Similar (?) Facts — *DPP v P* [1991] 3 WLR 161

This note concerns that part of the law of evidence inappositely referred to as 'similar fact evidence', and in particular its recent consideration by the House of Lords in *DPP v P*.[1] The baneful influence[2] exerted by the decision of the Privy Council in *Makin v Attorney General for New South Wales*[3] may have been diminished by the judgments of Lords Wilberforce and Cross in *DPP v Boardman*,[4] and subsequent decisions of the High Court. However, notwithstanding the decision in *DPP v P*, it remains true that "at least one more excursion to [the appropriate ultimate appellate tribunal] will probably be necessary before the law can be said to be established on a simple and rational basis".[5] In support of this contention, it is proposed to outline the decision in *DPP v P*, to consider the general principles regarding such evidence, and finally to argue that the analysis contained in *DPP v P* reflects a disappointing compromise of those principles.

DPP v P

P was indicted on four counts of rape and four counts of incest in respect of each of two of his daughters, and subsequently convicted on one count of rape and each of the counts of incest in respect of each daughter. The trial judge had refused an application for separate trials of the counts in relation to each daughter. The Court of Appeal allowed P's appeal, holding that, in the absence of some feature of similarity in the evidence with respect to each victim which was 'striking' and went beyond the 'stock in trade' of such offenders, the evidence of each victim was inadmissible in the counts relating to the other, and accordingly separate trials should have been ordered. However, the Court clearly regarded the requirement of such features as inappropriate and as preventing the jury from hearing "evidence of that which they would naturally and rightly consider themselves entitled to know".[6] Consequently, the Court granted the DPP's application for leave to appeal to the House of Lords and certified for it the question:

> Where a father or stepfather is charge with sexually abusing a young daughter of the family, is evidence that he also similarly abused other young children of the family admissible (assuming there to be no collusion) in support of such a charge in the absence of any other 'striking similarities'?[7]

The House of Lords allowed the appeal and restored P's convictions. Lord Mackay[8] quoted Lord Herschell's statement of principle from *Makin*,[9] and quoted at length from *Boardman*.[10] He concluded, substantially in accord with *Boardman*, that such evidence is admissible if there is some sufficient relation-

1 [1991] 3 WLR 161 (judgment delivered on 27 June 1991).
2 Mirfield, P, "Similar Facts — *Makin* Out?" [1987] 46 *CLJ* 82.
3 [1894] AC 57.
4 [1975] AC 421.
5 Hoffman, L H, "Similar Facts After *Boardman*" (1975) 91 *LQR* 193.
6 Above n1 at 164.
7 The House answered a second question concerning the ordering of separate trials without separate discussion.
8 Lord Mackay delivered the only substantive speech, with which Lords Keith of Kinkel, Emslie, Templeman and Ackner expressed their agreement.
9 Above n3 at 65. Quoted, above n1 at 164-5.
10 Id at 165-70.

ship between the evidence of each victim "that the evidence if accepted, would so strongly support the truth of that charge that it is fair to admit it notwithstanding its prejudicial effect".[11] However,

> ... restricting the circumstances in which there is sufficient probative force to overcome prejudice ... to cases in which there is some striking similarity ... 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.[12]

To that extent, the decision in *Boardman* had been misunderstood in subsequent cases. In this case,

> ... the evidence of both girls describes a prolonged course of conduct in relation to each of them. In relation to each of them force was used. There was a general domination of the girls with threats against them unless they observed silence and a domination of the wife which inhibited her intervention. The defendant seemed to have an obsession for keeping the girls to himself, for himself. The younger took on the role of the elder daughter when the elder daughter left home. There was also evidence that the defendant was involved in regard to payment for abortions in respect of both girls.[13]

These facts, relationships "in time and circumstance"[14] between the evidence other than striking similarity, provided that probative force which justified the admission of each daughter's evidence in the charges with respect to the other.

