

THE PROPENSITY EVIDENCE CONUNDRUM: A SEARCH FOR DOCTRINAL CONSISTENCY

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INTRODUCTION

Few topics in law have engendered as much controversy and confusion as the rule that is commonly referred to as the similar fact evidence rule. The purpose of this piece is to navigate the minefield of contentious issues in this troubled area which include, first and foremost, formulating a workable definition of what constitutes similar fact evidence and critically examining the various common law and statutory rules governing its admissibility in criminal prosecutions. As part and parcel in achieving this objective, attention will also focus on the definition and rules governing the admissibility of what is often termed as relationship and *res gestae* evidence and, in particular, how these categories differ from similar fact evidence. It is also important to emphasise that although some reference will be made to relevant cases in the United Kingdom, New Zealand, and Canada, practical reasons dictate that the central focus be on the Australian common law and statutory rules in question. Indeed, to do otherwise would entail the type of discussion that is better suited for a lengthy treatise than a law journal.

II A DEFINITION OF PROPENSITY EVIDENCE

Although there is no universally agreed upon definition of what constitutes similar fact evidence, there is overwhelming support for the view that such evidence is but a species of a broader category of evidence that is commonly referred to as ‘character’, ‘propensity’, or ‘disposition’ evidence.¹ Character (or ‘propensity’ or ‘disposition’) evidence denotes evidence which shows that a person (or thing) has a continuing propensity to behave in a particular manner or act with a particular state of mind.² Similar fact evidence, on the other hand, is

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¹ See A Ligertwood, *Australian Evidence* (4th ed, Chatswood: Butterworths, 2004) 104.

² Ligertwood, above n 1; J D Heydon, *Cross on Evidence* (7th Aust ed, Chatswood: LexisNexis Butterworths, 2004) 596.

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evidence of specific conduct, usually criminal or otherwise discreditable in nature, which is of the same general character or shares some common feature with the conduct that is the subject of the proceeding, and which is tendered as circumstantial evidence of one or more of the constituent elements of that conduct.³

Another definition of similar fact evidence, albeit problematic, is 'evidence which shows that on some other occasion the accused acted in a way more or less similar to the way in which the prosecution alleges the accused acted on the occasion the subject of the present charge'.⁴ The difficulty with this and similar definitions is that they create the erroneous impression that the term 'similar fact evidence' applies only in the context of criminal proceedings (see discussion below). It should be noted that two additional species of character evidence are relationship and *res gestae* evidence. Although these categories of character evidence also denote evidence of specific conduct other than that which is the subject of the proceeding in question, they differ from similar fact evidence in that strictly speaking, they are tendered for a purpose other than that of proving one or more of the constituent elements of the conduct at issue. More will be said about the status and scope of relationship and *res gestae* evidence in Parts VI and VII respectively.

In accordance with the definition suggested above, similar fact evidence must have relevance to an issue in the case.⁵ By definition, therefore, similar fact evidence does not include evidence that is relevant *solely* for the purpose of impeaching or buttressing a witness's credit.⁶ It is also important to note the distinction between the term 'similar fact evidence' and what is commonly referred to as the 'similar fact evidence rule'. While the former encompasses a broad category of evidence of the type mentioned above, the latter denotes an evidentiary rule of exclusion that applies only in *criminal prosecutions* - and only in favour

³ Heydon, above n 2, 655. Although Heydon does not define similar fact evidence in these precise words, the author believes the proffered definition to be both accurate and reflective of the overwhelming weight of judicial and academic commentary.

⁴ P K Waight and C R Williams, *Evidence: Commentary and Materials* (6th ed, Sydney: The Law Book Company Limited, 2002) 389.

⁵ *Markby v R* (1978) 140 CLR 105, 116; *Perry v R* (1982) 150 CLR 580, 609; *Sutton v R* (1984) 152 CLR 528, 533, 545-546, 556-557, 562-563 ('Sutton'); *Hoch v The Queen* (1988) 165 CLR 292, 292-294 (Mason CJ, Wilson and Gaudron JJ) ('Hoch'); *BRS v The Queen* (1997) 191 CLR 275, 298-299 (Gaudron JJ), 292 (Toohey J); *R v Rajakaruna* [2004] VSCA 114 (23 June 2004) [88-89] (Eames AJA); see also *R v Tektonopoulos* [1999] 2 VR 412 [23] (Winneke P) ('Tektonopoulos').

⁶ *Tektonopoulos* [1999] 2 VR 412 [28]. That is not to suggest that evidence properly admitted as similar fact evidence cannot be considered for another purpose such as, for example, to buttress the credibility of the complainant.

of an accused.⁷ Under the latter rule, evidence of the accused's previous conduct is presumptively inadmissible unless the prosecution can demonstrate that its probative value vis-à-vis an issue in the case outweighs its natural tendency to unfairly prejudice the accused through what is commonly described as a propensity or dispositional chain of reasoning (discussed below).⁸ The balance of this piece is devoted exclusively to defining the operation and scope of the latter rule under the current common law doctrine and statutes in Australia and, perhaps just as importantly, how it differs from the relationship and *res gestae* species of character evidence.

III THE SCOPE OF THE SIMILAR FACT EVIDENCE RULE

Although there is strong *obiter dicta* in support of the proposition that the similar fact evidence rule applies only to evidence of the accused's previous *criminal* acts, it appears that this issue is far from settled. In *Makin v Attorney-General (NSW)*,⁹ Lord Herschell formulated what many consider to be the seminal statement of the similar fact evidence rule:

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 show 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 (emphasis added).¹⁰

In *Pfennig*,¹¹ a similar view was adopted by Mason CJ, Deane and Dawson JJ:

⁷ *Pfennig v R* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ) ('*Pfennig*'). For an example of a civil case in which the admissibility of similar fact evidence was in dispute, see *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd* (1981) 36 ALR 23. For a succinct discussion of the status of propensity evidence in civil cases generally, see Heydon, above n 2, 693-697; Ligertwood, above n 1, 187-192.

