

TENDENCY AND COINCIDENCE EVIDENCE IN CRIMINAL CASES

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1. I have practised law from a time beyond which the memory of man runneth not. At least, that is how it feels. During those years I managed, I think, to develop a slippery hold on fundamentals of the law of evidence, from the myriad cases on the subject. I was recently heartened to read something written by Sir James Stephen in about 1886 in the Introduction to his Digest of the Law of Evidence¹. Speaking of the difficulty in finding concise guidance to the law of evidence he said:

No such work, so far as I know, exists; for all the existing books on the Law of Evidence are written on the usual model of English law-books, which, as a general rule, aim at being collections more or less complete of all the authorities upon a given subject to which a judge would listen in an argument in court. Such works often become, under the hands of successive editors, the repositories of an extraordinary amount of research, but they seem to me to have the effect of making the attainment by direct study of a real knowledge of the law, or of any branch of it as a whole, almost impossible. The enormous mass of detail and illustration which they contain, and the habit into which their writers naturally fall, of introducing into them everything which has any sort of connection, however remote, with the main subject, make these books useless for purposes of study, though they may increase their utility as works of reference. The enormous size and length of the standard works of reference are a proof of this. They consist of thousands of pages and refer to many thousand cases.

2. This was written before another 109 years in NSW of learned writings and various half-formed statutes culminated in what was intended to partly codify the law, at least in federal courts, the ACT and NSW (followed by Norfolk Island, Tasmania and Victoria), by the *Evidence Acts*. I have to say that, like the *Criminal Code Act*, aspects of the legislation, considered in theological terms, remain, to me, an unattainable mystery.

What are now called the tendency rule, the coincidence rule (ss.97 and 98) and the probative value and prejudicial affect rules (ss.101(2) and 137) (as well, of course, the issue of relevance: s.55) cover the ground formerly occupied by the common law principle of similar fact evidence. In talking about modern developments in the law one must look at its evolution before the present *Evidence Act*. The earlier evidence Acts of NSW, such as the Evidence Act of 1898, amended from time to time, do not go to the subject. “Relationship” evidence is outside the scope of this paper.

3. The law was, and remains, a law of exclusion subject to exceptions. In its broadest sense it worked to exclude evidence of acts not charged. It is difficult to determine when the rule first emerged in a recognisable form. Although deriving from the common law, it was the subject of a statute of William 3 in 1695² in relation to treason trials. The statute ruled that “no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever”. However, the law in the 19th and 20th Centuries vacillated between absolute exclusion of uncharged acts, and the admission of evidence of such acts if relevant to the issue to be determined. Stephen Introduction (xiv) saw four classes of facts, which in common life would usually be regarded as falling within his definition of relevancy, but which would be excluded from it by the law of evidence except in certain cases. The first of his four facts were “Facts similar to but not especially connected with each other (*res inter alios actae*)”. In Chapter III Article 12 Stephen asserted that:

Where there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in

each of which the person doing the act was concerned, is deemed to be relevant.

Stephen's definition of relevancy was modified several times up to 1877 when the definition became:

The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

It has been often judicially approved. See the detailed analysis by Heydon J in his paper "The Influence of Sir James Stephen on the Law of Evidence"³.

4. In a paper published in the Harvard Law Review in 1933⁴, Julius Stone examined the evolution of the rule observing (at 956):

The problem is one of the applications of Wigmore's maxim "All facts having rational probative value are admissible, unless some specific rule forbids." Is there in England (he asked) a specific rule forbidding the introduction of evidence of facts similar to the main fact in issue, even though such evidence has rational probative weight? If so, what are its limits and how may it be formulated?

5. Speaking of the history of the rule of exclusion, Stone observed (in brief summary):
 - the writings of early text-writers fails to reveal any recognised rule excluding evidence of similar facts (958);
 - in 1810 *Rex v Cole* (960) established that evidence which merely showed a propensity to do the sort of acts charged was not admissible;

- in 1814 *Phillips* (959) held that 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 be admitted;
 - *Reg v Geering* (1849) (961) (a precursor of other poisoning cases) is repeatedly cited as the starting point for the modern relaxation of a posited broad rule of exclusion.
6. *Geering* was approved by the Privy Council in *Makin v Attorney General of New South Wales*⁵ which seems to be the real beginning of the common law rule of exclusion in NSW, which lasted until 1995.
 7. By 1995 there was a long line of common law authority to the effect that circumstantial evidence demonstrating a mere propensity to commit crime, or crime of a similar kind, was inadmissible unless the evidence was relevant in some other way. The evidence of similar facts had to have a strong degree of probative force. It would usually be of acts bearing a striking similarity to the act charged, such that it would be unreasonable to suppose they occurred merely by coincidence. Such evidence might have been relevant if it bore upon the question whether the acts alleged were designed or accidental, or to rebut a defence otherwise open to the accused. Underlying the common law decisions was the principle that such evidence ought not be admitted unless its probative force far outweighed its capacity to cause prejudice. So let us start with *Makin*. (In recounting facts relevant to some of the reported decisions referred to in this paper I have drawn on headnotes.)

***Makin* (1894) AC 57 at 65**

8. In 1892 and earlier Mr and Mrs Makin accepted the care of infants in Sydney for a fee. To them, it was sound economics to keep the fees and dispense with the infants. When

charged with the murder of one baby, whose body was found buried, they found it difficult to explain the presence of thirteen other buried babies in premises occupied by the Makins. The Privy Council held that the discovery of the other bodies could throw light upon the cause of death of the infant with whose murder the Makins were charged.

9. The Privy Council stated:

“In their Lordship’s opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to shew 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 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.”

The evidence had been correctly admitted and the Makins were hanged.

