

## PHILLIPS V THE QUEEN: A DOCTRINE OF PRECEDENT CASE?

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### ABSTRACT

The High Court decision in *Phillips v The Queen* handed down ten years ago is arguably one of the most significant cases to emerge from North Queensland. It remains significant for affirming the common law rule of admissibility of similar fact evidence established in *Pfennig v The Queen*. It also involved an emphatic overruling of the Queensland Court of Appeal's reformulation of the admissibility test for similar fact evidence in *R v O'Keefe*. It is suggested that it is for this reason that it should be considered both as a doctrine of precedent case and a similar fact evidence case.

### I INTRODUCTION

The *Phillips v The Queen* ('*Phillips*')<sup>1</sup> case is arguably one of the most significant in the legal history of North Queensland. The main issue was the admissibility of similar fact evidence, though it is arguable it can, and perhaps should, be viewed as a doctrine of precedent case. This is because the High Court decision involved an emphatic overruling of the Queensland Court of Appeal's reformulation of the admissibility test for similar fact evidence in *R v O'Keefe* ('*O'Keefe*').<sup>2</sup>

It is suggested that, ten years after the decision, it is an appropriate time to look back at *Phillips* as an important example of a lower court's improper reformulation of a High Court principle of law, and its affirmation of the test from *Pfennig v The Queen* ('*Pfennig*').<sup>3</sup>

### II SIMILAR FACT EVIDENCE IN QUEENSLAND

#### *A The Makin Principle and Pfennig Test*

Similar fact evidence is a category of propensity evidence where the prosecution uses the defendant's past conduct to show that it is more likely that the defendant is guilty of the charged offence, or to combine a number of present charges in the one trial. In *Makin v Attorney General (NSW)*<sup>4</sup> Lord Herschell stated that it was 'not competent for the prosecution to adduce evidence' that tends 'to show the accused has been guilty of other criminal acts '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.' His Lordship then went on to state that 'the mere fact the

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<sup>1</sup> (2006) 225 CLR 303.

<sup>2</sup> [2000] 1 Qd R 564.

<sup>3</sup> (1995) 182 CLR 461

<sup>4</sup> [1894] AC 57.

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.<sup>5</sup>

This can be understood as more of an exercise of discretion, rather than the operation of a principle.<sup>6</sup> In *Pfennig* the High Court developed a procedure for determining the admissibility of similar fact evidence. The test involved asking whether there was a rational view of the evidence consistent with the innocence of the accused, with 'rational' being taken as meaning 'reasonable'. Similar fact evidence will be excluded if there is a rational or reasonable view of the evidence consistent with the defendant's innocence.<sup>7</sup> It is admissible when the only reasonable inference to be drawn from the evidence is that the defendant is culpable<sup>8</sup> of the charged offence<sup>8</sup> as only then can a conclusion be reached that 'the probative force of the evidence outweighs its prejudicial effect.'<sup>9</sup>

The *Pfennig* test has been criticised for raising the bar too high for admissibility, and requiring the judge to assume the role of the jury.<sup>10</sup> However, it still applies in Queensland, though its use has been controversial due to the Court of Appeal's articulation of the test in *O'Keefe*.<sup>11</sup>

#### B *Pre R v O'Keefe Cases*

Chief Justice Macrossan in *R v Wackerow* ('*Wackerow*')<sup>12</sup> noted the consistent line of Queensland Court of Appeal decisions following *Pfennig* as the governing authority in cases involving the admission of similar fact evidence<sup>13</sup> In *R v L.S.S.*<sup>14</sup> the accused had been convicted of eleven charges of sexual offences against his daughter,<sup>15</sup> Thomas JA discussed the evidence of sexual misconduct that did not relate clearly to a particular charge, noting that low quality evidence of the kind would rarely, if ever, satisfy the tests of *Pfennig*.<sup>16</sup> The accused in *R v Riley*<sup>17</sup> meanwhile was charged on the one indictment of 36 sexual offences against seven children over an eleven year period, Fitzgerald P, Dowsett J and Moynihan J all referring to *Pfennig* as the test that needed to be applied.<sup>18</sup> *R v Barrow*<sup>19</sup> meanwhile involved a case in which the accused was convicted of four counts of producing amphetamines, with Pincus and Muir JJ applying

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<sup>5</sup> *Ibid*, 65.