⁸ *DPP v Boardman* [1975] AC 421, 438-439 (Lord Morris), 443 (Lord Wilberforce), 451 (Lord Hailsham), 456 (Lord Cross), 461 (Lord Salmon) ('*Boardman*'); *Pfennig* (1995) 182 CLR 461, 483-485 (Mason CJ, Deane and Dawson JJ). An accused who seeks to adduce exculpatory similar fact evidence relating to the conduct of a co-accused or third party is not constrained by the similar fact evidence rule: see, for example, *Re Knowles* [1984] VR 751, 768-769; see also *R v Lowery and King (No 3)* [1983] VR 939, 944-945.

⁹ [1894] AC 57 ('*Makin*').

¹⁰ *Makin* [1894] AC 57, 65.

¹¹ (1995) 182 CLR 461.

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There is no one term which satisfactorily describes evidence which is received notwithstanding that it *discloses the commission of offences other than those with which the accused is charged*. It is always propensity evidence but it may be propensity evidence which falls within the category of similar fact evidence... (emphasis added).¹²

This view was expressly adopted by the Supreme Court of South Australia.¹³ There is, however, ample authority for the view that the rule extends to both criminal as well as non-criminal misconduct.¹⁴

IV THE STANDARD FOR ADMITTING EVIDENCE UNDER THE SIMILAR FACT EVIDENCE RULE

The controversy concerning the admissibility of similar fact evidence in criminal prosecutions commenced more than a century ago with the above quoted passage from the judgment of Herschell L in *Makin*.¹⁵ Herschell L's formulation has been criticised on the basis that it is inherently contradictory and, therefore, provides little or no guidance in defining the parameters of the rule. Specifically, the first sentence of this formulation purports to prohibit the prosecution from adducing evidence of prior criminal acts that derives its *relevance* solely on the basis of what is termed a propensity (or 'dispositional') chain of reasoning. A propensity chain of reasoning is one that reasons that the evidence of the previous act(s), if accepted as true, permits one to infer that the person in question has a tendency to behave in a particular manner, from which a further inference can be drawn that it is likely that he or she acted in a similar manner on the occasion at issue.¹⁶ Traditionally, the courts have been extremely wary of this type of reasoning.¹⁷ In fact, until fairly recent times the courts were reluctant or unwilling to concede that evidence of previous conduct could ever be admitted solely on the basis of a propensity chain of reasoning.¹⁸ What is important to understand is that evidence caught under the first sentence is not excluded because it lacks logical relevance to an issue in

¹² *Pfennig* (1995) 182 CLR 461, 464-465.

¹³ *R v Von Einem* (1985) 38 SASR 207; *R v Turney* (1990) 52 SASR 438.

¹⁴ *R v Ball* [1911] AC 447; *Griffith v R* (1937) 58 CLR 185; *R v Rodley* [1913] 3 KB 468; *R v Barrington* [1981] 1 WLR 419; *R v Carroll* (1985) 19 A Crim R 410, 413 (Kneipp J, CCA (Qld)); *Pfennig* (1995) 182 CLR 461, 512 (McHugh J); *R v Colby* [1999] NSWCCA 261 [106].

¹⁵ [1894] AC 57, 65.

¹⁶ *Boardman* [1975] AC 421, 438-439 (Lord Morris), 443 (Lord Wilberforce), 451 (Lord Hailsham), 456 (Lord Cross), 461 (Lord Salmon); *Pfennig* (1995) 182 CLR 461, 483-485 (Mason CJ, Deane and Dawson JJ); see also Heydon, above n 2, 639, 644-653.

¹⁷ See K J Arenson and M Bagaric, *Rules of Evidence in Australia: Text and Cases* (Chatswood: LexisNexis Butterworths, 2005) 220-221.

¹⁸ Ligertwood, above n 1, 112-114, 116-118.

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the case; rather, it is excluded because in most instances its probative value is outweighed by its tendency to unfairly prejudice the accused through a propensity chain of reasoning.

Under the second sentence of Herschell L's formulation, however, the prosecution is permitted to adduce evidence of the accused's uncharged criminal conduct if it is *relevant* to an issue in the case. Thus, the first sentence is rendered nugatory by the second. As adroitly stated by one distinguished commentator, '[c]onsiderable reinterpretation is required to avoid the literal contradiction of the Herschell formulation and to explain when evidence disclosing other misconduct is admissible as an exception to the rule'.¹⁹ Perhaps a viable reinterpretation is that the Herschell formulation represents an admonition that, because of the intrinsic dangers in admitting evidence solely on the basis a propensity chain of reasoning, it should only be done in the most exceptional circumstances.

Over the past few decades, the courts in Australia and elsewhere have endeavoured to enunciate a fair and coherent rule for determining the admissibility of similar fact evidence in criminal prosecutions. Under the first approach, similar fact evidence is admissible if it can be shown to be relevant in some way other than via propensity or disposition as, for example, where it establishes identity or rebuts a defence such as accident.²⁰ Where the evidence is relevant in this way, it is admissible even though it also reveals a propensity of the accused. This approach is flawed because it fails to address the rationale behind the rule. Further, it is difficult to reconcile with some of the leading cases on similar fact evidence in which the relevance of such evidence stems solely from the fact that it discloses a predisposition by the accused to engage in conduct similar to that charged.²¹

The second approach provides that similar fact evidence is admissible if its probative value outweighs its prejudicial effect.²² It has been argued that due to the nebulous nature of the key concepts (probative value and prejudicial effect), this test provides little practical guidance and is so broad that it resembles the exercise of discretion rather than the application of an evidentiary rule of exclusion.²³

¹⁹ Ligertwood, above n 1, 110.

²⁰ *Sutton* (1984) 152 CLR 528; *Thompson v R* (1989) 86 ALR 1 ('*Thompson*').