Propensity Reasoning

The growing weight of judicial and academic opinion since *Boardman* clearly supports the view that the "elegant and succinct"[15] antithesis expressed by Lord Herschell in *Makin*, between a forbidden chain of reasoning tending to proof of guilt by way of the accused's character, and other permissible uses of evidence of prior discreditable conduct, is incapable of reconciliation with the decided cases.[16] The *Makin* formulation "cuts across"[17] the competing principles of admissibility of probative evidence and exclusion of evidence likely to cause disproportionate prejudice to an accused.[18] The *Boardman* formulation on the other hand does not

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11 Id at 172-3.

12 Id at 171.

13 Ibid.

14 Id at 172.

15 Hoffman, L H, above n5 at 196.

16 See, in particular, Acorn, A E, "Similar Fact Evidence and the Principle of Inductive Reasoning" (1991) 11 *Oxford J Legal Studies* 63; Carter, P B, "Forbidden Reasoning Permissible: Similar Fact Evidence A Decade After *Boardman*" (1985) 48 *MLR* 29; Dawson, D, "Recent Common Law Developments in Criminal Law" (1991) 15 *Crim LJ* 14; Hoffman, L H, above n5; Mirfield, P, above n2; Mirfield, P, "'Similar Facts' in the High Court of Australia" (1990) 106 *LQR* 199; *Boardman*, above n4 at 456 per Lord Cross; *Perry v R* (1982) 150 CLR 580 at 592-3 per Murphy J, at 604-5 per Wilson J; *Harriman v R* (1989) 167 CLR 590 at 597-602 per Dawson J, at 613 per Gaudron J; *S v R* (1989) 168 CLR 266 at 275 per Dawson J. Nonetheless, the former approach, citing *Makin*, above n3, as authority for the rejection of propensity reasoning, retains considerable support: *Markby v R* (1978) 140 CLR 108 at 116 per Gibbs ACJ (Stephen, Jacobs and Aickin JJ agreeing); *Perry v R* at 585 per Gibbs J, at 609 per Brennan J; *Sutton v R* (1984) 152 CLR 528 at 533 per Gibbs CJ; *Hoch v R* (1988) 165 CLR 292 at 301. The commitment to an absolute rule of exclusion for the propensity chain of reasoning (*Boardman*, above n4 at 453) varies even in this line of authority: compare, for example, the judgments of Brennan and Wilson JJ in *Perry*.

17 Piragoff, D K, *Similar Fact Evidence — Probative Value and Prejudice* (1981) at 114.

18 On the *Makin* approach, "the stronger the evidence of propensity, the more likely it is that the forbidden inference will be drawn and therefore the greater the prejudice": *R v B(CR)* (1990) 55

erect a false distinction between *kinds* of relevance but rather balances *degrees* of relevance and disproportionate prejudice.

The question then is, how does one identify which propensity reasoning is sufficiently probative? Acorn has argued that instances of propensity reasoning may be divided into three categories.[19] The first, the most clearly unacceptable, is reasoning from a general criminal disposition to the guilt of the accused. In both the second and third categories, an initial generalisation is made and applied in a deductive syllogism, together with a specific item of evidence, to establish the guilt of the accused. In the second category, of which *Straffen*[20] is an example, evidence of similar conduct by the accused is the basis of an inductive generalisation as to a specific propensity of the accused. In the third, an observation or generalisation is made concerning human behaviour at large, or concerning the members of a particular group, and without specific regard to the conduct of the accused. That generalisation is then applied *to* the conduct of the accused established by the evidence to make a conclusion concerning guilt. For example, in *Thompson v R*,[21] the male accused was found carrying a powder puff and owned certain pornographic material. Accordingly he fell within a class whose members, the House of Lords assumed, were homosexual and possessed a propensity to commit acts of indecency with young males. The evidence was therefore admissible against the accused on such a charge.

However, in all cases the crucial question in assessing probative force is the inductive warrant which justifies the making of the generalisation. For example, in *Harriman*, Brennan J argued that "[a] person who is shown to have participated to a substantial degree in [the heroin] trade ... is likely ... to continue his participation in the trade",[22] a generalisation of the third category founded on accepted facts concerning the nature of the heroin trade. On the other hand, such facts could not provide the inductive warrant in *R v Smith*[23] for a generalisation that participants were by virtue of that participation more likely than others to commit murder and mutilation.