Smith (1916) 11 Cr App R229

10. George Smith, tried in England in 1915, had the misfortune to lose three lovers (each of whom he bigamously married) all by drowning in a bath, all in the same bizarre circumstances.

11. The Lord Chief Justice stated at 237:

“... it is not disputed, and could not be disputed, that if as a matter of law there was *prima facie* evidence that the appellant committed the act charged, evidence of similar acts became admissible, ...”

...

“Viewing the case put forward with regard to Bessie Munday only, we are of opinion that there was a case which the judge was bound in strict law to put to the jury. 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.”

The evidence having been correctly admitted, George Smith joined the Makins.

Noor Mohamed (1949) AC 182

12. Noor Mohamed the goldsmith had better luck, having lost a wife and a lover to cyanide poisoning. Evidence of the first death was rejected by the House of Lords on appeal, as showing no more than a propensity to commit murder.
13. At his trial for the death of Ayesha, evidence was admitted that tended to show the appellant had murdered another woman, his wife Gooriah, some years prior. Both women died from cyanide poisoning, and the appellant had ready access to potassium cyanide through his trade as a goldsmith.
14. Lord Du Parc provided the reasons of the House of Lords and stated from 192:

“There can be little doubt that the manner of Ayesha’s death, even without the evidence as to the death of Gooriah, would arouse suspicion against the appellant in the mind of a reasonable man. The facts proved as to the death of Gooriah would certainly tend to deepen that suspicion, and might well tilt the balance against the accused in the estimation of a jury. It by no means follows that this evidence ought to be admitted. If an examination of it shows that it is impressive just 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. After fully considering all the facts which, if accepted, it revealed, their Lordships are not satisfied that its admission can be justified on any of the grounds which have been suggested or on any other ground.”

15. Their Lordships found that there was nothing in the circumstances of Gooriah’s death that negated the possible defences of suicide or accident. Lord Du Parcq further stated at 193:

“... The effect of the admission of the impugned evidence may well have been that the jury came to the conclusion that the appellant was guilty of the murder of Gooriah, with which he had never been charged, and thus having adjudged him a murderer, were satisfied with something short of conclusive proof that he had murdered Ayesha. In these circumstances the verdict cannot stand, notwithstanding the care with which the learned judge summed up the case, and the fairness with which the trial was conducted in all other respects.”

16. Lord Du Parcq also quoted with approval other statements of principle at 195 and 196 emphasising that evidence should be limited to matters relating to the alleged events before the Court, and any departure from these matters should be strictly confined. Where disclosure of prior offences is required, “utmost vigilance at least should be maintained in restricting the number of such cases”.

Boardman (1975) AC 421

17. Boardman, a headmaster, was charged with one count of sexual assault with a student, and two counts of what might now be regarded as attempted sexual assault with two other students. The three counts were tried together (though the third count was not pursued for other reasons). The question on appeal was the extent to which the evidence on the one count could be used by the jury in determining the other count.

Their Lordships examined *Makin* and concluded that, to be admissible, similar fact evidence had to reveal “a close or striking similarity” or a “uniquely or strikingly similar manner” or “an underlying unity” or a “striking resemblance” or that to treat the evidence as pure coincidence would be “an affront to common sense”. As Lord Hailsham put it (at 454) while a repeated sexual act by itself might be quite insufficient to admit the evidence as confirmatory of identity or design, the fact that it was alleged to have been performed wearing the head-dress of a Red Indian chief or some other excentric garb might well in appropriate circumstances suffice. Though considered by many of the judges to be a borderline example, the Court found the facts demonstrated sufficient similarity to meet the posited test, and the appeal was dismissed.

Boardman seems to have set the high water mark of exclusion of similar fact evidence and was followed by the High Court of Australia in a succession of cases commencing in 1978 with *Markby*.

Markby (1978) 140 CLR 108

18. Gibbs ACJ said at 117 the admission of 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”*.

19. The facts of the case were that X and Y had arranged to meet A to sell drugs to A. X shot A with a rifle that Y knew to be loaded. Evidence had been admitted that both X and Y had previously been involved in two incidents where one party had cheated or robbed the other party while attempting to sell or purchase drugs. In one incident they had been the victims, the other the perpetrators. The Crown had argued that the accused knew that retaliation was likely in such a rip off situation and that the only way to prevent such retaliation was to eliminate the victim.

20. The Acting Chief Justice, with whom Stephen, Jacobs and Aickin JJ agreed, held that the evidence of the men's involvement in the previous incidents was evidence only of criminal propensity or disposition and was inadmissible. Gibbs ACJ cited *Makin* with approval and noted at 116 that in accordance with the principle of *Makin* the trial judge still has a discretion to exclude the evidence if its probable effect "would be out of proportion to its true evidential value" citing *Harris v Director of Public Prosecutions* [1952] A.C. 694 at 707.

21. Gibbs ACJ stated at 116:

"... The first principle, which is fundamental, is that the evidence of similar facts is not admissible if it shows only that the accused had a propensity or disposition to commit crime, or crime of a particular kind, or that he was the sort of person likely to commit the crime charged. The second principle, which is a corollary of the first, is that the evidence is admissible if it is relevant in some other way, that is, if it tends to show that he is guilty of the crime charged for some reason other than that he has committed crimes in the past or has a criminal disposition. ..."

[117] "... It is often difficult to decide whether a particular piece of evidence is or is not admissible within these principles. However when in doubt a judge should remember that the admission of similar fact evidence is the exception rather than the rule. To be admissible the

evidence must have “a strong degree of probative force” (per Lord Wilberforce in *Reg v Boardman* (22), or “a really material bearing on the issues to be decided” (per Lord Morris of Borth-y-Gest (23), citing *Harris v Director of Public Prosecutions* (24); 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” (see per Lord Cross in *Reg v Boardman* (25); and see per Lord Hailsham of St. Marylebone (26)). The question is one of degree, and in answering it the judge must apply his experience and common sense. ...”

