the jury, as the risk of a verdict based on illegitimate prejudice is too great. It is a classic exercise in case management which reflects the difficult balancing exercise for judges in deciding when evidence is more probative than prejudicial and is perhaps the first Australian case to reach a conclusion based not on striking similarity but on basic rules of relevance and reliability.

The exercise for judges in Australia was tested next in *Pfennig*,<sup>59</sup> which involved the presumed murder of a young boy (Michael Black) whose body was never found. Pfennig pleaded guilty to the abduction and rape of another young boy (H) about a year later. He was then tried for the earlier murder and the trial judge allowed the prosecution to rely on the evidence of the H abduction. The High Court upheld the conviction on the basis that the evidence established a propensity to commit the type of offence charged, which was a

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<sup>58</sup> *Hoch* (1988) 165 CLR 292.

<sup>59</sup> *Pfennig v R* [1995] HCA 7; (1995) 182 CLR 461.

piece of relevant circumstantial evidence which leads to no other rational explanation than the defendant perpetrated the murder. Here, there was a move away from striking similarity as the central consideration to an assessment of rational explanation, although McHugh J (at [47]) disagreed with the majority as to the requirement in general of such a high “no other rational explanation” test for admissibility:<sup>60</sup>

It also follows that I am unable to agree with those statements in this Court... that suggest that evidence that discloses the criminal propensity of the accused cannot be admitted unless that evidence together with the other evidence denies any rational explanation of the accused’s conduct that is consistent with his or her innocence. That rule will be generally applicable when the Crown is relying on the accused’s criminal propensity because the risk of prejudice from propensity reasoning is so high. But in the relationship cases, for example, where evidence of propensity is relied on as confirmatory or explanatory of evidence implicating the accused, I do not think that such a high standard is either required or appropriate. Similarly, in cases where the accused’s propensity is disclosed, but is not the basis of any reasoning process, a standard of proof lower than the no rational explanation standard may suffice for admission.

The “no other rational explanation” test faces the same criticisms as the “striking similarity” test. The justification for both fails to understand that true utility of pattern of behaviour evidence; that it can make the defendant’s guilt more likely but cannot prove it.

McHugh J’s approach was later endorsed by the New South Wales Court of Appeal in *R v Ellis*, with the Full Bench holding that the trial judge had made no error in not referring to the *Pfennig* majority’s “no other rational explanation” test in ruling on the tendency evidence involved, which consisted of 11 charges of break, enter and steal.<sup>61</sup> In a later High Court special leave hearing, Gleeson CJ expressed agreement with the decision of Spigelman CJ on the construction of the statutory provisions.<sup>62</sup> The “no other rational explanation” test imposed a very high threshold for the admissibility of propensity evidence against an accused, in effect requiring that individual pieces of circumstantial evidence needed to be capable of proving guilt “beyond reasonable doubt” rather than looking at the available evidence overall.

As is well known, trial judges are prohibited from elaborating on the meaning of this criminal standard in directing juries, but the test applied by

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<sup>60</sup> *Pfennig*, per McHugh J at [47].

<sup>61</sup> *R v Ellis* [2003] NSWCCA 319, per Spigelman CJ at [91] (other members agreeing). Note that this case, unlike *Pfennig* (and *Phillips*, discussed below), was decided under the UEL principles rather than the common law relating to tendency and coincidence.

<sup>62</sup> *Ellis v The Queen* [2004] HCA Trans 488 (1 December 2004).

Australian appeal courts in determining whether there has been a wrongful conviction is whether there remains, having regard to the admissible evidence, a rational hypothesis consistent with the innocence of the accused. The *Pfennig* majority test in effect applies this stringent test as an admissibility standard for propensity or similar fact evidence. As McHugh J pointed out, application of this test did not really involve a balancing exercise between probative value and unfair prejudicial effect (which is the exercise required under ss 101, 135 and 137 of the UEL).

The issues of striking similarity and absence of other rational explanation came together in *Phillips v The Queen*. This was a Queensland case dealing with whether multiple sexual assault counts involving six complainants could be heard together, and whether the trial judge had correctly dealt with cross-admissibility with regard to common law tendency rules. As to the question of consent, the High Court stated:<sup>63</sup>

Whether or not similar fact evidence could ever be used in relation to consent in sexual cases, it could not be done validly in this case. It is impossible to see how, on the question of whether one complainant consented, the other complainants' evidence that they did not consent has any probative value. It does not itself prove any disposition on the part of the accused: it proves only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her.

As to the situation in regard to issues other than consent, the High Court emphasised the lack of “striking similarity” as per the *Pfennig* approach.<sup>64</sup>

The similarities relied on were not merely not “striking”, they were entirely unremarkable. That a male teenager might seek sexual activity with girls about his own age with most of whom he was acquainted, and seek it consensually in the first instance, is not particularly probative. Nor is the appellant's desire for oral sex, his approaches to the complainants on social occasions and after some of them had ingested alcohol or other drugs, his engineering of opportunities for them to be alone with him, and the different degrees of violence he employed in some instances. His recklessness in persisting with this conduct near other people who might be attracted by vocal protests is also unremarkable and not uncommon.

As a result, the decision was that there should have been separate trials:<sup>65</sup>

It can be appreciated that separate trials of the several complaints by different complainants adds to the cost of the prosecutions and the defence of the accused. However, the dangers, in the trial of the appellant, of admitting the evidence relevant to all of the several

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63 *Phillips v The Queen* [2006] HCA 4 at [47].