²¹ See, eg, *R v Ball* [1911] AC 447; *R v Straffen* [1952] 2 QB 911; *Sutton* (1984) 152 CLR 528; *Harriman v R* (1989) 167 CLR 590, 627-634; *Pfennig* (1995) 182 CLR 461, 483-485 (Mason CJ, Deane and Dawson JJ).

²² *Sutton* (1984) 152 CLR 528, 547 (Brennan J), 559-569 (Deane J); *Boardman* [1975] AC 421.

²³ *Pfennig* (1995) 182 CLR 461, 483.

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The Canadian courts have adopted a combination of the first and second approaches: '[e]vidence which tends to show bad character or a criminal disposition on the part of the accused is admissible if (1) relevant to some other issue beyond disposition or character; and (2) the probative value outweighs the prejudicial effect'.²⁴ In *DPP v P*,²⁵ the House of Lords effectively adopted the probative value versus prejudicial effect test: '[s]imilar fact evidence is admissible where its probative force is sufficiently strong to make it *fair* to admit it, notwithstanding its prejudicial effect (emphasis added)'.²⁶ This approach also represents the law in New Zealand.²⁷

The most recent test enunciated by the High Court of Australia regarding the admissibility of similar fact evidence is that it is only admissible where there is no rational view of the evidence consistent with innocence:

The basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency by reason that it reveals a pattern of activity such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged.²⁸

While the High Court has yet to authoritatively declare whether this is the appropriate test to be applied in every conceivable scenario in which the prosecution seeks to adduce similar fact evidence, it is fair to say that the thrust of *Hoch*²⁹ (later reaffirmed in *Pfennig*³⁰) is that the probative value of similar fact evidence will only outweigh its prejudicial effect when there is no rational view of such evidence that is consistent with the innocence of the accused. It is certainly arguable, therefore, that this effectively replaces the probative value versus prejudicial effect test; at the very least, it can be argued that it is merely a permutation of that test. On the other hand, the probative value versus prejudicial effect test has not been expressly overruled. In *Pfennig*,³¹ cases which adopted the balancing test (for example, *DPP v P*³²) were cited with approval.³³ Hence, it appears that the High Court in *Pfennig*³⁴ was not attempting to formulate a new standard for the admissibility of similar fact evidence; rather, it was attempting to formulate a precise and articulable guideline

²⁴ *R v B (FF)* [1993] 1 SCR 697, 730-731; *R v W (DD)* 114 CCC (3d) 524.

²⁵ [1991] 3 All ER 337.

²⁶ *DPP v P* [1991] 3 All ER 337, 346.

²⁷ *R v Accused* (1991) 7 CRNZ 604; *R v McIntosh* (1991) 8 CRNZ 514.

²⁸ *Hoch* (1988) 165 CLR 292, 294 (Mason CJ, Wilson and Gaudron JJ); *Pfennig* (1995) 182 CLR 461, 483-485 (Mason CJ, Deane and Dawson JJ).

²⁹ (1988) 165 CLR 292.

³⁰ (1995) 182 CLR 461.

³¹ (1995) 182 CLR 461.

³² [1991] 3 All ER 337.

³³ *Pfennig* (1995) 182 CLR 461, 506-507.

³⁴ (1995) 182 CLR 461.

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for determining whether the probative value versus prejudicial effect test has been satisfied.

The 'another rational view' test has been subjected to significant criticism. One such criticism is that it raises the bar for admissibility too high. As pointed out by this writer:

The approach formulated in *Hoch* and reaffirmed in *Pfennig* ... imposes an excessively strict standard for the admission of "similar fact evidence". In particular, its opponents point out that it effectively requires trial judges to make a finding of guilt beyond a reasonable doubt as a condition precedent to its admissibility. In view of the High Court's pronouncement in *Pfennig* "that judges must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused", it is difficult to find fault with this observation. As to whether this standard imposes an unduly onerous burden on the prosecution, there are cogent arguments for and against this view. Opponents of the *Hoch-Pfennig* approach may raise a legitimate question as to why the voluntariness of confessional evidence, for example, is not determined by the same reasonable doubt standard as a condition precedent to its admissibility. This argument has considerable force when one considers that confessional evidence is potentially more damaging, unreliable, and misleading than "similar fact evidence"; this is especially true in the case of full confessions which, unlike "similar fact evidence", are direct evidence of guilt. On the other hand, proponents of the *Hoch-Pfennig* approach can argue with equal force that it is precisely for these reasons that questions regarding the voluntariness of confessional evidence ought to be determined by the same strict standard applicable to "similar fact evidence". The argument then follows that the analogy posited by the opponents necessarily assumes, without justification, that the present standard for determining questions of voluntariness is the correct one (citations omitted).³⁵

The 'another rational view' test has also been assailed on the ground that it involves an arrogation of power by judges traditionally reserved to juries: namely, adjudging the credibility of witnesses.³⁶ This criticism is especially poignant in cases such as *Hoch*³⁷ where counts involving similar allegations made by two or more complainants are sought to be joined in the same presentment. In these instances, there is a long line of authority holding that separate trials must be granted on the counts relating to each complainant unless the evidence relating to each of the counts joined would be cross-admissible in a separate trial for any of the others - save for instances in which a direction to the jury would be adequate to safeguard the accused from any unfair prejudice resulting from the inadmissible similar fact evidence.³⁸ Whenever the accused can

³⁵ K J Arenson, 'Propensity Evidence in Victoria: A Triumph for Justice or an Affront to Civil Liberties' (1999) 23 *Melbourne University Law Review* 263, 273.

³⁶ Ligertwood, above n 1, 130-132.

³⁷ (1988) 165 CLR 292.

³⁸ *Boardman* [1975] AC 421; *Sutton* (1984) 152 CLR 528; *De Jesus v R* (1986) 62 ALR 1; *Hoch* (1988) 165 CLR 292.