“... the principle allowing the admission of the evidence remains subject to the discretionary power to exclude it, even if legally admissible, where its prejudicial effect outweighs its probative value. In applying the test of admissibility to which I have just referred, practical assistance, in many cases, will be obtained by considering whether there is a “striking similarity” between the similar facts and the facts in issue (see *Reg v Boardman* (27)).”

***Perry* (1982) 150 CLR 580**

22. Mrs Perry was convicted of the attempted murder of her third husband, who was found to be suffering from arsenic poisoning in 1978. Evidence had been admitted that her second husband and her brother had died of arsenic poisoning in 1961 and 1962 respectively, and that her de facto husband had died of an overdose of barbiturates in 1970. The accused benefited financially from the deaths of her second husband and her de facto husband, and would have benefited from the death of her third husband had he died. She would not have benefited financially from the death of her brother.

23. The High Court allowed the appeal and ordered a retrial. While it appeared that the principles to be applied remained clear following *Markby* (though Murphy J was in dissent as to whether these principles should remain) the full Court differed substantially in relation to the admissibility of the evidence of the previous deaths:

- (a) The Court was unanimous in that the evidence of the death of the 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 (Murphy J dissenting) held that the evidence concerning the 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 (Wilson and Brennan JJ in dissent) held that the evidence concerning the brother's death was not admissible. Gibbs CJ stated at 590 that the issue was finely balanced; 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.

24. Gibbs CJ, Wilson and Brennan JJ agreed that:

- (a) Similar fact evidence may only be admitted if it has a strong probative force;
- (b) A "striking similarity" was an indicator as to whether such probative force was present.

25. Charges of sexual offences against three boys aged between ten and thirteen were tried together. Each boy gave evidence of an indecent dealing in circumstances strikingly similar to the others. Two of the boys were brothers and the third was a friend of one of the brothers. They lived together in a boys' home where the accused was employed as a recreation officer. There was evidence that the boys had an antipathy to the accused which may have been unrelated to any sexual act. The Court found that there was an opportunity to concoct the evidence.
26. The Court held that the basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculcation of the accused person in the offence charged.
27. The Court held that the principles of similar fact evidence remained unchanged from *Boardman*. However there was a serious issue as to how *Boardman* applied when there was a suggestion that the striking similarity was itself potentially evidence of concoction on the part of the witnesses and therefore damaging to the probative value to be attached to that evidence rather than corroborative. The trial judge failed to satisfy himself that there was no real or reasonable chance that similar fact evidence was not the product of concoction. The Court held that there was a serious miscarriage of justice and the convictions were quashed.

Harriman (1989) 167 CLR 590

28. The High Court applied the principles in *Boardman* to evidence of previous criminal behaviour that would be considered tendency or propensity evidence rather than coincidence or similar fact evidence. Though separate judgements were delivered, there did not appear to be much dispute about the principles to be applied.

29. The facts were that Harriman was on trial for being knowingly concerned in the importation of heroin in 1987. It was common ground that the accused, Harriman had travelled with X to Thailand and met in Bangkok. They travelled to Chiang Mai and returned to Bangkok. X then travelled to London where he posted heroin to a number of addresses in Australia.
30. X gave evidence that the accused, Harriman had arranged for heroin to be available in Chiang Mai, that together X and Harriman broke the heroin into smaller parcels, and that on Harriman's instructions X travelled to London to post the heroin back to Australia. The motive for the importation was alleged to be to relieve the financial stress of a company in which both Harriman and X were involved. Over objection, evidence was admitted of Harriman's involvement with X in the sale of heroin in 1986 and the fact that Harriman had used heroin at that time.
31. Through separate judgements, the Court was unanimous in finding that the previous involvement with X in the sale of heroin was admissible. It was highly probative of the criminal character of the accused's relationship with X in 1987. The probative value outweighed the prejudicial effect.
32. By majority the Court held that the accused's prior use of heroin was inadmissible. According to Toohey and McHugh JJ, the evidence had no relevance to the accused being knowingly concerned in the importation of heroin. According to Gaudron J, the evidence lacked the requisite probative value to make it admissible. Brennan J found that it was admissible, and Dawson did not express a view. Those in the majority on this issue held that the improper admission of this evidence had not resulted in a miscarriage of justice for the appellant.

33. Pfennig was charged with the murder of a ten year old boy at or near Murray Bridge on or about 18 January 1989. The body was never found. The prosecution was based on circumstantial evidence including that the boy was last seen on 18 January 1989 at Sturt Reserve on the Murray River and that Pfennig had abducted and raped another young boy about a year later at Port Noarlunga, an offence to which Pfennig had pleaded guilty. The trial judge admitted the evidence of the later offence.
34. The Court found unanimously that the evidence was admissible. To attempt to summarise the position taken by the Court:
- (a) Mason CJ, Deane and Dawson JJ cited *Hoch* as establishing that propensity evidence, being a subset of circumstantial evidence, will only have probative value beyond its prejudicial effect when there is no reasonable view of the evidence consistent with the innocence of the accused (at 483 to 484). Toohey J agreed with this position (at 506 and 507);
 - (b) McHugh J (in dissent of this issue, but in agreement on dismissing the appeal) stated at 531 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 generally be 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 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 it is not the basis of any reasoning process, a standard of proof lower than the no rational explanation standard may suffice for admission.”

35. McHugh J may have overstated the majority view in describing it as requiring a denial of any other *rational* explanation rather than *reasonable*.