<sup>6</sup> Kenneth Arenson and Mirko Bagaric *Understanding Evidence* (2002), 204; Mirko Bagaric, 'Editorial: Similar fact evidence law: the need for fundamental reform, not more reflexive tinkering', (2011) 35 *Criminal Law Journal* 3.

<sup>7</sup> *Ibid*, 482-3 (Mason CJ, Deane and Dawson JJ).

<sup>8</sup> *Ibid*, 483 (Mason CJ, Deane and Dawson JJ; See also Jonathan Clough, 'Pfennig v The Queen: A rational view of propensity evidence?' (1998) 20 *Adelaide Law Review* 287, 288.

<sup>9</sup> *Ibid* 482-3.

<sup>10</sup> Andrew Hemming, Miiko Kumar and Elisabeth Peden, *Evidence Commentary and Materials*, Lawbook Co, Eighth Edition, 2013, 374; David Hamer, 'Similar fact reasoning in Phillips: Artificial, Disjointed and Pernicious', (2007) 30(3) *University of New South Wales Law Journal*, 609, 613.

<sup>11</sup> [2000] 1 Qd R 564.

<sup>12</sup> *Ibid*.

<sup>13</sup> *R v Wackerow* [1998] 1 Qd R 197, 198 (Macrossan CJ).

<sup>14</sup> *R v L.S.S.* [2000] 1 Qd R 546

<sup>15</sup> *Ibid*, [1].

<sup>16</sup> *Ibid*, 556.

<sup>17</sup> [1997] QCA 277.

<sup>18</sup> *Ibid*, [3][9]

<sup>19</sup> [2001] 2 Qd R 525; [1999] QCA 56.

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*Pfennig*.<sup>20</sup> Thus, in the years following *Pfennig*, the Queensland Court of Appeal clearly followed *Pfennig*. However the application of *Pfennig* was to take a whole new discussion in *O'Keefe*.

*C R v O'Keefe*

In *O'Keefe* the accused was convicted on two arson offences committed in 1998. One offence involved a fire in a shed attached to a boarding house from which he had been asked to leave, and the other at a nearby, unoccupied house. At the trial, evidence had been admitted relating to two charges of arson against the accused in 1975, with the similarities being that one of the fires had been lit in a shed owned by someone against whom *O'Keefe* held a grudge, the other being lit on a nearby premise where he did not know the owner. The evidence was considered to be strikingly similar in regard to the motive, the method, and the fact that there was, in both cases, a second fire in a nearby building that was unoccupied.<sup>21</sup>

The Court of Appeal in *O'Keefe* also raised issues as to the meaning and application of the *Pfennig* test. On appeal, Thomas JA<sup>22</sup> (with whom Pincus JA and Davies JA agreed), examined the test that had been established by Mason CJ, Deane J and Dawson J in *Pfennig*,<sup>23</sup> stating that in attempting to apply those principles, state courts had expressed and applied different tests, with his Honour specifically referring to both Western Australian and South Australian decisions.<sup>24</sup> Thomas JA then pointed out that the Queensland courts had, in cases such as *Wackerow*,<sup>25</sup> *R v Ingram*,<sup>26</sup> *R v W*<sup>27</sup> and *R v Rushton*<sup>28</sup>, arguably adopted a less stringent test than that which the High Court had applied in *Pfennig*.<sup>29</sup> His Honour then stated that 'the only sensible resolution' of the aforementioned passages in *Pfennig* was for the trial judge to address two questions:

- (a) is the propensity evidence of such calibre that there is no reasonable view of it other than supporting an inference that the accused is guilty of the offence charged?; and
- (b) if the propensity evidence is admitted, is the evidence as a whole reasonably capable of excluding all innocent hypotheses? This would have to be answered on the assumption of the accuracy and truth of the evidence led. If the judge thought that the evidence as a whole was not reasonably capable of excluding the possibility that the accused is innocent, then the accused should not be exposed to the possible risk of mis-trial by a jury that might give undue prejudicial weight to propensity evidence. The judge's assessment is to be

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<sup>20</sup> *Ibid*, 529.