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show that there is a real possibility of collusion and fabrication among the complainants, the cross-admissibility criterion will not be satisfied because the risk of collusion and fabrication represents another rational view of the similar fact evidence that is consistent with innocence.³⁹ It was on this basis that the High Court in *Hoch*⁴⁰ overturned the trial judge's refusal to order separate trials. In commenting on the notion that achieving this result via application of the 'another rational view' test amounted to an encroachment on the traditional role of juries in deciding issues of credibility, this observer wrote:

[I]n certain cases where the similar facts are in dispute, such an approach unjustifiably permits the trial judge to invade the province of the jury in deciding issues of credibility. In cases such as *Makin*, for example, where the similar facts are not in dispute, the *Hoch-Pfennig* approach merely requires the trial judge to decide whether the inference of guilt to be drawn therefrom is strong enough to exclude any reasonable hypothesis which is consistent with innocence. In cases such as *Hoch*, however, the necessary inference can only achieve this threshold if one can exclude the possibility that the similarities in the accounts given by the boys were the result of collusion. Arguably, this involves an issue of credibility which should be left to the jury - unless the trial judge finds that no reasonable jury could fail to find the presence of collusion. Although *Hoch* did not hold that trial judges are required to make an ultimate determination as to whether collusion existed, a decision to exclude the evidence does remove the issue of credibility from the jury's consideration. If the accounts given by the witnesses are so similar that they would bear no rational explanation consistent with innocence but for the *possibility* of collusion - what is the justification for taking the issue of credibility away from the jury? Is it not fair to say that juries are routinely entrusted with this responsibility in other contexts where the stakes are equally high? Is the *possibility* of collusion and its pernicious consequences any less, for example, in cases where two or more prosecution witnesses to the *same event* provide accounts which are substantially similar (citations omitted)?⁴¹

³⁹ *Hoch* (1988) 165 CLR 292, 296.

⁴⁰ (1988) 165 CLR 292.

⁴¹ K J Arenson, above n 35, 273-274. The continued vitality of *Hoch* (1988) 165 CLR 292 is now open to question in the aftermath of the High Court's decision in *Phillips v The Queen* [2006] HCA 4 (1 March 2006). Although the Court reaffirmed the 'another rational view' test enunciated in *Hoch* and *Pfennig* (1995) 182 CLR 461, it then opined that 'it must be recognized that, as a test of admissibility of evidence, the test is to be applied by the judge on certain assumptions. Thus it must be assumed that the similar fact evidence would be accepted as true and that the prosecution case... may be accepted by the jury': at [63] (per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ). Although this language appears to overrule the Court's earlier decision in *Hoch*, the judgment in *Phillips v The Queen* is conspicuously devoid of any criticism of *Hoch* which was actually cited with apparent approval in the preceding paragraph. Aside from the fact that the above quoted passage is arguably *obiter dicta* in light of the effect of s 132A of the *Evidence Act 1977* (Qld) (see Part V.A below), it is dubious, to say the least, that the Court would overrule a decision as momentous as *Hoch* by mere implication in such a cavalier manner. On the assumption that the quoted passage was not intended to overrule *Hoch*, it might be explained as a simple admonition that in ruling on the admissibility of evidence laden with the potential for unfair prejudice, due regard must always be given to the fact that such evidence will be accepted by the jury.

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It was this concern that prompted the legislatures in Victoria, Queensland, and Western Australia to enact remedial legislation that will be discussed in Parts V and V.A respectively. The manner in which the uniform Evidence Acts deal with similar fact evidence is dealt with in Part VIII of this piece.

Under the current Australian common law doctrine, similar fact evidence can only achieve the requisite probative force to warrant admission when ‘the *objective improbability* of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged (emphasis added)’.⁴² In other words, the similar fact evidence must be of such a character as to make it highly improbable that the events in question could have occurred other than as alleged by the prosecution; and this criterion will only be satisfied when the evidence in question bears no reasonable explanation consistent with the innocence of the accused on the offence charged. Thus, although broadly speaking the test for admissibility is one of ‘objective improbability’, the ‘another rational view’ test represents the standard for the requisite degree of objective improbability that must be demonstrated in order for the evidence to be admissible. There are two ways in which similar fact evidence can acquire the probative force necessary to surmount this rigorous test.

The first is when its probative strength via a straight propensity chain of reasoning is clear.⁴³ This would occur, for example, in cases where the occurrence of the events that are alleged to comprise the similar facts is not in dispute, the accused’s complicity in such events is conceded or supported by cogent evidence (meaning that the accused has either confessed to, or the facts relating to the similar events point strongly to his or her complicity therein), *and* the events are so *strikingly similar* to the offence charged that the only rational inference to be drawn is that, but for an incredible coincidence, a ‘copycat’ offender, fabrication, or some other extraordinary explanation, all the acts must have been committed by the same person. This involves a straight propensity chain of reasoning because the jury is being asked to conclude that the defendant not only has a tendency to behave in a particular manner, but in a manner that is unique. Therefore, the only reasonable inference to be drawn is that barring one of the foregoing explanations, the defendant is responsible for all the acts. Although this involves a propensity chain of

⁴² *Hoch* (1988) 165 CLR 292, 294-295 (Mason CJ, Wilson and Gaudron JJ); *Pfennig* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ); see also *Sutton* (1984) 152 CLR 528, 556-557; *Harriman v R* (1989) 167 CLR 590, 600 (Dawson J).

⁴³ *Pfennig* (1995) 182 CLR 461, 483-485 (Mason CJ, Deane and Dawson JJ), 504-507 (Toohey J); see also Ligertwood, above n 1, 112, 116, 126-127.