Moreover, even in the second category, the inductive generalisation must depend on assumptions about human behaviour in general which justify the assumption of continuity of behaviour in the instant case. While the specific evidence of the accused's like conduct may support the inductive generalisation, it can only do so in part. In the third category, a generalisation is made as to the behaviour of a class of individuals *from a prior generalisation* about members of the class based on their individual actions. Finally, a valid generalisation of the second category can itself be generalised to the form of the third category. Nonetheless, this analysis is valuable in directing attention to the fact that the probative cogency evidence of 'similar fact' evidence depends crucially on the manner in which it is to be used in drawing a conclusion of guilt.[24]

CCC (3d) 1 at 8 per Sopinka J (dissenting). Compare the approach of Dawson J in Harriman, S, above n16.

19 Acorn, A E, above n16 at 65-7 and following.

20 *R v Straffen* [1952] 2 QB 911.

21 [1918] AC 221.

22 *Harriman*, above n16 at 595.

23 (1990) 61 CCC (3d) 232 at 239 (Ontario Court of Appeal).

24 Cf *Boardman*, above n4 at 453 per Lord Hailsham, and see text at n72 below.

Objective Improbability Reasoning

Notwithstanding the above, the decided cases have tended to stress non-propensity reasoning. In *Hoch*,[25] a distinction was drawn between cases where the accused disputes the occurrence of the acts said to be sufficiently similar to warrant the admission of evidence of one on a charge with respect to the other, and cases where the occurrence was not itself in dispute. In the latter case, the probative force of the evidence was said to lie in raising the objective improbability that the event occurred other than as alleged by the prosecution. In the former case, of which *Hoch*, *Boardman*, and *DPP v P* are instances,

> probative force is derived from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by common sense, either all be true, or have arisen from a cause common to all the witnesses or from pure coincidence,[26]

or, in other words, in the objective improbability of witnesses uttering similar lies. The similarity of analysis in the two cases may be seen if one treats the *making* of the allegations as events whose happening is not in dispute.

However, in neither case can the sequence of events or allegations alter the individual *a priori* improbabilities. This analysis can only demonstrate the improbability of the *sequence* being explicable by innocent coincidence. Piragoff argues that:

> ... because the improbability was derived *inter se* from among all of the incidents ... , the improbability applies equally to each individual incident when viewed as a whole. One either draws the inference that the accused [was responsible for all the incidents], or draws no inference of culpability as to any of the incidents.[27]

This does not address the difficulty that to proceed to a conclusion of guilt it is necessary to restrict the possible causes of the similarity to coincidence, concoction or guilt.[28] This transposition of the conditional,[29] from the (im)probability of the existence of evidence given innocence, to the probability of guilt given the existence of the evidence, may be justified as a matter of common sense.[30] However, it is important to realise that objective improbability of similar lies does not of itself prove guilt.[31] On the other hand, it may provide the inductive warrant for a propensity generalisation.

The probative force of such evidence is determined by the individual improbability of each occurrence or allegation.[32] Similarity has only an indirect

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25 (1988) 165 CLR 292 at 295.

26 *Boardman*, above n4 at 444 per Lord Wilberforce. See also *Sutton*, above n16 at 539 per Murphy J; *R* (1989) 45 ACrimR 441.

27 Above n17 at 33. See also Cowen, Z, and Carter, P B, *Essays on the Law of Evidence* (1956) at 138.

28 Cf text at n26 above.

29 Eggleston, R, "Wigmore, Fact-finding and Probability" (1989) 15 *Monash ULR* 370 at 377-8.

30 Cf *Boardman*, above n4 at 453, 455, 462; see also *Martin v Osborne* (1936) 55 CLR 367 at 384-5 per Evatt J: "As human experience negatives the likelihood of any repetition of disastrous accidents of a peculiar kind involving the same person, proof of such repetition is allowed to destroy or reduce the probability of the hypothesis of accident in the given case." The process is inductive, rather than deductive. See generally on such reasoning Ligertwood, A L C, *Australian Evidence* (1988) at 5-24, 40-50; Eggleston, R, "The Philosophy of Proof" (1991) 65 *ALJ* 130.