<sup>21</sup> *R v O'Keefe* [2000] 1 Qd R 564, 565-6.

<sup>22</sup> *Ibid*, 567-8.

<sup>23</sup> *Pfennig v The Queen* (1995) 182 CLR 461, 483-5.

<sup>24</sup> *R v O'Keefe* [2000] 1 Qd R 564, 568, with his Honour specifically referring to *R v Tamboureas and Batas* (1996) 186 LSJS 286; *R v Correia* (1996) 15 WAR 95; *Thompson v R* (Unreported, Western Australian Court of Criminal Appeal, Kennedy, Wallwork, Steytler JJ, 19 October 1998).

<sup>25</sup> [1998] 1 Qd R 197, 204-5.

<sup>26</sup> [1996] QCA 294.

<sup>27</sup> [1998] 2 Qd R 531.

<sup>28</sup> (Unreported, Queensland Court of Appeal Fitzgerald P, de Jersey and Dowsett JJ, 17 June 1997).

<sup>29</sup> *R v O'Keefe* [2000] 1 Qd R 564, 569.

undertaken with special care because of the potential danger of misuse of such evidence by the jury.<sup>30</sup>

Thus, the question that arose from *O'Keefe* was whether this was merely an explanation of the *Pfennig* test, or an actual re-wording of it, and if the latter, was the Queensland courts applying a test different to that stated by the High Court in *Pfennig*.

#### D Cases Post *R v O'Keefe*

The Queensland courts' subsequent adoption of the *O'Keefe* test was nuanced, with some Court of Appeal decisions referring to *O'Keefe* in terms equivalent to a clarifying of the *Pfennig* test. In *R v Pryor; ex parte Attorney-General (Qld)*<sup>31</sup> for instance, the joint decision of McMurdo P, Davies JA and Jones J noted that the test for the admissibility of similar fact evidence was as set out in *Pfennig*, and was 'usefully explained by Thomas JA in *O'Keefe*'.<sup>32</sup>

Other cases, however, went further and merged the *Pfennig* and *O'Keefe* tests. In *R v O'Neill*<sup>33</sup> it was noted, for example, that the Court of Appeal in *O'Keefe* had applied *Pfennig*, and that Thomas JA had then stated that, to be admissible, similar fact evidence must be of such a calibre that there can be no reasonable view of it other than as supporting an inference that the accused was guilty of the offence with which s/he had been charged.<sup>34</sup> Similarly, in *R v Hooper ('Hooper')*<sup>35</sup> Chief Justice de Jersey stated that *O'Keefe* was 'a helpful explanation of *Pfennig*'<sup>36</sup> which had 'synthesised into the form of two questions, the approach required by *Pfennig*'.<sup>37</sup> McMurdo P held that, in cases such as *Hooper*, *Pfennig* required that the trial judge address the two questions proposed by Thomas JA in *O'Keefe*.<sup>38</sup>

Other Queensland decisions, meanwhile, merged the two tests in a manner that arguably resulted in an elevation of *O'Keefe* to the same status as the *Pfennig* High Court decision. In *R v Meizer*,<sup>39</sup> for instance, Williams JA held that the test of admissibility of similar fact evidence was derived from *Hoch*, *Pfennig* and *O'Keefe*.<sup>40</sup> Thus, rather than *O'Keefe* being used as a Queensland Court of Appeal case which had clarified the *Pfennig* test, it was being treated as a case that established a test that seemingly had the same status as the High Court decision. Similarly, in *R v Delgado-Guerra*<sup>41</sup> Thomas JA referred to the 'principles identified in *Pfennig*, *O'Keefe* and *KRM v The Queen*'.<sup>42</sup> Likewise, in *R v McGrane*,<sup>43</sup> and also *R v PV*, the Court of Appeal stated that it was

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<sup>30</sup> Ibid 572-3.