64 *Phillips*, at [56].

65 *Phillips*, at [78] and [79].

allegations against him, was very great. Despite the efforts of the trial judge to give the jury precise instructions on the separate admissibility and use of different evidence, in a case such as the present, such instructions were bound to be confusing and prone to error. The prejudice to the fair trial of the appellant was substantial.

Criminal trials in this country are ordinarily focused with high particularity upon specified offences. They are not, as such, a trial of the accused's character or propensity towards criminal conduct. That is why, in order to permit the admission of evidence relevant to several different offences, the common law requires a high threshold to be passed. The evidence must possess particular probative qualities; a strong degree of probative force; a really material bearing on the issues to be decided. That threshold was not met in this case. It was therefore necessary that the allegations, formulated in the charges brought against the appellant, be separately considered by different juries, uncontaminated by knowledge of other complaints. This is what Pfennig and other decisions of this Court require. To the extent that O'Keefe or other authority suggests otherwise, it does not represent the law. No other outcome would be compatible with the fair trial of the appellant.

A forceful critique of this decision is to be found in David Hamer's article:<sup>66</sup>

The admissibility of similar fact evidence depends upon its probative value. In Pfennig the High Court held that, to be admitted, there should be no rational view of the evidence consistent with innocence. In effect, the Court adopted the criminal standard of proof as an admissibility test. This created uncertainty in the lower courts. In applying the test, how was the trial judge to apply a standard ordinarily applied by the jury? And could similar fact evidence ever prove guilt to such a standard? Criminal appeal courts developed their own interpretations of Pfennig so as to make it workable. In Phillips, the High Court admonished the temerity of the lower courts in placing their own gloss on Pfennig. But the Court provided little by way of authoritative clarification. On the contrary, Phillips establishes fertile ground for further confusion.

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Phillips creates considerable ambiguity as to the admissibility of similar fact evidence. In another respect, however, it may be taken as a clear precedent. According to the High Court, the evidence of other alleged rape victims is irrelevant to the complainant's lack of consent. This ruling is illogical. The relevance of such evidence is clear. The fact that the defendant forced other victims to have non-consensual sex with him tends to show he has a propensity for forcing women to have non-consensual sex with him, and it increases the probability that the defendant forced the complainant to have non-consensual sex with him.

Perhaps the worst aspect of Phillips is the pernicious effect it is likely to have on sexual assault prosecutions. Sexual assault charges are already notoriously difficult to prosecute, particularly the most common types, acquaintance rape and child sexual assault, which often become a battle of credibility between complainant and defendant. The presumption of innocence, of course, makes the battle very uneven, and Phillips effectively takes away

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<sup>66</sup> David Hamer, "Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious" (2007) 30(3) *University of New South Wales Law Journal* 609, at 638.

one of the few lines of evidence that may bolster the complainant's credibility. To criticise Phillips in this way is not to suggest that the defendant's rights should be carelessly discarded. But sexual assault prosecutions should not be hampered unnecessarily.

In Phillips, the High Court has done just this without justification in law, policy or logic. Phillips sets a very bad precedent.

This brings us back to the recent Victorian case of *Velkoski*, which – like *Phillips* – involved the question whether evidence about multiple victims of alleged sexual offences could be heard together and was cross-admissible as tendency evidence. The *Velkoski* case, however, fell to be decided under the UEL provisions rather than the common law. The defendant was tried in the County Court of Victoria and convicted of 15 charges of committing an indecent act with a child under 16, but acquitted of a charge of attempting to commit such an act. The charges related to three complainants, all children who had attended a day-care centre run by the defendant's wife. On appeal, the Court of Appeal considered whether the acts relied upon by the prosecution were admissible as “tendency” evidence, and in particular, whether evidence relating to each complainant was cross-admissible as tendency evidence relating to the other complainants. The joint judgement reviewed the common law and statutory background, observing:<sup>67</sup>

The fact that evidence of prior acts of misconduct was generally regarded as inadmissible, and only received in wholly exceptional cases, meant that applications for severance, particularly in cases involving sexual offences, were frequently made, and almost as frequently granted. Certainly, that was so where there were multiple complainants, perhaps each alleging multiple offences, and it could not be said that their evidence was, in modern terms, “cross-admissible”.

This high threshold meant that, in many cases, juries were left to consider the evidence concerning each alleged victim in isolation, without ever being made aware of the fact that allegations of a similar kind had been made by other complainants. Such cases often involved allegations that went back many years, and sometimes came down to a consideration of oath against oath. The result, in a great many cases, was a series of acquittals, whereas, had the evidence been made available, the outcome would almost certainly have been different.

From about the latter part of the 1980s, this state of affairs began to change. The High Court, in a series of cases, began to reformulate the test for cross-admissibility. Law reform bodies, too, were given the task of developing a new, and more principled, approach to this area. Their recommendations led to a series of legislative reforms, many of them designed, so it would seem, to make it easier to procure convictions in such cases.

Unfortunately, there was a price to be paid for all of this. That price is still being paid today. Under the law as it stood in this State prior to the enactment of the Evidence Act,

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67 *Velkoski v The Queen* [2014] VSCA 121 per Redlich JA, Weingerg JA and Coghlan JA at [30]–[33].

and under the Evidence Act itself, the entire subject broadly encompassed by the term “similar fact evidence”, has become exceedingly complex and extraordinarily difficult to apply. The situation is not helped when, as will be demonstrated, appellate courts fail to speak with one voice on this topic.