31 There is necessarily a move away from concentration on the individual incident which is the subject of the charge. See text at n66 below.

effect on the combined improbability — the *specificity* of the individual allegations reduces the likelihood of the making of that particular allegation. This analysis confirms what has been long held by the High Court, and revealed by the House of Lords in *DPP v P*, that striking similarity is not the *sine qua non* of evidence of this kind.[33] In principle, any circumstance rendering the making of the individual allegations less likely increases the overall probative force. In practice, however, the effect of such factors may be difficult to assess.

Hoch: *Concoction and Probative Force*

Under the *Boardman* paradigm, the assessment of the probative value of the evidence revealing other discreditable conduct is central. However, there has been remarkably little analysis in the cases of the mode of reasoning in which the evidence under consideration is to be employed and the effect of this on its probative value. Moreover, the balancing exercise has been supplanted, to an extent, by the application of two sets of formulae, one epithetical and one purportedly analytic, focussing principally on probative value.

While the various epithets[34] merely structure a 'hard' discretion,[35] the dangers of resurrection of a 'catchword' approach to admissibility and of losing sight of the underlying balancing principle ought not be lost.

The danger of the the analytic formulation laid down in the judgment of Mason CJ, Wilson and Gaudron JJ in *Hoch* is greater. Their Honours held that in order to be admissible, there must be no rational view of the evidence inconsistent with the guilt of the accused.[36] In *Sutton*,[37] Dawson J had held that, as 'similar fact' evidence is circumstantial evidence, assistance in applying the *Boardman* analysis may be derived from this test.[38] However, Dawson J had not held, as was held in *Hoch*, that unless it were satisfied, the evidence was without probative value. Indeed, circumstantial evidence in general will possess probative value where the conditional probability of guilt[39] given the existence

32 So that where the events are not unlikely to occur innocently, the probative value is small. See, for instance, *R v S(PL)* (1990) 57 CCC (3d) 531 (Newfoundland Court of Appeal).

33 See, for example, *Sutton*, above n16 at 535, 549, 567; *Perry*, above n16 at 587, 593, 610; *Robertson* (1987) 33 CCC (3d) 481. To the extent that *DPP v P*, above n1 at 172, suggests that striking similarity may be necessary in cases of the first class identified in *Hoch*, above n16 at 294-5, it is submitted that a more flexible approach following this analysis is to be preferred.

34 These include that the probative force be such that it would be an affront to common sense not to admit the evidence, that the evidence be highly probative or possess *strong* probative force. Tests requiring that probative force (clearly) transcend prejudicial effect go some way to reminding the judge of the underlying principle to be applied. See generally *Hoch*, *Harriman*, above n16.

35 Cross on Evidence (4th Australian edn by D Byrne and J D Heydon, 1991) at 599-602.

36 Above n16 at 296-7. The only other judicial suggestion that concoction be excluded if the criminal standard is not met is to be found in a dissenting judgment of Sopinka J in *R v B(CR)*, above n18 at 14, on the ground that the Crown must prove at this level any factual conditions precedent to the admissibility of evidence. Following *Wendo v R* (1963) 109 CLR 559, this reasoning cannot apply in Australia. Sopinka J regarded his test as *less* strict than that required by *Boardman*, above n4, and followed in *Hoch*, above n16. Compare the approach of the New Zealand Court of Appeal in *R v Accused (CA 208/87)* [1988] 1 NZLR 573 where a *theoretical* possibility of concoction was said to be a matter for the jury.

37 Above n16 at 564.

38 It is the accepted exegesis of the criminal standard of proof applied in charging juries in cases involving circumstantial evidence, and reflects the content of that standard in inferential reasoning required in such cases.

39 Or of the existence of the fact in issue.

of the evidence exceeds the *a priori* probability of guilt given only the other evidence in the case,[40] and will seldom *of itself* raise the conditional probability to any given level. Were it required that the 'similar fact' evidence *of itself* exclude all reasonable hypotheses consistent with innocence, the standard of admissibility would be higher than that required for proof of guilt.[41]

Moreover, it follows from *Doney*[42] that probative value as circumstantial corroborative evidence is not contingent on satisfaction of the *Hoch* test. While it may be artificial to make this distinction where the evidence is relied on to corroborate direct testimony of similar events, and thus the circumstantial and corroborative functions merge, it remains the case that the *Hoch* test is not analytically mandated.