<sup>31</sup> [2001] QCA 241.

<sup>32</sup> Ibid, [13].

<sup>33</sup> [1999] QCA 180. (McMurdo P, Davies and Chesterman JA).

<sup>34</sup> Ibid, [7].

<sup>35</sup> (1999) 108 A Crim R 108.

<sup>36</sup> Ibid, 109

<sup>37</sup> Ibid, 109 [2].

<sup>38</sup> Ibid, 113.

<sup>39</sup> [2001] QCA 231.

<sup>40</sup> Ibid, [32].

<sup>41</sup> [2002] 2 Qd R 384; [2001] QCA 266.

<sup>42</sup> (2001) 75 ALJR 550. See also *R v Delgado-Guerra* [2002] 2 Qd R 384, 388.

<sup>43</sup> [2002] QCA 173.

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'*Pfennig*, as explained in *O'Keefe*'<sup>44</sup> that needed to be applied, while in *R v Noyes*<sup>45</sup> it was held that Thomas JA's questions in *O'Keefe* were a shorthand way of expressing the reference in *Pfennig* to the objective improbability of an innocent explanation.<sup>46</sup>

A similar trend was also being displayed by Queensland Courts of first instance. In *R v Fraser*,<sup>47</sup> the accused had been convicted of two counts of murder, and one of manslaughter, in relation to the deaths of three women in Rockhampton. The Court of Appeal noted that the trial judge had admitted the similar fact evidence on the 'basis discussed in *Pfennig* and *O'Keefe*.'<sup>48</sup> *S*<sup>49</sup> involved a case where the appellant was convicted of eight out of ten accounts of sexual offences against his two step-daughters, Thomas JA noting that the trial judge had applied what he referred to as the 'abridged test in *O'Keefe*.'<sup>50</sup> Ambrose J was in agreement with Thomas JA, with his Honour adding that the 'admissibility of propensity evidence in this case should be determined having regard to decision of this court in *O'Keefe*.'<sup>51</sup> Finally, in *R v Macphee*<sup>52</sup> the Court of Appeal noted that the trial judge had reviewed the relevant authorities, particularly in *Pfennig* and *O'Keefe*, in regard to the admissibility of similar fact evidence.<sup>53</sup>

This suggests there was, at times, even a preference for *O'Keefe* over *Pfennig* within the Queensland court system, though in *R v Sadeed*<sup>54</sup> no mention was made of *O'Keefe*, and in *R v Huebner and Maher* more emphasis was placed on *Pfennig*, with McMurdo P specifically stating that 'propensity evidence will only be admissible if it meets the *Pfennig* test.'<sup>55</sup>

Thus, it is perhaps too simplistic to suggest that the Queensland courts had simply replaced the *Pfennig* test with the *O'Keefe* test. Not all decisions made reference to *O'Keefe*, others approvingly referred to the decision as clarifying the law, whilst other cases merged Court of Appeal and High Court tests, sometimes arguably elevating the former by giving equal weight to the two decisions. However, while it is perhaps questionable as to whether the Court of Appeal had in fact taken on its own interpretation of what was required for similar fact evidence to be admitted, it was obvious that by the time of *Phillips* the High Court was waiting for a similar fact evidence case to be appealed from Queensland.

E *Phillips v The Queen*

In *Phillips* the defendant was convicted in the District Court in Innisfail of a number of rapes and sexual assaults that had taken place over a period of time in Innisfail, North

<sup>44</sup> *Ibid.*, [31]. See also *R v PV; ex parte A-G (Qld)* [2004] QCA 494, [19].

<sup>45</sup> [2005] 1 Qd R 169.

<sup>46</sup> *Ibid.*, 177.

<sup>47</sup> [2004] 2 Qd R 544.