In particular, the Victorian Court of Appeal reviewed leading common law decisions in the UK and Australia that insisted on a threshold requirement of “striking similarity” for evidence of other offences to be admissible against a defendant, and considered how the test for admissibility was affected by the introduction of the *Evidence Act 2008* (Vic).<sup>68</sup> This legislation mirrors the UEL Acts adopted in most other Australian jurisdictions and does not in its provisions dealing with tendency and coincidence evidence incorporate any reference to a “striking similarity” requirement.<sup>69</sup> Courts applying these acts, particularly in New South Wales, thus regarded the common law requirements as having been overtaken by the UEL provisions, which apply their own tests for admissibility.<sup>70</sup>

Despite acknowledging that the tests to be applied under ss 97, 98 and 101 of the UEL differ from the common law’s approach, the Victorian Court of Appeal nonetheless reasoned that 9 of the 16 charges involved “did not possess any distinctive or similar feature of the kind necessary to satisfy tendency reasoning”. And yet, no such distinctive similarity of acts or events constituting a pattern of behaviour is required under the UEL provisions. Sections 97 and 98,

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**68** *Evidence Act 2008* (Vic), in force from 1 January 2010. The *Evidence Act 2008* (Vic) (also referred to as “the Victorian UEA”) is the principal Act that introduced UEL into Victoria. The other UEL Acts are the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas), *Evidence Act 2004* (NI), *Evidence Act 2011* (ACT) and the *Evidence (National Uniform Legislation) Act 2011* (NT).

**69** The key provisions are s. 97 (The tendency rule), s. 98 (The coincidence rule) and s. 101 (Further restrictions on tendency evidence and coincidence evidence adduced by the prosecution). Both s. 97 and s. 98 of the Acts impose requirements of reasonable notice and “significant probative value” for, respectively, tendency and coincidence evidence, while s. 101(2) further provides: “Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.”

**70** In *R v Ellis* [2003] NSWCCA 319 (5 November 2003), in which an appellate bench of five was convened, the NSW Court of Criminal Appeal unanimously held that “in the regime for tendency and coincidence evidence... the Parliaments intended to lay down a set of principles to cover the relevant field to the exclusion of the common law principles previously applicable” (at [74]). The Victorian Court of Appeal accepted this in *Velkoski*, at [162]: “The provisions of the Evidence Act dealing with tendency and coincidence evidence should be viewed as a code. None of the common law principles that formerly governed this branch of the law are any longer binding in this area.”

governing tendency and coincidence evidence, respectively, require only that reasonable notice be given that such evidence will be adduced and that the evidence be of “significant probative value”. Section 98(1) explicitly refers to similarity of events and circumstances in capturing the reasoning process involved in coincidence evidence:

Evidence that two or more events occurred is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless –

- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence; and
- (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

However, s. 97(1) makes no such reference:

Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind unless –

- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence; and
- (b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

In *Velkoski*, the Victorian Court of Appeal detected a divergence of opinion that had emerged in sexual assault cases decided in New South Wales and Victoria and emphasised the need for “pattern of behaviour” evidence in such cases, particularly where involving multiple complainants, to have *real cogency* in order to be cross-admissible as tendency evidence. The joint judgement observes:<sup>71</sup>

Neither tendency nor coincidence evidence requires proof, as a condition of admissibility, of “striking similarity”. Nor should a trial judge ask whether it would be “an affront to common sense” to withhold evidence of that kind from the jury. Such expressions, taken from the common law, are unduly restrictive when it comes to the construction of the relevant provisions of the Evidence Act.

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<sup>71</sup> *Velkoski v The Queen* [2014] VSCA 121, at [169]–[171].

Nonetheless, some cases may meet even that higher threshold test. In that event, the task for the trial judge is likely to be relatively straightforward. The evidence will certainly satisfy the requirements of ss.97 and 98. It will almost certainly also satisfy the requirements of s.101.

The features relied upon must in combination possess significant probative value which requires far more than “mere relevance”. In order to determine whether the features of the acts relied upon permit tendency reasoning, it remains apposite and desirable to assess whether those features reveal “underlying unity”, a “pattern of conduct”, “modus operandi”, or such similarity as logically and cogently implies that the particular features of those previous acts renders the occurrence of the act to be proved more likely. It is the degree of similarity of the operative features that gives the tendency evidence its relative strength.

In allowing the appeal and ordering a retrial on numerous counts, the Court stated:<sup>72</sup>

We agree that on [several of the charges] the manner of the applicant’s offending conduct did not possess any distinctive or similar feature of the kind necessary to satisfy tendency reasoning. Applying the principle we have discussed above, we do not think there are present such features of similarity as show a pattern of conduct or modus operandi concerning either the previous acts, or the circumstances in which they were committed that logically and to a significant degree implies that it is more probable that he committed the act or acts in issue. The evidence of the complainants that could support tendency reasoning should have been confined to those charges which possessed sufficient common or distinctive features with the charge in issue and which thus demonstrated a pattern of conduct that cogently increased the likelihood of the occurrence of the charge in issue.

In taking the position that *it is the degree of similarity that gives tendency reasoning its relative strength*, it is arguable that the Victorian Court of Appeal has in effect reinstated the common law requirement of “striking similarity” in its interpretation of the UEL provisions and their application in sexual assault cases. The result is to potentially undo the considerable advance that both the common law and statutory reforms had made in this difficult area of law.