THE EVIDENCE ACT

(REFERRING TO THE NSW AND COMMONWEALTH ACTS)

36. I will try to deal briefly with some of the array of cases thrown up by the Act. Sections 97 (tendency) and 98 (coincidence) each requires that evidence in its respective category, to be admissible, must have significant probative value. Section 101(2) purports to exclude tendency and coincidence evidence unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the accused. Underlying the common law decisions was the principle that evidence should be excluded if its prejudice would cause an injustice. There is no statutory guidance about what is meant by “significant probative value” but ordinary language suggests it means something less probative than the sort of standards demanded by *Boardman* and *Markby* in the assessment of the admissibility of similar fact evidence at common law.
37. It has been held that it is not essential the evidence reveal striking similarities or unusual features (for example, *Jacara Pty Ltd v Perpetual Trustees WA Ltd*⁶) and in *Ellis*⁷ Spigelman CJ held that in the *Evidence Act* parliament intended to lay down a set of principles to cover the relevant field to the exclusion of the common law principles previously applicable, noting the change in terminology from “similar fact” to “coincidence” and from “propensity reasoning” to “tendency evidence”. So the common law has gone.

PROBATIVE VALUE

38. As Mr Odgers observed in *Uniform Evidence Act* (9th ed) at 439):

It will often be the case that striking or unusual similarity in events, or the circumstances in which the events occurred, will be necessary for the evidence to satisfy the requirement of significant probative value. However *that will not always be the case*.

39. Precisely what does the Act mean by “probative value”, obviously the first step in the determination of whether evidence could be of “significant” probative value? The dictionary to the Act defines it as the extent to which the evidence could rationally effect the assessment of the probability of the existence of a fact in issue. The law in NSW appears to be that a trial judge should not generally take into account issues of credibility when assessing probative value, whether for the purposes of ss.101(2) or 137 (for example, *R v Shamouil*⁸). It follows that a judge should not take account of apparent weaknesses or contradictions in the proposed evidence before determining its “probative value” or indeed whether it could have “significant probative value”.
40. In *Shamouil* Spigelman CJ said (at [60]):

The preponderant body of authority in this Court is in favour of a restricted approach to the circumstances in which issues of reliability and credibility are to be taken into account in determining the probative value of evidence for the purposes of determining questions of admissibility. There is no reason to change that approach.

At [63] he then cited *Cook*⁹ by pointing to circumstances where issues of credibility or reliability are such that it may be possible for a court to determine that it would not be open to the jury to conclude the evidence could rationally affect the assessment of the probability of the existence of the fact in issue.

41. Western Australia overcame the problem by enacting that it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion¹⁰. The subject is dealt with in detail in a recent paper by Smith and Odgers¹¹. The view of the authors is that the decision in *Shamouil* was wrong. They say (at 293):

Broadly speaking, divergent views have emerged as to whether, in assessing the probative value of evidence for the purposes of s 137, the court is to proceed on the assumption that the evidence is both credible and reliable (the “narrow construction”) or is free, within limits, to assess the credibility and/or reliability of the evidence for itself (the “broad construction”). Putting the matter in a slightly different way, the question is whether the court is required to assume that the evidence will be “accepted” by the tribunal of fact or if the court is not required to make that assumption.

The High Court is yet to rule on the issue, although Gaudron J and McHugh J have, at different times, expressed views which have been regarded as being on different sides of the debate. At an intermediate appellate level, New South Wales authority adopts the narrow construction so that a trial judge in that jurisdiction should not, in general, take into account “issues of credibility” or matters of “general unreliability” when assessing probative value for the purposes of the application of s 137. In contrast, Tasmanian authority gives support to a broad approach – at least to the extent of considering the reliability of the

evidence when applying s 137. The Victorian Court of Appeal is yet to rule on the question.

It is the authors' view that the narrow construction of this term should be rejected.

42. In *Nassif*¹² Simpson J said of s.101(2):

Examination of the language of s.101(2) particularly when contrasted with the language of ss.97 and 98, yields yet another of those mysteries of the Evidence Act that have diverted litigation lawyers, judges and commentators for nigh on a decade.

I sympathise with her Honour. She said: s.101(2) has generally been construed as a rule with respect to admissibility (notwithstanding that on its face the wording is language of exclusion).

43. In *Lockyer*¹³ Hunt J Held that “significant” in s.97 means “important” or “of consequence” neither of which expressions seem to come very close to the language in the common law cases, but which have been adopted as appropriate, in later cases.
44. In *AW v The Queen*¹⁴ the Court of Criminal Appeal held that to have significant probative value the evidence must be “meaningful in the content of issues at trial... it must be more than merely relevant but may be less than substantially so”. It would seem to be unarguable that such a test is a step back from the common law requirement of “striking similarity” or that to exclude such evidence would be “an affront to common sense”.

Fletcher (2005) A Crim R 308

45. Fletcher is an example of the way ss 97, 98 and 101(2) have introduced a new concept, not necessarily a just one. The majority of the CCA held that evidence of an uncharged sexual act, different from the acts charged, on a different person, remote in time from the offences charged, was properly admitted. It would be difficult to see the admissibility of the evidence at common law. The High Court refused special leave to appeal.

46. The appellant, a parish priest, was charged with nine counts of sexual acts on a boy between 1990 and 1991, when the boy was aged 14 and 15. Tendency and coincidence evidence comprised a statement from another boy referred to as GG. He described two incidents in 1986 and 1987 (when GG was approximately 12 and 13) that alleged that the accused performed fellatio on GG, and some matters of background material. The appellant submitted that the evidence was improperly admitted because it did not have significant probative value and its probative value did not substantially outweigh its prejudicial effect.