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reasoning, it is clear that the probative value of the evidence is so strong that it would be an affront to common sense and the interests of justice to exclude it from the jury's consideration. In these instances, the similar fact evidence would have sufficient probative force to warrant its admission from the outset and, therefore, the prosecution would be permitted to adduce it as part of its case in chief. It is noteworthy that the courts have admitted similar fact evidence solely on the basis of a propensity chain of reasoning in three situations. The first is to prove the *identity* of the accused as the perpetrator.⁴⁴ The second is to prove a relevant relationship between the accused and the alleged victim or an accomplice.⁴⁵ The third is to prove that the relevant acts were committed intentionally or to prove that the relevant acts were not unintended, accidental, or fortuitous.⁴⁶

The second circumstance in which similar fact evidence can acquire the degree of probative force to warrant admission is when it has substantial relevance to an issue in the case independent of a propensity chain of reasoning. There are many scenarios in which similar fact evidence can be admitted on this basis. This would occur, for example, in cases where a person charged with selling cocaine testifies that he has never used cocaine and, further, that he would not even recognise the substance if he saw it. In order to rebut this testimony, the prosecution could adduce evidence that the accused had been convicted of possession and use of cocaine prior to the date when the alleged sale occurred. Here, it is clear that the similar fact evidence is relevant to an issue in the case independent of any propensity chain of reasoning. While the prior conviction and the offence charged are of the same general character or share a common feature in that both are illegal and both involve the same illegal drug (thereby creating a potential for prejudice through a propensity chain of reasoning), it is apparent that the prior conviction is highly relevant to rebutting the defence put forth by the accused and in impeaching his credit. In this example, it is apparent that the similar fact evidence did not become sufficiently probative to warrant admission until after the accused testified. Thus, it is important to emphasise that similar fact evidence which is inadmissible during the prosecution's case in chief may become admissible at a later stage of the trial, depending upon the defence put forth by the accused. This example also demonstrates that notwithstanding some occasional expressions to the contrary, the admissibility of similar fact evidence is not necessarily dependent upon a showing that it bears a striking similarity to the offence charged.

⁴⁴ *Straffen* [1952] 2 QB 911; *Thompson v R* [1918] AC 221; *Sutton* (1984) 152 CLR 528; *Pfennig* (1995) 182 CLR 461.

⁴⁵ *R v Ball* [1911] AC 447; *Harriman v R* (1989) 167 CLR 590.

⁴⁶ *Thompson* (1989) 86 ALR 1.

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The scenario presented in *Hoch*⁴⁷ provides another good illustration of how similar fact evidence can be admitted on the basis of relevance independent of a propensity chain of reasoning. Readers will recall that in this type of fact pattern, the accused is charged with multiple counts involving two or more complainants – and the allegations made by each are very similar. As noted earlier, a question of severance will typically arise, and this will generally be determined on the basis of whether the evidence relating to each complainant would be cross-admissible in a separate trial involving any of the others. As also noted above, the test of cross-admissibility under common law doctrine is determined by applying the similar fact evidence rule or, to be more precise, the ‘another rational view’ test. Assuming there are strong similarities in the allegations made by the complainants and there is no real possibility of collusion or unconscious influence, the ‘another rational view’ test will be satisfied based upon the high degree of objective improbability that two or more complainants would fabricate such similar allegations by mere coincidence; that is, the similar fact evidence makes it so improbable that the events occurred other than as alleged by the prosecution – that there is no rational view of that evidence consistent with innocence.

The prosecution is generally not permitted to circumvent the prohibition against similar fact evidence by merely joining two or more counts involving multiple complainants in a single trial. In this context, ‘complainant’ denotes an alleged victim or a witness to a so-called victimless crime such as possession of a controlled substance. If it were otherwise, the result would be that the rule would be emasculated beyond recognition. For example, sch 6, Rule 2 of the *Crimes Act 1958* (Vic) provides that ‘[c]harges for any offences may be joined in the same presentment if those charges are founded on the same facts or form or are part of a series of offences of the same or similar character’. Similar rules exist throughout the various Australian jurisdictions.⁴⁸ Technically, therefore, these statutory provisions permit joinder under circumstances in which the evidence relating to each of the complainants joined would not be cross-admissible in a separate trial involving any of the others. Subsection 372(3) of the *Crimes Act 1958* (Vic) provides, however, that a court may, in its discretion, order that one or more counts be tried separately whenever joinder of offences would seriously jeopardise the accused’s right to a fair trial. Subsection 372(3) is typical of the severance provisions that exist in the other States and Territories.⁴⁹

⁴⁷ (1988) 165 CLR 292.

⁴⁸ See, eg, *Criminal Code* (NT) s 309; *Criminal Code* (Qld) s 567; *Criminal Code* (WA) s 586; *Criminal Law Consolidation Act 1935* (SA) s 278.

⁴⁹ See, eg, *Criminal Code* (Qld) s 597A(1); *Summary Procedure Act 1921* (SA) s 102(4); *Criminal Procedure Act 2004* (WA) s 133; *Criminal Procedure Act 1986* (NSW) s 21.

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Although discussed earlier in the more limited context of cases such as *Hoch*,⁵⁰ there is substantial High Court authority for the proposition that where multiple complainants are involved, separate trials must be ordered in instances where the evidence relating to each complainant would not be cross-admissible in a separate trial involving any of the others, unless a proper direction to the jury would be sufficient to protect the accused from any unfair prejudice that may arise from the evidence relating to the other complainants. In cases where such a direction would not be effective, the High Court has held that failure to order separate trials constitutes an abuse of discretion amounting to a substantial miscarriage of justice.⁵¹ As the discussion below illustrates, the courts have thus far failed to elucidate any clear and precise rules for determining the circumstances under which a cautionary direction would be adequate to safeguard the accused from unfair prejudice.

Where the accused is charged with two or more counts involving a single complainant, a different rule applies. Here, the success or failure of the prosecution's entire case will often rest upon the credibility of the lone complainant. In these instances, there is only a minimal risk of unfair prejudice arising from the joinder of multiple counts, notwithstanding that the evidence relating to each would not be cross-admissible in a separate trial for any of the others.⁵² In these instances, all that is generally required is a direction that the jury must consider and dispose of each count separately from the others, and it must do so solely on the basis of the evidence relating to each count.⁵³ There may be special circumstances, however, where such joinder will create a perceptible risk of a substantial miscarriage of justice. In this context, a perceptible risk is one that is real or of substance - as opposed to one that is insignificant or merely theoretical.⁵⁴ Under these circumstances, it will be necessary to also provide the jury with what is termed a 'propensity warning'.⁵⁵ A propensity warning is one which directs that should the jury find one or more of the allegations to have been proven beyond reasonable doubt, it may not reason that the accused has a propensity to commit crimes of that nature and, therefore, is the kind of person who is likely to have committed one or more of the others charged.⁵⁶

Regrettably, the Court of Appeal's decision in *R v J (No 2)*⁵⁷ failed to provide any meaningful guidance on the all important question of what

⁵⁰ (1988) 165 CLR 292.