In *Velkoski*, only s. 97 was in play as the prosecution and defence had agreed to permit the multiple complaint evidence to be used only as tendency, not as coincidence, evidence. It was therefore the importation of an extraneous similarity test that led the Court to, arguably wrongly, decide that the s. 97 threshold had not been met for the nine charges in question. The case demonstrates the need for both advocates and judges to approach such cases with care. As the commentator Stephen Odgers notes, under the statutory test:<sup>73</sup>

<sup>72</sup> *Velkoski v The Queen* [2014] VSCA 121 at [184] and [185].

<sup>73</sup> Stephen Odgers, *Uniform Evidence Law* (11th ed. 2014) Thomson Reuters, p. 479.

The distinction between tendency and coincidence reasoning needs to be emphasised, notwithstanding the fact that essentially the same test of admissibility applies (see ss98 and 101). The existence of “similarity” is not essential to tendency reasoning, while it will always be a necessary requirement for coincidence evidence (see s98). This provision, unlike coincidence evidence under s98, is not “based upon similarities.”

The UEL was a step towards a more enlightened and logical future. It appears that, despite the UEL, there is a lurking fear of propensity reasoning and a desire for the silver bullet still alive in the Australian judiciary and this is leading them back to the unhelpful striking similarity test. As can be deduced from our discussion of the use of pattern of behaviour evidence above, we consider the line taken in *Phillips* and *Velkoski* as unhelpful and unnecessary. Before we turn to what should be done, we need first to consider the position in English law.

## The law on pattern of behaviour evidence in England

Despite the strongly exclusionary principle outlined in *Makin* and *DPP v Boardman*, the courts in England regularly admitted propensity evidence when its relevance called out for its admission.<sup>74</sup> Fear of the “forbidden” propensity reasoning led the courts to find other descriptions for propensity evidence to enable the “rule” to be circumvented: admitting the evidence as background or motive (see, for example, *R v Ball*<sup>75</sup>); to show that D has incriminating articles (see, for example, *Thompson v R*<sup>76</sup>); to disprove mistake, accident or innocent association (see *Ball* again); or to disprove an allegation that the witness is lying (see, for example, *Boardman*); or to establish identity (see, for example, *Straffen*). *Boardman* attempted a more wide-ranging review but its legacy is “similar fact” evidence and the “striking similarity” test which resulted in an obsession with finding something “out of the ordinary” in D’s activities to be able to bring the evidence of other activity within the “striking similarity” test. For example, in *R v Inder*<sup>77</sup> the Court of Appeal held that evidence of six small boys of the abuse they suffered whilst living with D should not been admitted as “similar fact evidence” as the similarities in their evidence “represent the stock in trade of the seducer of small boys and were not unique”.<sup>78</sup> This line of cases came to an abrupt end in 1991 with the House of Lords’ decision in *DPP v P*,

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<sup>74</sup> *The erosion of Boardman v DPP*, New Law Journal, 11 August 1995.

<sup>75</sup> [1911] AC 47, HL.

<sup>76</sup> [1918] AC 221, HL.

<sup>77</sup> (1978) 67 Cr App R 143.

<sup>78</sup> *R v Inder* (1978) 67 Cr App R 143 at 149.

which involved a man who had sexually abused his two daughters. The argument put forward on appeal was that there was nothing similar about the girls' allegations, which could bring them within the striking similarity test. The House of Lords reaffirmed the admissibility of "similar fact" evidence in limited circumstances, but stated that "striking similarity" was not the only factor which would lead to admissibility:<sup>79</sup>

[T]he essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed... [R]estricting the circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle.

Even following *DPP v P*, the basis for admissibility was still widely believed to be the unlikelihood of coincidence based on an all or nothing approach: either there is a coincidence and the defendant is not guilty, or the coincidence would be an affront to common sense and the defendant is guilty.<sup>80</sup> Of course this ignores the alternative that coincidence is possible but in fact the defendant did do it. The decision as to whether or not the defendant did do it should be made by the jury on all the evidence rather than by the judge on an admissibility ruling, as Hamer argues.<sup>81</sup> The search in England, just as in Australia, has been for the silver bullet discussed above. This mythical quest in England resulted in extreme decisions like *Inder*. After *DPP v P* the judicial belief in and desire for absolute certainty – that silver bullet – seems to have waned.

In *R v H*<sup>82</sup> the House of Lords upheld a trial judge's decision to allow similar fact evidence to be used despite allegations of collusion/contamination against the two complainants (who were the adopted and step-daughter of the appellant). Lord Mustill challenged the idea that the admission of propensity evidence was based on "*the unlikelihood of coincidences between truly independent events*" which required that the prosecution "*establish that there is no reasonably possible explanation of the similarity of the events other than guilt or coincidence*"

<sup>79</sup> *DPP v P* [1991] 2 AC 447 at p. 460.

<sup>80</sup> See, for example, *Archbold Criminal Pleading, Evidence and Practice*, 2004 edn. (London: Sweet & Maxwell, 2004), Richardson, P. (ed.) at 13–9. This notion can also be seen in the Australian decision of *Perry* quoted from at length above.

<sup>81</sup> See note 66.