<sup>48</sup> *Ibid.*, 553.

<sup>49</sup> (2001) 125 A Crim R 526.

<sup>50</sup> *Ibid.*, 533-4 [35].

<sup>51</sup> *Ibid.*, 538 [58].

<sup>52</sup> [2005] QCA 175.

<sup>53</sup> *Ibid.*, [53], [135].

<sup>54</sup> [2004] QCA 32.

<sup>55</sup> *Ibid.*, [26].

Queensland, with one count taking place in Brisbane.<sup>56</sup> After the accused had an appeal against conviction to the Court of Appeal dismissed, special leave to appeal was granted by the High Court.

The High Court noted that the trial judge had treated *O'Keefe* as being authoritative at all stages of the trial, and had therefore applied Thomas JA's reformulation of the *Pfennig* test. The court also noted the trial judge in *Phillips* had identified five points of universal similarity in regard to the evidence of the first five complainants. These were the fact that all the girls were teenagers; all the incidents had included penis/vaginal intercourse; all the girls were within the accused's extended circle of friends which meant he was aware they all could have identified him; and in each case he had first made sexual advances to the girls requesting consensual sex, before becoming violent.<sup>57</sup> The trial judge also found six other points of similarity between the evidence given by some, but not all, of the complainants. These included that in a number of the counts the accused had indicated a desire for oral sex, a number of them had taken place at parties, and five of the counts had taken place within a 16 month time period.<sup>58</sup>

The High Court, however, pointed out that the trial judge had not considered the fact that there was nothing unusual about the first five points,<sup>59</sup> or that the last six features were not common to each complaint.<sup>60</sup> It also noted that, after applying Thomas JA's test in *O'Keefe*, the trial judge had been satisfied that there was no reasonable view of the evidence other than supporting an inference that the accused was guilty of each of the offences charged.<sup>61</sup> The High Court further noted that, by the time of the summing up, the trial judge had limited the use of the similar fact evidence to the issue of consent, and had stated that it could not be used to decide whether or not there had been penetration, or whether the accused had made an honest mistake.<sup>62</sup> The jury was also informed that, in considering any charge, the evidence of the other complainants had to be considered in combination, or not at all.<sup>63</sup> It was the view of the trial judge that the strength of the probative value of the evidence lay in what he referred to as the 'probability theory', that is, while it was possible one or two of the complainants may have deliberately lied, the probability of all six doing so was 'remote in the extreme in the absence of any real risk of concoction.'<sup>64</sup>

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<sup>56</sup> Note the defendant was found guilty of four counts of rape, and although found not guilty on three other charges or rape, he was found guilty of unlawful carnal knowledge on two of these. He was also found not guilty of a charge of indecent assault with circumstance of aggravation.

<sup>57</sup> *Phillips v The Queen* (2006) 225 CLR 303, 312.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, 313.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, 314.

<sup>62</sup> *Ibid.*, 315

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, 316. Note that in *Phillips* it was contended by the accused that the police had failed to record their investigations properly, thus providing an opportunity for collusion or suggestion between the various complainants and witnesses. The High Court, however, held, at 307, that even if these contentions were sound the application of s132A of the *Evidence Act 1977* (Qld) meant that it had no bearing on the admissibility of the evidence, nor should separate trials have been ordered by reason of s597A (1AA) of the *Criminal Code 1899* (Qld).

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The High Court noted that the difficulties in the case arose from the narrowness of the purpose for which the similar fact evidence was admitted,<sup>65</sup> and that, normally, similar fact evidence was only used to assist on issues relating to the conduct and mental state of an accused.<sup>66</sup> Furthermore, the evidence tendered on the issue of the consent of each complainant was irrelevant to that issue, as the evidence that the five complainants had not consented 'could not rationally affect the assessment of the probability that a sixth complainant did not consent.'<sup>67</sup> The High Court then dealt with the inadmissibility of the similar fact evidence in issue, other than consent, referring to *Pfennig* in regard to the fact that evidence of propensity needs to have 'a specific connection with the commission of the offence charged, a connection which may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it'.<sup>68</sup> In the High Court's opinion none of these criteria had been met in *Phillips*,<sup>69</sup> and that the similarities relied on were not merely not 'striking', they were also 'entirely unremarkable'.<sup>70</sup> Thus the High Court quashed the convictions and ordered retrials, to be conducted separately for each count.