47. Simpson J (with whom McClellan CJ at CL agreed) wrote the majority judgment. In dismissing the appeal, Simpson J recounted the evidence above and noted that, in the 9 counts before the court, only one (Count 4) concerned an allegation of fellatio performed by the accused on the complainant. One count was an allegation of an act of indecency (Count 1). The other 7 counts involved intercourse in the form of either fellatio performed by the complainant on the appellant (Counts 2, 3 and 6) or of anal intercourse (Counts 5, 7, 8 and 9).

48. Simpson J considered the operation of s 97 and stated:

It is also useful to articulate the exercises involved in a decision to admit or reject evidence tendered as tendency evidence under s97(1). Some

precision in that analysis, also, is required. It is necessary to bear in mind: -

- (i) the actual probative value to be ascribed to a particular piece of evidence is committed to the tribunal of fact (in this case, the jury);
- (ii) even where the judge is the tribunal of fact, it is not ordinarily possible finally to determine the actual probative value of any piece of evidence until the evidence in the case is complete. This is explicitly recognised in s97(1)(b), which envisages that the evaluation of the probative value of the evidence in question is to be made having regard to other evidence “to be adduced”, and implicitly by the use of the subjunctive “would not” in s97(1)(b).
- (iii) whether a particular piece of evidence is capable of being ascribed probative value is to be determined by the trial judge; this is to be done by reference to the test prescribed in the definition of “probative value” contained in the Dictionary and involves an assessment of the extent to which that evidence could rationally affect (i.e. is capable of rationally affecting) the probability of the existence of a fact in issue;
- (iv) ...The evidence is not to be admitted if the judge concludes that the evidence, either alone or in conjunction with other evidence already adduced or to be adduced, would not have significant probative value, i.e. if the judge concludes that the jury would not regard the evidence as having probative value, and to a significant degree (in the sense explained by Hunt CJ at CL in *Lockyer* (1996) 89 A Crim R 457). If the determination is that, notwithstanding that the evidence would have probative value, its probative value would not be significant, then the evidence is not admissible.¹⁵

49. Simpson J proceeded to focus on the material that was before the trial judge on the voir dire for the purposes of assessing whether the decision to admit the evidence was wrong as a matter of law. She stated:

“... What was contained in the tendency material was capable of establishing a pattern of behaviour on the part of the appellant, incorporating at least the following features. GG was two or three years older than the complainant, and his allegations were of conduct three or four years earlier than that alleged by the complainant: both were therefore young adolescents, twelve, thirteen or fourteen, at the time of the alleged conduct. Both gave accounts of being members of practising Catholic families, who were befriended by the appellant. Both served as altar boys. Both recounted conversations of a sexual nature. Both recounted admonitions by the appellant not to divulge to anybody what had happened. Both recounted assertions made by the appellant that the activity was normal.”¹⁶

50. Simpson J ultimately found that there was no error in admitting the challenged evidence.
51. In relation to the operation of s.101, she found that a literal interpretation of s.101(2) would present insuperable barriers in a jury trial, requiring the jury to assess the prejudicial effect. It should continue to be treated as if it were a provision concerning admissibility. It was open to the judge to conclude the prejudicial effect was substantially outweighed by the probative value.
52. But, in my view, the section presents a real problem if factors of credibility and unreliability cannot be taken into account by the trial judge.

53. After considering the High Court's consideration of similar fact evidence in *Hoch* prior to the introduction of the Evidence Act, Simpson J noted:

“There is no reason why the reasoning that led the High Court to accept the admissibility of similar fact evidence in appropriate cases before the enactment of the Evidence Act should not guide the reasoning process in the evaluation of whether tendered evidence is capable of having, or would have, significant probative value.”¹⁷

54. This approach is not apparent from the majority judgments. The significance of the case in the present context is that it is unlikely the evidence could have met the common law tests.
55. Rothman J, in dissent, focussed closely on the use of the tendency evidence. Rothman J found that GG's evidence of the other conduct “does not render more probable the happening of the conduct charged, only the identity of the perpetrator if the conduct is otherwise proven. In reality, the evidence is sought to be used to show that the complainant is truthful.”¹⁸ Such a use was not coincidence evidence, as Rothman J considered that the events were not sufficiently related to each other, but credibility evidence and therefore inadmissible under s.102.

Zhang (2005) 158 A Crim R 504

56. The appellant was tried and convicted for attempting to import crystal methylamphetamine and for possessing the same drug. She ran a company which imported foodstuffs from China, and bags of methylamphetamine of a particular purity were found in a consignment by Customs. Crystal methylamphetamine of a similar purity in similar containers was found in her bedroom. Her case at trial was that a co-accused imported the drugs without her knowledge and gave her a bag to look after, the contents of which she was unaware. The trial judge allowed the evidence of the

importation and possession to be admitted on both counts and heard together. On appeal it was submitted that the ruling to admit the evidence was erroneous.

57. Buddin J agreed with Simpson J on dismissing the appeal. Basten JA was in dissent.
58. Simpson J relevantly held:
- The related events were the consignment of the drug and the simultaneous possession of the drug in her bedroom.
 - The evidence was admissible in respect of the charge to which it is related, and in a joint trial of the two charges was clearly admissible. The secondary purpose of the evidence was as coincidence evidence.
 - The task of the judge determining the admission of coincidence evidence is evaluative and predictive, requiring first a determination of relevance, then, if relevant, determining in the light of evidence adduced and anticipated the likelihood that the jury would assign the evidence significant probative value.
 - The trial judge addressed the correct questions and the evidence was properly allowed to be used on a cross admissible basis. There was no miscarriage of justice.
59. Basten JA took issue with Simpson J's view of the operation of section 98 that stated that the actual probative value to be assigned to any item of evidence is a question for the tribunal of fact, in this case, the jury. Basten JA considered that this phrasing conflated two approaches, assessing whether the evidence was capable of rationally affecting the

probability of a fact in issue, and then evaluating whether the jury would assign that evidence significant probative value. His Honour therefore favoured a different approach to the operation of s 98, that is, the trial judge must make his or her own assessment of probative value for the purposes of s.98.