<sup>82</sup> [1995] 2 AC 596.

which involved disproving collaboration or contamination as a precondition of admissibility.<sup>83</sup> Lord Mustill criticised this approach stating “I consider that its foundations are at best suspect and that the reasoning built upon them is unsound, for it starts the inquiry half-way through.”<sup>84</sup> In Lord Mustill’s view the decision in *DPP v P* means that<sup>85</sup>

the function of the trial judge is not to decide as an intellectual process whether the evidence satisfies prescribed conditions, but to strike as a matter of individual judgment, in the light of his experience and common sense, a balance between the probative value of the similar fact evidence and its potentially damaging effect.

The logical result of that was the decision in *R v H*:<sup>86</sup>

if the admissibility of the evidence no longer depends solely on the unacceptability of a coincidence the fact that the possibility of collusion introduces a third explanation, consistent neither with coincidence or guilt, cannot in itself destroy the justification for admitting the evidence.

The possibility of collusion/contamination went to the weight of the evidence rather than its admissibility and was thus a matter for the jury, not the judge. This acceptance that propensity evidence is admissible even when there are issues about its reliability indicated a real movement away from the need for absolute certainty in the propensity evidence.

In *R v Christou*<sup>87</sup> (sexual abuse of the appellant’s two young cousins) the House of Lords made clear that even where evidence of multiple complainants is *not* cross-admissible, they could still be tried together, severance being a matter for judicial discretion.

The relaxation of the common law approach was matched by that of the law reformers. The Law Commission’s consultation paper<sup>88</sup> and final report<sup>89</sup> paved the way for what became the “bad character” provisions of the CJA 2003, although the provisions in the final act are sufficiently different to the Law Commission’s proposals that it would be dangerous to place too much reliance on their reports when interpreting the act.

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**83** *R v H* [1995] 2 AC 596 at 619.

**84** *R v H* [1995] 2 AC 596 at 619.

**85** *R v H* [1995] 2 AC 596 at 621.

**86** *R v H* [1995] 2 AC 596 at 621.

**87** *R v Christou* [1997] AC 117.

**88** *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (London: HMSO, 1996), Law Commission.

**89** *Evidence of Bad Character in Criminal Proceedings* (Cm 5257, 2001) (London: HMSO, 2001), Law Commission.

Propensity is at the heart of the CJA 2003 provisions. The forbidden reasoning is forbidden no more, at least in theory. The statute governs the admission of “bad character” evidence which is defined as “*evidence of, or of a disposition towards, misconduct on the part of the defendant*” (emphasis added).<sup>90</sup> Evidence is admitted through one or more of the “gateways” which include that<sup>91</sup>

- (c) It is important explanatory evidence,
- (d) It is relevant to an important matter in issue between the defendant and the prosecution,
- (e) It has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant.

Once admissible through one of the gateways, the parties can put the evidence to any appropriate use. Given the potential overlap between the gateways, this is not uncommon. The jury should be told the purpose for which evidence of bad character is relied upon.<sup>92</sup> However, that does not dictate how the jury will use the evidence.

Gateway (c) retains the background evidence exception and is further explained as only being admissible if<sup>93</sup>

- (c) without it, the court or jury would find it impossible or difficult to understand other evidence in the case, or
- (d) its value for understanding the case as a whole is substantial.

This gateway allows for background evidence to be adduced so, for example, where the defendant and complainant have previously engaged in sadomasochistic orgies this might be considered to be reprehensible and valuable knowledge for a jury (subject to the rules on questioning complainants).<sup>94</sup> The overlap with propensity gateway (d) is obvious and it is unsurprising that in *R v Davis*<sup>95</sup> the English Court of Appeal stated that the test for gateway (c) should be applied cautiously where there is potential to use the evidence as propensity evidence and the jury must be directed as to the use that the evidence is put.<sup>96</sup>

“Matters in issue” in gateway (d) is interpreted as including:

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<sup>90</sup> “Misconduct” is the commission of an offence or some other reprehensible behaviour: CJA 2003, ss 98 and 112; *R v Rafiq* [2005] EWCA Crim 1423; *R v Renda* [2006] 1 Cr App R 24.

<sup>91</sup> CJA 2003, s. 101.

<sup>92</sup> *R v Campbell* [2007] 2 Cr App R 28.

<sup>93</sup> CJA 2003, s. 102.

<sup>94</sup> Cross-examination of complainants is restricted by the Youth Justice and Criminal Evidence Act 1999, s. 41.

<sup>95</sup> *R v Davis* [2008] EWCA Crim 1156, [2009] 2 Cr App R 17.

<sup>96</sup> See also *R v Lee (Peter Bruce)* [2012] EWCA Crim 316.

a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence.<sup>97</sup>

Although cases on gateway (d) tend to reiterate that it is not limited to propensity, the fact is that most arguments are, at heart, propensity arguments. The test remains relevance and it does not require the prosecution to have established the “matter in issue” by prima facie evidence.<sup>98</sup>

The trial judge retains the power to refuse to admit the evidence due to its prejudicial effect or, having admitted it, stop the trial if s/he finds the evidence to be “contaminated”.<sup>99</sup>

The CJA 2003 provisions kept the exclusionary rule only in so far as judicial leave is necessary for admission of pattern of behaviour evidence to which the defence objects. Propensity reasoning is no longer forbidden but is a gateway to admissibility. This should have swept away the categories of exception to the old exclusionary rule and led to a clear-eyed consideration of relevance, risks and case management. The leading case on the application of gateway (d), *R v Hanson*,<sup>100</sup> suggested that the courts were embracing the new approach. In *Hanson* the Court of Appeal stated “that Parliament’s purpose in the legislation, as we divine it from the terms of the Act, was to assist in the evidence based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice.”<sup>101</sup> The Court then provided this guidance:

Where propensity to commit the offence is relied upon there are thus essentially three questions to be considered:<sup>102</sup>

- (1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
- (2) Does that propensity make it more likely that the defendant committed the offence charged?
- (3) Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?