Finally, although the objective improbability analysis is not contingent on absolute independence of the allegations or occurrences,[43] the conditional transposition required to conclude the guilt of the accused does require the exclusion of concoction. Nonetheless, the capability of proving guilt and the possession of probative force by an individual piece of evidence must be clearly separated.

Although the *Hoch* formulation may as a matter of judgment place the balance of probative force and prejudicial effect at an appropriate level,[44] there is a danger of moving attention away from that underlying task.

Assessment

The statements of principle in *DPP v P* are, as has been seen, fundamentally in accord with *Boardman*. The express reference to fairness in the statement of the test of admissibility is a welcome reminder of the object of the balancing exercise.[45]

However, the application of the stated principles to the facts raise important concerns. The admission of such evidence has been repeatedly stated to be exceptional,[46] and it was acknowledged in *Boardman* that the case was close to the borderline in allowing admission.[47] There is no indication in *DPP v P* that the case was regarded as other than clear, or that the admission of the evidence

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40 Probative force is to be assessed in light of the whole of the evidence: *Sutton*, above n16 at 549. The *balance* of probative force and prejudicial effect will also depend on the whole of the evidence. Circumstantial and identification evidence implicating the accused in a series of prior occurrences ought to be excluded where DNA tests exclude the accused's implication in the series: *R v Parent* (1988) 46 CCC (3d) 414 (Alberta Court of Queen's Bench). Compare the approach of Wilson J in *Robertson*, above n33, where she suggests that evidence of limited probative value will be *less* likely to be prejudicial. Such an approach neglects the fact that the rule aims to protect against *unfair* prejudice.

41 It would appear that this higher standard is not required: see *Harriman*, above n16 per Dawson, Toohey, Gaudron JJ.

42 *Doney v R* (1990) 171 CLR 207.

43 In a mathematical analysis, lack of independence will result in a subtractive term.

44 Compare Odgers, S, "Proof and Probability" (1989) 5 *Australian BR* 137 at 152 with James, G, *Similar Fact Evidence—Thompson v. The Queen* (1989) 63 ALJR 447, (1989).

45 See also Mirfield, P, above n2 at 93, where the author expresses concern that the object can also be lost in application of the 'positively probative' formula adopted in *Rance and Herron* (1975) 62 CrAppR 118.

46 See, for example, *Markby*, above n16 at 117; *Sutton*, above n16 at 533 per Gibbs CJ, at 547 per Brennan J; *Boardman*, above n4 at 444 per Lord Wilberforce.

47 *Boardman*, above n4 at 445, 460, and notwithstanding the allegedly distinguishing passive role of the accused.

was exceptional. Yet there appeared little, if any, more probative force in the evidence than in *Boardman.*

More importantly, there is no clear analysis of how the evidence derived such probative force as to justify admission.[48] The factors Lord Mackay regarded as important in the instant case have been set out previously.[49] Following the analysis above, the evidence could have derived strong probative force by non-propensity reasoning from similarities or other factors rendering the making of the individual allegations less likely. Without further explanation, only the evidence with respect to payment for abortions for both girls is capable of doing this, conduct which itself would appear reasonably capable of innocent explanation. In so far as the evidence demonstrated a prolonged course of conduct involving force and domination, it was evidence of the same course of family life and was deprived by lack of independence of much of its probative force.

Rather, the factors set out by Lord Mackay seem directed to the disposition of the accused. It is difficult to see that evidence of his obsessions could be relevant in any other way, and could indeed *itself* arise other than as a generalisation or inference from his similar conduct. Such evidence standing alone would almost certainly be regarded as inadmissible evidence of a mere propensity, to be applied in the forbidden first category of Acorn's typology, and lacking the strong probative force necessary for admission. The inductive warrant for any generalisation, whether of the second or third category, is entirely speculative,[50] and the supporting evidence in the second category tenuous, even if the logical canon, that one cannot assume the truth of what is sought to be proved, is not broken.[51] There is, in any event, no acknowledgement of the difficulty in reconciling the differing approaches in *Boardman*, and of the academic criticism of *Makin.* As a result, the legitimacy of propensity reasoning remains unclear.