60. On 4 August 2006, an application for special leave to appeal to the High Court of Australia was refused, although Gummow J, speaking for the court, acknowledged that the issues raised were significant, and may, on another occasion, warrant a grant of special leave.¹⁹ It seems that the Court of Criminal Appeal assembled a panel of 5 judges to determine this issue in *DAO v R* (considered below) specifically to resolve the issue in a definitive way.

***R v PWD* (2010) 205 ACrimR 75**

61. The Court of Criminal Appeal held that evidence of sexual misconduct with boys different from the misconduct and the boys named in the indictment was admissible as tendency evidence. In the process it was held that “for the evidence to be admissible under the *Evidence Act* s.97 there need not be striking similarities, or even closely similar behaviour. In contrast, coincidence evidence is based upon similarities.”

***BP* [2010] NSWCCA 303**

62. Hodgson JA held:

“Evidence with which s 97 is relevantly concerned is evidence that a person has a tendency to act in a particular way or have a particular state of mind; and the probative value of the evidence will depend both on its probative value in establishing the tendency and on the probative value of the tendency (if established) in relation to an issue in the case: *R v Li* [2003] NSWCCA 407 at [11], *R v Cittadini* [2008] NSWCCA 256; (2008) 189 A Crim R 492 at [22] – [23].

“To be admissible as tendency evidence, the evidence must have significant probative value. It must be capable of rationally affecting the probability of the existence of a fact in issue to a significant extent, meaning (at least) an extent greater than required for mere relevance: *Zaknic Pty Limited v Svelte Corporation Pty Limited* [1995] FCA 1739; (1995) 61 FCR 171 at 175-6, *R v Ford* [2009] NSWCCA 306 at [50] and [51], *R v PWD* [2010] NSWCCA 209 at [66]. The question of probative value (and also the possibility of prejudicial effect) must be assessed having regard to the issues in the case: *PWD* at [63].

“It is not necessary in criminal cases that the incidents relied on as evidence of the tendency be closely similar to the circumstances of the alleged offence, or that the tendency be a tendency to act in a way (or have a state of mind) that is closely similar to the act or state of mind alleged against the accused; or that there be a striking pattern of similarity between the incidents relied on and what is alleged against the accused. However, generally the closer and more particular the similarities, the more likely it is that the evidence will have significant probative value.

“The possibility of prejudicial effect with which s 101 is concerned is the possibility that the jury will act on the evidence otherwise than by way of its rational effect on the probability of a fact in issue, for example by giving effect to “some irrational, emotional or illogical response” or “giving the evidence more weight than it truly deserves”: *R v Suteski*²⁰. An assessment must be made whether the probative value of the evidence substantially outweighs any prejudicial effect that the evidence may have.

“One matter that powerfully affects both the probative value of tendency evidence and the possibility of prejudicial effect is the risk of concoction or contamination of evidence.”

63. The applicant was charged with 18 counts of sexual offences against six complainants, who were male and under the age of 16 years at the time of the alleged offences. The complainants were parishioners and altar boys when the applicant was a Catholic priest. The applicant sought orders for a separate trial of the counts that related to each complainant. The the DPP gave notice under s 97 of the Evidence Act 1995 (NSW) of its intention to adduce tendency evidence. The DPP asserted that the evidence of each complainant was cross-admissible in relation to each other complainant, whereas the applicant asserted that none of the evidence of any of the complainants was cross-admissible in relation to any other complainant.
64. The primary judge ordered that the counts in respect of three complainants be separated, but declined to do so in respect of the remaining three complainants, which he ordered were to proceed to a joint trial. The primary judge did not make an express ruling on the cross-admissibility of the tendency evidence with respect to the complainants the subject of the joint trial, but it was clear that the ruling incorporated such a ruling. Before the Court of Criminal Appeal, the applicant sought leave pursuant to s 5F(3) of the *Criminal Appeal Act 1912* (NSW) to appeal against the decision of the primary judge refusing, in part, his application for severance of counts on the indictment.
65. At issue before the Court of Criminal Appeal was whether the court had jurisdiction to deal with the application, whether the court was bound to determine appeals that raise the correctness of a decision on the admissibility of evidence tendered under s 97 by

reference to the principles stated in *House v R* (1936) 55 CLR 499 or *Warren v Coombes* (1979) 142 CLR 531; 23 ALR 405, and whether leave to appeal ought to be granted.

66. A panel of 5 judges was assembled principally to deal with the conflict in appellate approach to review of s 97 decisions.

67. The Court relevantly held (Per Simpson J, Spiegelman CJ, Allsop P, Kirby and Schmidt JJ agreeing):
 - (a) For the purposes of s 97 of the Evidence Act, the real question is whether the evidence is capable, to a significant degree, of rationally affecting the assessment by the jury of the probability of the existence of a fact in issue;
 - (b) In applying s 97 of the Evidence Act, evidence of more serious conduct may support allegations of less serious conduct just as evidence of less serious conduct may support allegations of more serious conduct;
 - (c) The primary judge correctly weighed up the competing considerations, and reached the view that the evidence of the tendency witnesses could have interconnecting significant probative value, and correctly applied s 101 of the Evidence Act;
 - (d) If it were necessary to exercise an independent consideration of the admissibility of the evidence, there is no reason to come to any different decision to that of the primary judge.