⁵¹ *Sutton* (1984) 152 CLR 528; *De Jesus v R* (1986) 62 ALR 1; *Hoch* (1988) 165 CLR 292.

⁵² *R v J (No 2)* [1998] 3 VR 602, 614, 638-643.

⁵³ *R v J (No 2)* [1998] 3 VR 602, 614, 638-643.

⁵⁴ *R v J (No 2)* [1998] 3 VR 602, 643.

⁵⁵ *R v J (No 2)* [1998] 3 VR 602, 643.

⁵⁶ *R v J (No 2)* [1998] 3 VR 602, 643.

⁵⁷ [1998] 3 VR 602.

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would amount to special circumstances necessitating such a warning. It is the opinion of this observer that these circumstances should include any case in which the success or failure of the prosecution does not rest solely on the credibility of the complainant. If, for example, there are other eyewitnesses to corroborate the complainant's version of the events in question, then the success of the prosecution can no longer be said to rise or fall solely on the credit of the complainant. In cases such as these, the count which is corroborated by the testimony of a third party takes on an entirely different character which, in many respects, is similar to *a count involving another complainant*. Thus, the corroborated count should be treated as such and, accordingly, separate trials should be ordered in all but the most exceptional cases where a proper direction would be adequate to protect the accused from any unfair prejudice that may occur through a propensity chain of reasoning. A cogent argument can be made along these same lines where the sole complainant's testimony is corroborated by evidence other than an eyewitness to the actual event - such as physical or scientific evidence.

Subsections 372(3AA) and (3AB) of the *Crimes Act 1958* (Vic), inserted by way of the *Crimes (Amendment) Act 1997*, purport to alter this rule in cases where two or more sexual offences are joined in the same presentment. Subsection 372(3AA) provides that

'[d]espite subsection (3) and any rule of law to the contrary, if, in accordance with this Act, two or more counts charging sexual offences are joined in the same presentment, it is presumed that those counts are triable together'.

Subsection 372(3AB) then provides that '[t]he presumption created by sub-s (3AA) is not rebutted merely because evidence on one count is inadmissible on another count'. The Court of Appeal, however, has read down these provisions to the point where the cross-admissibility rule set forth in *Sutton*⁵⁸, *De Jesus v R*⁵⁹, and *Hoch*⁶⁰ remains largely intact.⁶¹

In writing for the Court in *Bullen*,⁶² Callaway JA stressed that the word 'triable', as used in sub-s 372(3AA), means triable consistent with an accused's common law right to a fair trial.⁶³ Callaway JA then noted that while juries are normally assumed to be capable of following cautionary directions, such an assumption is unrealistic in cases which involve

⁵⁸ (1984) 152 CLR 528.

⁵⁹ (1986) 62 ALR 1.

⁶⁰ (1988) 165 CLR 292.

⁶¹ *R v Bullen* (1998) 102 A Crim R 74 ('*Bullen*').

⁶² *Bullen* (1998) 102 A Crim R 74.

⁶³ *Bullen* (1998) 102 A Crim R 74, 79.

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crimes of a revolting nature such as sexual offences.⁶⁴ Callaway JA concluded, therefore, that despite the language of sub-s 372(3AA), it would generally be contrary to the right of a fair trial and an abuse of discretion to allow joinder of sexual offences (involving two or more complainants) in the same presentment where the evidence relating to each of the offences charged would not be cross-admissible in a separate trial for any of the others — unless a direction to the jury would be adequate to protect the accused from any unfair prejudice emanating from a propensity chain of reasoning.⁶⁵ Callaway JA then intimated that such a direction would only be adequate in this regard when the evidence relating to each offence has absolutely *no probative value in relation to the others*.⁶⁶ Thus, notwithstanding the wording of the new legislation, the Court of Appeal appeared to thwart an unmistakable attempt by Parliament to emasculate the common law rule of cross-admissibility in cases where two or more sexual offences involving multiple complainants are joined in the same presentment.

Bullen,⁶⁷ however, was not the last word on the construction ascribed to this legislation. In *R v KRA*,⁶⁸ the Court of Appeal upheld a trial judge's exercise of discretion in allowing joinder of multiple sexual offences involving two child complainants under circumstances where the offences joined did not meet the test of cross-admissibility.⁶⁹ Though conceding that the recent amendments to the *Crimes Act 1958* (Vic) did not overrule the common law rule of cross-admissibility, the Court of Appeal stressed that the presumption that juries will follow cautionary directions is not necessarily rebutted in all cases where sexual offences are sought to be joined in the same presentment; rather, each case must be judged on its peculiar facts.⁷⁰ In commenting generally on the exercise of discretion under sub-ss 372(3AA) and (3AB), Winneke P, with whom Brooking and Ormiston JJA concurred, noted with approval the following passage from Lord Taylor's judgment in *R v Christou*:⁷¹

[T]he essential criterion is the achievement of a fair resolution of the issues. That requires fairness to the accused but also to the prosecution and those involved in it. Some, but by no means an exhaustive list, of the factors which may need to be considered are: how discrete or inter-related are the facts giving rise to the counts; the impact of ordering two or more trials on the defendant and his family; on the victims and their families; on press publicity; and importantly, whether directions which the

⁶⁴ *Bullen* (1998) 102 A Crim R 74, 83.

⁶⁵ *Bullen* (1998) 102 A Crim R 74, 85.