It is equally improper to admit this evidence under the rubric of 'background'.[52] While in contexts other than the criminal trial,

> ... it [may] be unrealistic to completely divorce the specific sexual assaults with which the accused was charged from the long-standing pattern of abuse which culminated in the charges being laid,[53]

unless the relevance of the evidence to the particular charge can be shown as above, it should not be admitted. Where the evidence is legitimately probative it will be admitted. Evidence of background or of the *res gestae*,[54] should pass the same test unless it is "vital to the proper understanding of the other evidence in the case".[55] Similarly, it must be recognised that the corroborative or credibility enhancing function of such evidence depends on the same factors as when it is

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48 Compare the similar unsupported assertion in *R v D(LE)* (1989) 50 CCC (3d) 142 at 148 per L'Heureux-Dubé J: "[i]n determining whether a father has sexually assaulted his 17-year-old daughter, it is particularly relevant to know whether such behaviour is part of a long-standing pattern of abuse."

49 See text above at n13.

50 The Supreme Court of Canada would appear to have accepted such a generalisation *sub silentio* in *R v Green* (1988) 40 CCC (3d) 333, and then rejected it in *R v D(LE)*, above n48.

51 *Sutton*, above n16 at 552 per Brennan J; see also *R v Millar* (1989) 49 CCC (3d) 193 at 214-5 (Ontario Court of Appeal).

52 This appears to have been the reason for admitting such evidence in *R v C(BR)*, above n18.

53 *R v D(LE)*, above n48 at 149 per L'Heureux-Dubé J.

54 As McHugh J labelled it in *Harriman*, above n16 at 627-36.

55 Above n48 at 160 per Sopinka J.

used as circumstantial evidence of guilt. Relevance to credibility should not be a ticket to admissibility.

The question posed for the House relieved it of the necessity of considering the question of collaboration between witnesses. However, given only the circumstances of the witnesses,[56] it is difficult to see that concoction is other than a reasonable hypothesis, and following the judgment of Mason CJ, Wilson and Gaudron JJ in *Hoch*, the evidence inadmissible.[57] Such an approach is difficult to reconcile with their later insistence that the role of the trial judge is limited to ascertaining the facts relevant to the circumstances of the witnesses, not directed to making a preliminary finding of whether or not there was concoction, but rather to permit an assessment of the probative value of the evidence.[58] The earlier inflexible insistence on exclusion fails to match the flavour of *Thompson v R*[59] and an approach to the admission of such evidence sensitive to the underlying principles. However, as has been suggested, even on this approach, the evidence in *DPP v P* ought to have been excluded.

Perhaps the most worrying aspect of *DPP v P* is the apparent approval of the comments of Lord Lane LCJ in the Court of Appeal, regarding as desirable changes in the rules relating to similar fact evidence which prevent the jury from hearing "evidence of that which they would naturally and rightly consider themselves entitled to know".[60] These statements indicate an apparent shift away from the concern to ensure the accused a fair trial, protected from unfairly prejudicial material.[61] Rather they seem to fuel the "instinctive reaction of the ordinary man which the general rule is intended to counter".[62] In dissenting from the conclusion of the Supreme Court of Canada in *R v D(LE)*, L'Heureux-Dubé J held that:

> [t]he fact that most child sexual assaults occur under circumstances where the problem is hard to detect and even harder to prosecute places an obligation upon the judiciary to ensure that the abuses suffered by victims are not perpetuated by the inability of the legal system to respond to the particular nature of the crime.[63]

In *R v Green*, the majority of the same court in allowing the Crown's appeal did not disapprove of the dissenting judgment of Monnim CJM, who asked:

> [s]hould not the search for truth and the enforcement of law not be as important as the possible prejudice to an accused? Youthful witnesses or the state should also not suffer prejudice and their testimony or the evidence which the state tenders should be accepted readily if admissible.[64]

While these dicta provide a welcome recognition of the extent to which defence counsel can effectively put the victim on trial, the proper response is not to shift the focus away from ensuring the fair trial of the accused.