68. The Court also held (Per Simpson J, Schmidt J agreeing, Allsop P and Kirby J agreeing to similar effect in obiter) that in reviewing a decision under s 97 of the *Evidence Act*, the Court of Criminal Appeal is governed by the principles in *House v R* (1936) 55 CLR 499. That is, decisions to exclude or admit evidence by a trial judge should only be set aside on appeal where a clear error is demonstrated and not where the superior court is in a position to make a decision and takes a different view.

69. On the meaning of ‘significant probative value’ Simpson J referred to the dictionary definition of probative value in the Act, then holding that:

"Significant" means "important" or "of consequence": *R v Lockyer* (1996) 89 A Crim 457; *R v Lock* (1997) 91 A Crim R 356; and see, to similar effect in different words, *Zaknic Pty Ltd v Svelte Corporation Pty Ltd* (1995) 61 FCR 171; 140 ALR 701; [1995] FCA 1739.

***Stubley* (2011) 85 ALJR 435**

70. Finally, I go to a recent High Court decision, *Stubley v WA* (2011) 85 ALJR 435. The issue in dispute was whether evidence of uncharged sexual offences should have been admitted as propensity evidence under *Evidence Act* (WA) s.31A as having significant probative value.

71. Relevantly, s.31A of that Act provides:

(1) ...

propensity evidence means:

- (a) similar fact evidence or other evidence of the conduct of the accused person; or
 - (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;
- (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers —
- (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
 - (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.
- (3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

72. The requirement at s 31A(2)(b) seems to invoke concepts closer to the ‘affront to common sense’ formulation from Lord Hailsham in *Boardman* than have been adopted by the *Evidence Act*. However it could not be said to require that there be no reasonable view of the evidence consistent with the innocence of the accused per *Pfennig*. Indeed the Court specifically stated that s 31A abrogated the common law rule in *Pfennig*: see *Stublely* at 438 para [11] per Gummow, Crennan, Kiefel and Bell JJ.

73. The requirement at s 31A(3) to consider probative value without regard to the possibility of concoction seems to be a radical departure from the common law approach (in particular the ruling in *Hoch*). It is unclear what the NSW position is.

74. The appellant was a psychiatrist charged with sexual acts against patients. The issue was whether the acts were consensual and whether evidence of uncharged acts was properly admitted. The majority in the High Court held that the evidence should not have been admitted because it lacked significant probative value, holding that proof of a tendency to engage in grave professional consensual misconduct could not rationally effect the assessment of the likelihood that the complainants' consents had been obtained by threats or intimidation.
75. The decision of the Supreme Court of Western Australia (Court of Appeal) was reversed.
76. The Court noted that the pre-trial application to determine the admissibility of the evidence had proceeded without identification by the respective parties or by the trial judge as to how the evidence of the appellant's conduct before or after intercourse was probative of any issue in the trial. There was no identification of the asserted tendency or feature of the conduct of the appellant which the evidence was admitted to prove: (439 to 440 para [15]). This was a serious omission in assessing the probative value of the evidence. It was clear that the only issue was consent. Binding authority²¹, and a detailed consideration of the evidence, concluded that the propensity evidence was not probative on the issue of the victim's consent to the sexual activity with the accused.
77. The decision also noted with approval a consideration of the meaning of 'significant probative value' in a different context from Steytler P in *Dair v Western Australia* (2008) 36 WAR 413. It must be evidence that could rationally affect the assessment of the probability of the relevant fact in issue to a significant extent. It must be more than mere relevance, but something less than a substantial degree of relevance. It is a probative value that is 'important' or 'of consequence', and must be assessed on the nature of the facts in issue and the relationship of the evidence to those facts (*Stubley* at 439 par. [11]).

TENDENCY EVIDENCE ADMITTED FOR OTHER PURPOSES

78. Tendency evidence may sometimes be admitted not to prove a tendency but for some other purpose, in which case it is essential that the jury be given very clear directions as to the permissible use to which the evidence may be put. Illustrative of this point is a recent decision in the New South Wales Court of Criminal Appeal (*L'Estrange*).

L'Estrange (2011) NSWCCA 89

79. The trial judge admitted evidence of an earlier conspiracy as evidence of association. It also pointed to a tendency to rob drug dealers. On appeal McCallum J (for the Court) in upholding the appeal, observed:

Where evidence that invites tendency reasoning is admitted in a criminal trial other than as tendency evidence, the need for clear direction to the jury is well recognised: see *R v Beserick* (1993) 30 NSWLR 510 at 516B per Hunt CJ at CL; *JDK v R*; *R v JDK* [2009] NSWCCA 76 at [32] per McClellan CJ at CL. As already indicated, the risk that the jury would use the evidence for an impermissible purpose was high in the present case and a warning was plainly required both at the point when the evidence was led and in the summing up. Nothing in the trial judge's summing up addressed that issue. This ground should be upheld.

LAW REFORM COMMISSION

80. The Law Reform Commission considered tendency and coincidence in detail in ALRC 26 and ALRC 38.

81. In the draft legislation attached to ALRC 38 the Commission recommended the following sections on the topic:

Subdivision B - Tendency evidence

Exclusion of tendency evidence

86. Evidence of the character, reputation or conduct of a person, or of 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.

Subdivision C - Conduct evidence

Exception: conduct (including of accused) to prove tendency

87. Where there is a question whether a person did a particular act or had a particular state of mind and it is reasonably open to find that -

(a) the person did some other particular act or had some other particular state of mind, respectively; and

(b) all the acts or states of mind, respectively, and the circumstances in which they were done or existed, are substantially and relevantly similar,

the tendency rule does not prevent the admission or use of evidence that the person did the other act or had the other state of mind, respectively.