The difficulty is to establish when propensity is being relied upon (and when a jury may *use* the evidence as propensity evidence), and we shall see that remains a complicated and rather confused area. In *Hanson* the court went on

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<sup>97</sup> CJA 2003, s. 103.

<sup>98</sup> *R v Bullen* [2008] 2 Cr App R 25 at [29] and *R v Bowman* [2014] EWCA Crim 716 at [64].

<sup>99</sup> Police and Criminal Evidence Act 1984, 78; CJA 2003, ss 101(3) and 107.

<sup>100</sup> *R v Hanson* [2005] 1 WLR 21, [2005] 2 Cr App R 21.

<sup>101</sup> *R v Hanson* [2005] 1 WLR 21, [2005] 2 Cr App R 21 at [4].

<sup>102</sup> *R v Hanson* [2005] 1 WLR 21, [2005] 2 Cr App R 21 at [7].

to comment that the fewer the convictions/allegations, the weaker the evidence of propensity is likely to be, although single incidents of unusual behaviour, such as child sexual abuse, may show a propensity.<sup>103</sup> The subsequent cases have embraced this and there are numerous examples of single incidents of child sexual abuse that have been admitted to show a propensity towards such activity. The Court of Appeal deprecated the use of propensity evidence in weak cases, but subsequent cases certainly have not embraced this principle to the extent that, arguably, the focus is once again on the behaviour rather than the probative value of the evidence.

Despite the change in judicial thinking prior to the CJA 2003, and the embracing of propensity evidence in the CJA 2003 provisions, and the guidance in *Hanson* old habits die hard and there remain instances of inconsistency and muddled thinking. *R v Wallace*<sup>104</sup> and later *R v McAllister*<sup>105</sup> are good examples. In *Wallace*, the defendant was alleged to have committed four robberies with certain features in common. In dealing with the bad character evidence on appeal the Court of Appeal stated that “the important matter in issue was not whether the appellant had a propensity to commit offences or to be untruthful but whether the circumstantial evidence linking him to the robberies, when viewed as a whole, pointed to his participation in and guilt of each offence”.<sup>106</sup> In *McAllister* the defendant was prosecuted for a robbery in Banff, Scotland and the jury returned a verdict of “not proven”. In his subsequent prosecution for a robbery in Leeds which had taken place three days before the Banff robbery, the prosecution sought leave to adduce the evidence linking the defendant to the Banff robbery firstly to establish a propensity to commit robbery and secondly that when looked at as a whole, the evidence of both the robberies added to the strength of the evidence against the defendant for the Leeds robbery. The dictum from *Wallace* was cited with approval and the court also commented that<sup>107</sup>

... from time to time in the submissions both before the judge and before us we detect an error which is not uncommon, namely a confusion between those cases in which it is sought to adduce evidence of the commission of other offences because it shows a propensity and those in which it is sought to adduce such evidence because it strengthens other evidence tending to establish guilt... Such evidence may loosely be described as “similar fact” evidence, although attaching labels in this area of the law, as in so many others, aggravates the confusion.

**103** *R v Hanson* [2005] 1 WLR 21, [2005] 2 Cr App R 21 at [9].

**104** *R v Wallace* [2007] 2 Cr App R 30.

**105** *R v McAllister* [2009] 1 Cr App R 10.

**106** *R v Wallace* [2007] 2 Cr App R 30 at [39].

**107** *R v McAllister* [2009] 1 Cr App R 10 at [13] and [14].

This harking back to the common law term “similar fact” highlights the problem here. In *McAllister* and *Wallace* the case against the defendants is strengthened only if it is accepted that the defendant has a propensity to rob; otherwise the evidence – whether it is called similar fact or not – has no relevance as committing one robbery would make it no more likely that the defendant had committed another. The approach in these two cases creates two problems. First, categorising the evidence as “not propensity” avoids answering the important first two questions in *Hanson* that must be answered in the affirmative for the case against the defendant to be strengthened. Second can be seen from this comment in *McAllister*:<sup>108</sup>

the safeguards which a defendant must be afforded by way of directions in relation to propensity make no sense in a case in which the jury is asked to look at the evidence as a whole in considering the strength of the evidence in relation to each particular offence.

The problem is that the jury is being asked to use propensity reasoning, but is then not directed as to how it should be used. The emphasis in cases like *Wallace* and *McAllister* is on asking how the parties seek to rely on the evidence, but this ignores the fact that fact propensity is at the heart of the “whole case” argument. Further, it ignores the role of the jury and the possibility that *it* will use the evidence to show propensity, even when the parties are not running propensity arguments. This difficulty arises with evidence admitted under any one of the gateways.