⁶⁶ *Bullen* (1998) 102 A Crim R 74, 84.

⁶⁷ (1998) 102 A Crim R 74.

⁶⁸ [1999] 2 VR 708.

⁶⁹ *R v KRA* [1999] 2 VR 708, 717.

⁷⁰ *R v KRA* [1999] 2 VR 708, 716-717.

⁷¹ [1997] AC 117, 129.

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judge can give to the jury will suffice to secure a fair trial if the counts are tried together. In regard to that last factor, jury trials are conducted on the basis that the judge's directions of law are to be applied faithfully. Experience shows ... that juries, where counts are jointly tried, do follow the judge's directions and consider the counts separately. Approaching the question of severance, as indicated above, judges will often consider it right to order separate trials. But I reject the argument that either generally or in respect of any class of case, the judge must so order.⁷²

This passage was also cited with approval in *R v Glennon*.⁷³

In applying these principles to the facts of this particular case, Winneke P noted that proof of two of the offences alleged to have been committed against one complainant was dependent, in part, upon evidence to be given by the other.⁷⁴ The Court thus reasoned that it would have been an ill-advised exercise of discretion to require one of the child complainants to testify at separate trials.⁷⁵ Far more importantly, the Court stressed that the accused's defence was predicated on a claim that the mother of the complainants had colluded with them to fabricate the allegations as part of her personal vendetta against him.⁷⁶ The Court reasoned, therefore, that such a defence could best be raised in a single trial with both complainants present.⁷⁷ In other words, what purpose would be served by ordering severance and separate trials when the nature of the accused's defence required that the jury be made aware of all the allegations? Under these circumstances, there is benefit rather than unfair prejudice to the accused in having all the allegations adjudicated in a single trial. When viewed from this perspective, the Court's judgment in *R v KRA*⁷⁸ is sound, logical, and does not signal any significant retreat from its judgment in *Bullen*.⁷⁹ Indeed, this view finds strong support in the following passage from the judgment of Winneke P, with whom Buchanan and Ormiston JJA concurred, in *R v Papamitrou*:

Nevertheless, it seems to me to remain a sound approach in cases such as the present for the trial judge, in exercising the discretion given by s 372(3), to determine whether the evidence of the several complainants is cross-admissible because such a determination will - in most cases - be a powerful factor influencing the discretion. The capacity to ensure a fair trial for the accused must always be the dominant consideration governing

⁷² *R v KRA* [1999] 2 VR 708, 715.

⁷³ [2001] VSCA 17 (16 March 201) [99].

⁷⁴ *R v KRA* [1999] 2 VR 708, 715. (Winneke P; Brooking and Ormiston JJA concurred on this point.)

⁷⁵ *R v KRA* [1999] 2 VR 708, 715.

⁷⁶ *R v KRA* [1999] 2 VR 708, 715.

⁷⁷ *R v KRA* [1999] 2 VR 708, 715.

⁷⁸ [1999] 2 VR 708.

⁷⁹ (1998) 102 A Crim R 74.

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the exercise of the discretion; and the more complainants there are whose evidence is not admissible in the trials affecting other complainants, the more difficult it will be for adequate directions to be given by the trial judge to avoid prejudice occurring to the accused. To that extent, the views expressed by the High Court in *De Jesus [v R]* and *Sutton* (to which I have referred in [III]) will remain influential in this State.⁸⁰

In substance, therefore, the test for proper joinder is substantially the same as that relating to the proper application of the rule against similar fact evidence.

V THE CRIMES (AMENDMENT) ACT 1997 (VIC) AND ITS IMPACT ON THE SIMILAR FACT EVIDENCE RULE

Pursuant to the *Crimes (Amendment) Act 1997* (Vic), s 398A was inserted into the *Crimes Act 1958* (Vic). Section 398A provides:

398A. Admissibility of propensity evidence

- (1) This section applies to proceedings for an indictable or summary offence.
- (2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.
- (3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2).
- (4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.
- (5) This section has effect despite any rule of law to the contrary.

The question, therefore, is to what extent has this legislation, as construed by the Court of Appeal in *R v Best*⁸¹ and subsequent decisions, altered the existing common law doctrine regarding the admissibility of similar fact evidence? In *Best*,⁸² the Court of Appeal went to great lengths to read down the language of s 398A to comport, in so far as possible, with the common law right to a fair trial. While the clear

⁸⁰ [2004] VSCA 12 (27 February 2004) [27].

⁸¹ [1998] 4 VR 603 (*Best*). See also *Evidence Act 1906* (WA), s 31A. This section was introduced in 2004 and although worded differently, has been construed as having an effect that is very similar, if not identical to s 398A: see *Donaldson v The State of Western Australia* [2005] WASCA 196 [88]-[130] (Roberts-Smith JA) (17 October 2005). For that reason the author has opted to forego a plenary discussion of s 31A in this piece.

⁸² [1998] 4 VR 603.

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import of sub-s 398A(3),(4) is to abrogate the ‘another rational view’ test enunciated by the High Court in *Pfennig*,⁸³ the Court of Appeal narrowly construed sub-s 398A(3) as applying only in instances where the accused seeks to impugn the reliability of propensity evidence on the basis of collusion, concoction, unconscious influence or some other means.⁸⁴ Where this occurs, the Court of Appeal construed sub-s 398A(3) to mean that the trial judge must assume the truth of the propensity evidence and, on that basis, decide whether the probative value of such evidence outweighs its tendency to jeopardise an accused’s right to a fair trial.⁸⁵ If this question is answered in the affirmative, the evidence is then admitted under sub-s 398A(2) and it is then open to an accused to impugn the reliability of the propensity evidence during the course of the trial.⁸⁶ The trial court should then direct the jury that they must be satisfied beyond a reasonable doubt of its reliability before making use of such evidence in their deliberations.⁸⁷

The practical effect of s 398A, therefore, is to prevent an accused from excluding highly probative evidence of guilt by impugning the reliability of propensity evidence (as, for example, by alleging collusion among multiple complainants as in *Hoch*⁸⁸). This means that where the ‘probative value versus unfair prejudice’ test is satisfied after assuming the truth of the disputed evidence, the accused is now forced to defend two or more charges involving multiple complainants in a single trial. Depending on the facts, this may or may not be beneficial to the accused. If there is significant evidence of collusion, concoction, unconscious influence or some other basis for impugning the reliability of the propensity evidence, an accused might be better served by dealing with all allegations in a single trial where a jury will have the benefit of hearing all the evidence in support of the attack on the reliability of the evidence. Moreover, this limits the prosecution to one opportunity to convict before a single jury rather than several opportunities with different juries, not to mention the avoidance of

⁸³ (1995) 182 CLR 461.