Another important feature of the High Court's judgment in *Phillips* was the examination of the tests from *O'Keefe* which the trial judge had applied, apparently in preference to those set out in *Pfennig*. The High Court noted that the Court of Appeal in *O'Keefe* had stated that those tests 'were the only sensible resolution of passages in *Pfennig*.' This was because they were 'not as workable as the views expressed by minority judges,' had revealed 'fundamental' difficulties and 'artificiality,' were 'rather perplexing,' and had led to 'the expression and application of different tests' in the various state courts, as well as having a 'dubious pedigree'.<sup>71</sup>

The High Court in *Phillips* stated, however, that it was 'for this Court alone to determine whether one of its previous decisions is to be departed from or overruled.' While it was acknowledged by the High Court that there were times when judges needed to elaborate on its rulings, this did 'not extend to varying, qualifying or ignoring a rule established by a decision of this Court'<sup>72</sup> and that 'such a ruling is binding on all courts and judges in the Australian Judicature'.<sup>73</sup> It then stated that the tests in *O'Keefe* were expressed differently to those in *Pfennig*, it could therefore not be assumed that in every case they would operate identically to the tests in *Pfennig*, and it could be suggested that the tests propounded in *O'Keefe* were intended to have a different operation from those stated in *Pfennig*.<sup>74</sup> Notably, however, the High Court in *Phillips* did not explain how an application of the *O'Keefe* test would produce a different result from the *Pfennig* test.

Thus, the High Court made it clear that the tests from *O'Keefe* should not be adopted or applied and that 'intermediate and trial courts must continue to apply *Pfennig*'.<sup>75</sup> It should be noted, however, that despite the criticisms made by the High Court, Gans is

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<sup>65</sup> Ibid 317-8

<sup>66</sup> Ibid, 318.

<sup>67</sup> Ibid, 319

<sup>68</sup> Ibid, 321.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid..

<sup>71</sup> Ibid, 322; *R v O'Keefe* [2000] 1 Qd R 564, 575.

<sup>72</sup> Ibid, 322-3.

<sup>73</sup> Ibid 323

<sup>74</sup> Ibid, 324

<sup>75</sup> Ibid.

of the opinion that in the original trial the comments made to the jury by Judge White were ‘a model of clarity, precision and fairness.’<sup>76</sup> Gans has also suggested that while the High Court unanimously condemned the *O’Keefe* tests in *Phillips*, it did so ‘without any consideration of their merits’, with the reason for their rejection being that they were ‘expressed differently from *Pfennig*.’<sup>77</sup> While such criticism may be warranted, the fact is that *Phillips* re-affirmed *Pfennig* as the law relating to the admission of similar fact evidence in Queensland. Despite the presence of legislation in other jurisdictions, as Gans also notes, ‘the ruling in *Phillips* on the relevance of similar fact evidence in consent cases is applicable across Australia because all jurisdictions retain a requirement of relevance as the fundamental test of the admissibility of evidence.’<sup>78</sup>

#### F *The Queensland Cases Immediately Post Phillips*

In the first Queensland case post *Phillips*, *R v HAB*<sup>79</sup>, the accused was tried upon five counts of indecent treatment of two children under the age of 12. One of the grounds of appeal was that the trial judge had erred in not directing the jury that the evidence given by one complainant was not admissible in proof of the charge(s) relating to the other complainant.<sup>80</sup> The Court of Appeal noted that ‘the issue was one of the admissibility of similar fact evidence, according to the test in *Pfennig*, as recently confirmed in *Phillips*,’<sup>81</sup> with there being no mention of *O’Keefe*. Similarly, *R v KP; ex parte Attorney-General (Qld)*,<sup>82</sup> where the appellant had been convicted on 34 counts of indecent dealing with children whilst employed as a music teacher in Brisbane, the Court of Appeal stated that the ‘High Court has recently restated the requirements for admissibility of similar fact evidence in *Phillips*.’ It also noted that ‘as explained in *Pfennig* “the evidence of propensity needs to have a specific connexion with the commission of the offence charged, a connexion which may arise from the evidence giving significant cogency to the prosecution case.”’<sup>83</sup> Thus, there was no reference to *O’Keefe*.