The issues were dealt with in *R v C*<sup>109</sup> where the defendant was indicted on a single count of indecent assault<sup>110</sup> against a 9-year-old boy in the street namely by touching the boy’s genital area in broad daylight. The father of the boy who had given chase had apprehended the defendant. The boy described the perpetrator as a fat, bearded man wearing a blue fleece. The boy was not present when the defendant was apprehended having stayed behind with his mother. The father apprehended the defendant around a corner. He was a fat, bearded man wearing a blue fleece. He also had two previous convictions for, on separate occasions, touching children in their genital areas. On an interlocutory appeal, the Court of Appeal overturned the trial judge’s ruling that the evidence of bad character was not admissible. The trial judge had excluded the evidence of propensity on the grounds that the prejudicial effect outweighed its probative value stating that a close analysis of each alleged similarity (location, type of touching, age of child, etc.) did not demonstrate sufficient probative force. The

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**108** *R v McAllister* [2009] 1 Cr App R 10 at [18].

**109** Court of Appeal, 2007, unreported (in which Felicity Gerry QC appeared).

**110** Under the applicable law at the time: s. 15 Sexual Offences Act 1956.

Court of Appeal held that a pattern of previous criminal behaviour (indecently assaulting children in a similar way) could be used to rebut coincidence as a piece of circumstantial evidence having regard to the fact is in issue. Here the defendant admitted being across the road from the scene but denied participation. In essence – rebutting the coincidence that there would be another fat, bearded man wearing a blue fleece in the same street who also had a propensity to touch boys in the genital area. Proper identification of the propensity argument in its context enables admission of the evidence with the safeguards of proper direction to the jury. Interestingly, once the evidence of previous indecent behaviour was admitted, at the subsequent retrial, the defence case asserted that the incident had taken place near a hostel for sexual offenders and posited the suggestion that the indicted assault had been committed by what might be called “some other paedophile”. This shows the need for a clear-eyed analysis of the role of propensity reasoning in a case that must depend on the context; D’s propensity is only relevant if in the circumstances it does make it more likely that s/he was the perpetrator and directions to the jury must be tailored to this.

As with Australia, in England, the Court of Appeal in cases like *Hanson*<sup>111</sup> and *R v Highton*<sup>112</sup> has realised that absolute certainty is unnecessary and inappropriate having regard to the range of complex factual scenarios that come before the courts. Appellate decisions in the English courts have begun to focus on how judges should direct juries having regard to the actual factual issues that come before them for trial, having regard to both common law principles of fairness (which also apply in Australia) and human rights requirements by virtue of Article 6 of the European Convention on Human Rights.<sup>113</sup> Such cases have affirmed the importance of the trial judge directing the jury about propensity when it is relied upon by a party or where evidence is used to rebut coincidence. Judges must focus not on what the parties say (or agree – as happened in *Velkoski*). Targeted judicial direction is just as important where neither party says that they rely upon propensity, but in reality they are, or there is a risk that the jury will use propensity reasoning.

In *R v Kamara*<sup>114</sup> the prosecution relied on the argument under s. 101(1)(d) that they were using previous similar convictions to rebut D’s claim of innocent association. D was charged with possession with intent to supply crack cocaine

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<sup>111</sup> *R v Hanson* [2005] 1 WLR 21, [2005] 2 Cr App R 21.

<sup>112</sup> *R v Highton* [2005] 1 WLR 3472.

<sup>113</sup> The United Kingdom is a signatory to the European Convention on Human Rights and courts must take it and decisions made under it into account (The Human Rights Act 1998, s. 2).

<sup>114</sup> *R v Kamara* [2011] EWCA Crim 1146.

and had previous convictions for possession with intent to supply both crack cocaine and heroin. He claimed at trial that he knew nothing about the drugs found at the address he shared with his girlfriend and it must have been his girlfriend who was dealing them. The trial judge concluded that the previous convictions were capable of assisting the jury and directed them that the previous convictions established<sup>115</sup>

a tendency, a propensity, to deal in the most serious class of unlawful drugs and that it defies commonsense [say the prosecution] that with his background and with him using that room in her flat, that he was in the dark as to her drugs there and her proceeds from drug dealing there and it defies commonsense in the circumstances against that background that it is her private enterprise which she effectively kept secret from him.

The trial judge went on to warn the jury of the age of the convictions and that it did not follow that just because the defendant had been involved in drug dealing before he was involved in it on this occasion. The Court of Appeal commented that the direction perhaps focused somewhat too much on propensity, but considered that that was not critical because

the different ways of expressing the matter – whether by reference to propensity, coincidence or innocent association – can be seen to be to some extent interrelated, albeit that the true focus is in our view on the rebuttal of the defence of innocent association”.

As in *Markby*,<sup>116</sup> as long ago as 1978 in Australia, the solution becomes somewhat easier to express in the context of drug dealing rather than the emotive context of sexual offending, but the legal principles are just the same.

The Court of Appeal in *R v O’Sullivan and O’Sullivan*<sup>117</sup> was even more explicit. In this case of a cannabis farm for which electricity was being abstracted unlawfully, the first defendant’s previous conviction for cannabis cultivation and abstraction of electricity was relied upon to rebut his evidence at trial that he had let the property and was surprised to find the cannabis farm there. The trial judge directed the jury about propensity, reminding the jury of the common features of the cases and warning them against mere prejudice. The Court of Appeal cited *Kamara* with approval and took the view that<sup>118</sup>

bad character evidence properly admitted can be approached quite legitimately in different ways with the same ultimate purpose in mind, namely to explain to the jury the relevance of the evidence to the important matter in issue between the prosecution and defence.