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56 *Hoch*, above n16 at 297.
57 In particular at 296.
58 Above n16 at 297.
59 (1988-9) 169 CLR 1.
60 *DPP v P*, above n1 at 164. Cf *R v Huijser* [1988] 1 NZLR 577 at 578-9. Quoted in *DPP v P*, above n1 at 172.
61 However, in *Huijser*, the Court accepted that the facts legitimately supported a second category inductive generalisation: id at 579.
62 *Boardman*, above n4 at 460 per Lord Cross; see also *R v Bailey* [1924] 2 KB 300 at 305; Piragoff, D K, above n17 at 46.
63 *R v D(LE)*, above n48 at 150 per L'Heureux-Dubé J.
64 *R v Green*, above n50 at 354.

Similar fact evidence is regarded as potentially disproportionately prejudicial to the accused because of its potential to distort the morality of the criminal trial, which holds as fundamental the presumption of innocence,[65] and trial for particular acts, not moral infirmity or past conduct.[66] Propensity reasoning is regarded as objectionable because of the perceived danger that the jury will fail to adequately account for the fact that the accused is an individual agent, responsible for his or her own acts and capable of mending his or her ways, and regard disposition as more probative than it truly is.[67] Such failure undermines the aspiration to certainty and full proof in the criminal trial.[68]

The public interest requiring that the Courts have full access to all relevant material and that guilty persons be convicted[69] is not further served by compromise of these values and denial of the need for rational probative value.[70]

Conclusion

The decision in *Boardman* may not have been an isolated reappraisal of the operation of the strict rules of evidence to ensure that they conform to one or more of their underlying rationales,[71] and restored some confidence in Wigmore's prediction that the science of judicial proof would supplant, or at least inform a reassessment of, the formalistic and unreal rules of admissibility.[72] However, this science demands neither the particular rigidities of the *Hoch* formulation, nor a qualification or abdication of the fundamental principles of a fair trial, as on one reading *DPP v P* may indicate. The probative force possessed by the evidence in question is only one side of the equation. It is to be regretted that both *Hoch* and *DPP v P* fail to consider seriously the possibility of unfair prejudice to the accused, a failure compounded in the latter case by a disappointing analysis of the probative force of the evidence.

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65 See, for example, *Sutton*, above n16 at 545 per Brennan J, at 558 per Deane J; *Perry*, above n16 at 593-4 per Murphy J.

66 *R v D(LE)*, above n48 at 149 per L'Heureux-Dubé J; *R v B(CR)*, above n18 at 16 per McLachlin J, quoting Foster, *Crown Law* (1762) at 246. For similar reasons, since the seventeenth century, the law has proscribed duplicitous counts in the one indictment: see *S v R*, above n16 at 281, 284-6.

67 See, for example, *Perry*, above n16 at 586 per Gibbs CJ, at 594 per Murphy J; *Sutton*, above n16 at 545 per Brennan J. As to the reality of these dangers, see Schaefer, E G, and Hansen, K L, "Similar Fact Evidence and Limited Use Instructions — An Empirical Investigation" (1990) 14 *Crim LJ* 157.

68 Ligertwood, A L C, above n30 at 46-8.

69 Above n35 at 726.

70 However, the force of this public interest is not to be denied. For this reason, separate trials of co-accused will only be ordered in a strong and exceptional case: *R v Murray*, *R v Manton* [1980] 2 NSWLR 526 at 534-536.

71 In the High Court, see also *Thompson*, above n59. There is growing recognition that hearsay evidence is not homogeneous with respect to one of the principles, that of reliability, said to underlie its exclusion as a class of evidence: see *Walton v R* (1989) 166 CLR 283, especially per Mason CJ. See also *Ahern v R* (1988) 165 CLR 87.

72 Wigmore, J H, *The Principles of Judicial Proof* (1913) at 1-5. The individuation of the reasoning process in 'similar fact' cases advocated by Acorn, above n16, falls squarely within Wigmore's exhortations.