#### G *Phillips: A Doctrine of Precedent Case?*

It is clear that in *Phillips* the High Court was concerned to confirm its authority as the ultimate source of binding precedent and did so by affirming the principles as they were originally established in *Pfennig*. Understood through the prism of the doctrine of precedent then there was an element of inevitability that, after strongly rebuking the Queensland Court of Appeal, the High Court would find the similar fact evidence should not have been admitted at the trial. In doing so, however, The High Court seems to have ignored the problems with that original formulation which State Courts have

<sup>76</sup> Jeremy Gans, ‘Similar facts after Phillips’, (2006) 30 *Criminal Law Journal* 224, 226. Note, too, that Phillips was found guilty in a number of the subsequent retrials.

<sup>77</sup> Jeremy Gans, ‘Similar facts after Phillips’, (2006) 30 *Criminal Law Journal* 224, 237.

<sup>78</sup> *Ibid*, 244. Note that in *Daniels v Western Australia* (2012) 226 A Crim R 61, [71] stated that *Phillips*, along with *Pfennig*, were referred to as an authority that the evidence must rationally affect the assessment of a fact in issue in the proceedings.

<sup>79</sup> [2006] QCA 80.

<sup>80</sup> *Ibid*, [5].

<sup>81</sup> *Ibid*, [10]. In this case however the Court of Appeal stated that it was unnecessary to consider that question of admissibility as counsel for the defendant requested in his oral argument that the court first consider whether a re-trial should be ordered on other grounds.

<sup>82</sup> [2006] QCA 301

<sup>83</sup> *Ibid*, [55]. See also *Pfennig v The Queen* (1995) 182 CLR 461, 485.



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since sought to address by attempting to explain how it should work in particular instances. Perhaps it would have been better had the High Court used this opportunity to clarify exactly how those principles should be applied in the varied instances.

It is further suggested that if *Pfennig* made the admissibility of similar fact evidence more difficult, then *Phillips* perhaps made it even more so. This is because the term 'entirely unremarkable', while perhaps not markedly different from 'unusual features', is arguably a more onerous requirement to fulfil. Thus, in the authors' opinion, the High Court in dismissing the probability theory in *Phillips* raised the bar in cases where similar charges could be joined, since it dismisses the unlikely event that a number of different complainants are all concocting the same story. It is also suggested that, for example, in sexual assault and murder cases where the accused has committed multiple crimes, they are likely to have involved a similar mode of operation. This raises the question as to whether this similar evidence should be automatically rejected, purely because there is nothing remarkable about it, when the probative value lies in the multiple incidents.

### III CONCLUSION

Doctrine of precedent is a fundamental principle of our legal system, uniformity in the application of the law being achieved by lower courts being required to follow higher courts. However, it is suggested that it is far too simplistic a view to state that the Queensland Court of Appeal had replaced the *Pfennig* test with the *O'Keefe* test as a review of the cases indicates it was more complicated than that. The relevant courts, for instance, often referred to both tests. It is arguable that *Phillips* has actually raised the already high threshold *Pfennig* test even higher by its 'entirely unremarkable' requirement, though this perhaps should be put into the context of *Phillips* as a doctrine of precedent case. However, what *Phillips* clearly did not do was to address the criticisms that had been made of the *Pfennig* test which means, at present, any changes to the Queensland rules of admissibility will most likely have to be legislative, the examination of which need to be the subject of another paper.