Exclusion of evidence of conduct (including of accused) to prove improbability of co-incidence

88. Evidence that 2 or more events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind unless it is reasonably open to find that -

(a) the events occurred and the person could have been responsible for them; and

(b) all the events, and the circumstances in which they occurred, are substantially and relevantly similar.

Further protections: prosecution evidence of conduct of accused

89. (1) This section applies in relation to evidence in a criminal proceeding adduced by the prosecutor and so applies in addition to sections 87 and 88.

(2) Evidence that the defendant did or could have done an act or had or could have had a particular state of mind, being an act or state of mind that is similar to an act or state of mind the doing or existence of which is a fact in issue, is not admissible unless -

(a) the existence of that fact in issue is substantially in dispute in the proceeding; and

(b) the evidence has substantial probative value.

(3) In determining whether the evidence has substantial probative value, the matters to which the court shall have regard include -

(a) the nature and extent of the similarity;

(b) the extent to which the act or state of mind to which the evidence relates is unusual;

(c) in the case of evidence of a state of mind - the extent to which the state of mind is unusual or occurs infrequently; and

(d) in the case of evidence of an act -

(i) the likelihood that the defendant would have repeated the act;

(ii) the number of times on which similar acts have been done; and

(iii) the period that has elapsed between the time when the act was done and the time when the defendant is alleged to have done the act that the evidence is adduced to prove.

CONCLUSIONS

82. Neither the requirement for substantial and relevant similarity, nor the further protections in relation to the strength of the probative force of the evidence, found their way into the legislation. The effect of the legislation makes the reception of propensity evidence easier, no longer requiring the sort of tests discussed in the common law cases. In particular the elements of requiring such strong probative force for it to be “an affront to common sense” to exclude it, or the alternative phrasing from *Pfennig*, “having sufficient probative value to exclude all reasonable views of the evidence consistent with the accused’s innocence” have been omitted from the operation of the *Evidence Act*. The reception of this evidence is therefore easier notwithstanding that the onus is on the party calling the evidence to justify its reception as having significant probative value.
83. It is possible that drafters of the *Evidence Act* did not take account of the important protections of the common law as stated in *Pfennig* and *Hoch*, in relation to the strength of the probative force of the evidence, purely as a matter of timing. Both decisions were made after the ALRC had issued its reports that led to the passage of the legislation.. While those decisions clearly drew on principles derived from the long line of authority that preceded them, and in particular *Boardman*, it is arguable that they reinforced the rule of exclusion at common law.
84. Certainly it appears that the ALRC did not take account of the development of these protections. The ALRC considered in 1987 that the recommended provisions were largely in line with the common law but merely providing more guidance to judges so as to provide more consistency on the topic. It is also clear that *Pfennig* was not considered by the ALRC or by parliament before the passage of the legislation. *Pfennig* was handed down on 17 February 1995, six days before the *Evidence Act* 1995 (Cth) received Royal Assent on 23 February 1995.

85. The second reading speeches suggest that the restriction in the common law approach was deliberately rejected by the respective parliaments as an ‘unnecessary restriction on putting relevant evidence before the court’.²² For whatever reason, it remains clear that the common law safeguards have been omitted from the legislation, and in my view we are the poorer for it.
86. I know of no statistics, but decided cases and anecdotes suggest that judges are admitting tendency and coincidence evidence much more readily than they admitted similar fact evidence before the *Evidence Act*. In my view the law relating to the admissibility of evidence of acts not charged should be amended to take us back to the common law as articulated by the majority in *Pfennig* or somewhere near it. I do not think that Chapter 3 Part 3.6 of the *Evidence Act* can properly be labelled as law reform. It is time it went.

My grateful, thanks to Michael Rennie of Frederick Jordan Chambers for his assistance with research. My thanks also to FJC Librarian Leonie Nagle for her assistance and to Kathy Thom for typing unruly drafts. Any errors are mine.

¹ pp.viii to ix, as reproduced in NSW by Shaw in 1909.

² 7 William 3 C3 s.8.

³ The Influence of Sir James Stephen on the Law of Evidence (2011) Autumn NSW Bar News 22.

⁴ The Rule of Exclusion of Similar Fact Evidence in England 46 Harv.L.Rev.954 1932-1933. (Referred to in Cross, 3rd Australian Edition p.509.)

⁵ (1894) AC 57.

⁶ (2000) 106 FCR 51.

⁷ (2003) 54 NSWLR 700 at 716.

⁸ (2006) 66 NSWLR at [60]-[64].

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- 9 (2004) NSWCCA 52.
- 10 *Evidence Act* s.31A(3).
- 11 Determining “Probative Value” for the purposes of s.137, 2010 34 Crim L.J. 292.
- 12 (2004) NSWCCA 433 at [46-47]
- 13 (1996) 89 ACrimR 457.
- 14 (2009) NSW CCA
- 15 Fletcher (2005) A Crim R 308 at 316 par.33.
- 16 Fletcher (2005) A Crim R 308 at 321 par.57.
- 17 Fletcher (2005) A Crim R 308 at 322 par.60.
- 18 Fletcher (2005) A Crim R 308 at 336 par.129.
- 19 As noted by Simpson J in *DAO v R* (2011) 278 ALR 765 at 793 par.[154].
- 20 (2002) 56 NSWLR 182 at [116].
- 21 *Phillips v The Queen* (2006) 225 CLR 303 and also *Western Australia v Osbourne* [2007] WASCA 183.
- 22 Per the second reading speech by the Honourable Mr Kerr, Minister for Justice and member for Denison on 15 December 1993 in *Hansard*.