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**115** *R v Kamara* [2011] EWCA Crim 1146 at [30] and [21].

**116** *Markby v R* (1978) 140 CLR 108.

**117** *R v O’Sullivan and O’Sullivan* [2013] EWCA Crim 43.

**118** *R v O’Sullivan and O’Sullivan* [2013] EWCA Crim 43 at [21].

The court stated<sup>119</sup>

[t]he [trial judge] was simply explaining to the jury how the conviction might affect their view of the account now being given by the appellant in his defence. That, it seems to us, was a virtually inevitable consequence of the admission of the evidence in rebuttal of the innocent explanation. We ask rhetorically: how else would the jury use the evidence in rebuttal of the explanation, unless to measure the conviction against the averment now made in evidence?

How indeed? Despite some lapses into pre-CJA 2003 approaches the English appellate decisions have moved firmly in the direction of seeing pattern of behaviour evidence as part of a larger picture of evidence enabling the jury to draw reasonable inferences. It is heartening to see that trial judges are going beyond the question of “Probative value v prejudicial effect” and asking themselves the question “How can I remove the prejudice by directing the jury or otherwise managing the admission of the evidence?”; the possibility of prejudice is not the end of the consideration of admissibility.

## Conclusion

The progress made in both countries to improve clarity, and avoid unhelpful labelling resulting in evidence being kept from the triers of fact, has not been without the odd backwards step. This progress has necessitated a rethinking of how juries are directed and this rethinking is not yet over. The decision in *Velkoski* in Australia, though, suggests a different path, tending back towards the common law approach, with its fear of propensity reasoning and somewhat muddled thinking that there must be a pre-determined judicial direction that can be drafted with absolute certainty. In our view, this is an unattainable fiction which could never retain sufficient flexibility to adapt to the many and varied ways in which evidence is available of how people behave and that is why each case has to be determined having regard to the facts in issue – to include any defence assertions that can be safely rebutted.

The legislation in both jurisdictions has led to undue complexity, partly through their reliance on concepts of character and partly due to the search for separate categories of tendency/propensity and coincidence/innocent association. The categories initially developed to circumvent the common law exclusionary rule that forbade propensity reasoning and their utility is at an end. In

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<sup>119</sup> *R v O'Sullivan and O'Sullivan* [2013] EWCA Crim 43 at [18].

our view the obsession with category-specific principles has led to basic principles of evidence being ignored, and unviable tests put in their place, and unnecessary concern over pooling and sequential approaches.

The question for both jurisdictions should be “What is the safe and just approach?” Each piece of evidence on its own does not have to *conclusively* demonstrate D’s guilt for it to be relevant and admissible. That is true of any case, whether sexual offending or otherwise. Pattern of behaviour evidence has the potential for great utility in criminal cases, particularly in properly reflecting the modern understanding of patterns of behaviour of those who sexually abuse. A lone allegation of sexual abuse may be easily deflected whereas a pattern of allegations may bring a weight greater than the sum of its parts. It is, however, vital to maintain fair trials and to avoid miscarriages of justice, the use of such evidence has to be managed, with the risk of distraction of, and prejudicial reasoning by, the jury faced and dealt with. The court has to go beyond the simple “Probative v prejudicial” question and focus on trial management and jury direction when determining whether to admit the pattern of behaviour evidence at trial. As was rightly recognised in *Perry*,<sup>120</sup> the only overarching principle is the presumption of innocence. The balance needs to be struck to ensure this is not a presumption of guilt, but the jury must be in possession of as much relevant evidence as possible and equipped with the right tools to enable them to use it properly.

It follows that insisting on the coincidence/propensity (tendency) split is not helpful to logical thought or proper direction of the jury. Being careful with concoction or collusion is the daily function of a court but the fear of propensity evidence shown in *Velsoski* has and will lead to a renewed search for the silver bullet (as we have called it) which in our view is a wholly retrograde and unnecessarily confusing step. The Australian legislative solution of focusing on the weight/probability, and the similar points made in the questions posed in *Hanson* show the path forward. We suggest that admissibility of pattern of fact evidence should come down to these four questions:

- (1) Does the evidence (whatever “category” it is put into) make it more likely that D committed the offence with which s/he is charged (i.e. is the evidence relevant)? The strength of any inference from pattern of behaviour evidence must be considered in the context of the other evidence in the case. If the evidence is not relevant, it must not be admitted.
- (2) Is any kind of propensity reasoning really being relied upon by the parties, whatever “category” is relied upon? It is important to ascertain at this stage whether the utility of the pattern of behaviour evidence is in any way based

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120 *R v Perry* (1982) 150 CLR 580.

on showing that the defendant has a propensity for a particular kind of behaviour.

- (3) If the evidence is admitted is there any risk of the jury placing too much weight upon the propensity reasoning, or employing unwarranted propensity reasoning, or being otherwise distracted from their ultimate task of deciding the case on the evidence?
- (4) If the answer to (2) and/or (3) is yes, then the jury will need to be directed about propensity reasoning. Can this be done in a way which will result in a fair trial for the defendant? If trial management cannot make the trial of the defendant fair, the evidence must not be admitted.

All other points, about collusion, contamination, similarity, age and number of previous convictions are subsumed within these questions.

Evidence of tendency, propensity and/or coincidence is logically admissible only when the court focusses on the facts in issue and balances the interests of each party fairly. Frankly nothing less than that should do on either side of the world.

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