⁸⁴ *Best* [1998] 4 VR 603, 610. Although s 398A refers generally to ‘propensity’ evidence, the Court of Appeal construed that term (for purposes of s 398A) as encompassing *only* evidence of specific conduct which, if accepted as true, could cause the jury to infer from that fact that the accused is the sort of person who is likely to have committed the crimes that are the subject of the prosecution in question (that is, evidence disclosing propensity): *Best* [1998] 4 VR 603, 608 (citing Heydon, above n 2, 655).

⁸⁵ Heydon, above n 2, 610. In construing s 398A, the Court of Appeal relied heavily on the House of Lords’ decisions in *DPP v P* [1991] 3 All ER 337 and *R v H* [1995] 2 AC 596.

⁸⁶ *Best* [1998] 4 VR 603, 611.

⁸⁷ *Best* [1998] 4 VR 603, 611.

⁸⁸ (1988) 165 CLR 292.

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added expenses incurred in separate trials. On the other hand, the effect of s 398A will be anything but beneficial to the accused where he or she has sufficient evidence of collusion and concoction to warrant separate trials under *Hoch*, albeit not substantial enough to justify a decision to face all his or her accusers in a single trial. In these situations s 398A represents a substantial change in the law and a tremendous boon to the prosecution.

There are two additional considerations which counsel against exaggerating the extent to which s 398A represents a radical departure from the common law doctrine regarding the admissibility of propensity evidence. Where the reliability of the disputed propensity evidence is not in dispute, the *Best*⁸⁹ decision suggests that s 398A does not dramatically alter the common law doctrine; the same appears to be true in cases where the reliability of such evidence is disputed but the evidence is excluded (notwithstanding the assumption that it is truthful) on the basis that its probative value is outweighed by its tendency to unfairly prejudice the accused - as when there are insufficient similarities among the alleged crimes to warrant admission.⁹⁰

What the Court of Appeal failed to do in *Best*,⁹¹ however, is provide any guidance as to how the trial judge is to determine, assuming the truth of the disputed evidence, whether its probative value outweighs its tendency to unfairly prejudice the accused. It could be argued that the 'another rational view' test has not been displaced by the narrow construction accorded sub-s 398A(3) and, therefore, is still the standard to be applied in determining whether the probative value of the evidence outweighs its tendency to unfairly prejudice the accused, thus rendering it 'just to admit it' under sub-s 398A(2). The argument is that as Victoria is a common law jurisdiction, common law principles govern in construing ambiguous legislation in the absence of a clear legislative intention to displace these principles.⁹² One could further argue that given the construction accorded to sub-s 398A(3) *and* the amorphous language of sub-s 398A(2), there is nothing in the wording of s 398A that evinces a clear legislative intention to displace the common law test set out in *Pfennig*.⁹³ Finally, and perhaps most importantly, the argument follows that if the Court of Appeal's construction of sub-s 398A(2) is correct, then the operation of s 398A is more akin to an exercise of the *Christie*⁹⁴

⁸⁹ [1998] 4 VR 603.

⁹⁰ See, eg, *R v Rajakaruna* [2004] VSCA 114 (23 June 2004) [88]-[89] (Eames AJA).

⁹¹ [1998] 4 VR 603.

⁹² *Baker v Campbell* (1983) 153 CLR 52, 120-124, 132 (Dawson J); P Gillies, *Criminal Law* (4th ed, North Ryde: Law Book Company Information Services, 1997) 8.

⁹³ (1995) 182 CLR 461.

⁹⁴ *R v Christie* [1914] AC 545, 564.

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discretion than an evidentiary rule of exclusion.⁹⁵ To be sure, this was the underlying rationale for the High Court's rejection of such an amorphous balancing approach in *Pfennig*.⁹⁶

Subsequent to *Best*,⁹⁷ however, the Court of Appeal has steadfastly adhered to the view that s 398A has indeed supplanted the 'another rational view' test enunciated in *Hoch*⁹⁸ and *Pfennig*.⁹⁹ In *Rajakaruna*,¹⁰⁰ the Court of Appeal provided what is perhaps the most comprehensive statement to date concerning the operation and scope of s 398A. Though the judgment of Eames JA unmistakably reaffirmed that the *Pfennig*¹⁰¹ test was supplanted by s 398A, the following passage from his judgment casts considerable doubt on this proposition:

As discussed by Callaway, J.A. in *Best*, the common law test for admissibility which had been stated in *Pfennig* and *Hoch* for propensity evidence (of which similar fact evidence was one type), was that where there was a reasonable view of the evidence consistent with innocence the evidence would not be admitted. That test was not adopted in s 398A. Instead, the evidence would be inadmissible unless the trial judge ruled that its probative value was sufficiently great to make it just to admit it in all the circumstances. In making that evaluation the judge must assume the evidence to be true. Once admitted it is then for the jury to determine its reliability and whether there is a reasonable explanation for the evidence consistent with innocence. *Although the test for admissibility proposed in the earlier cases has not been adopted in s.398A the statements of principle at common law as to the operation of similar fact evidence generally remain applicable* (emphasis added, citations omitted).¹⁰²

Moreover, Eames JA stressed that while *striking* similarities between the similar fact incident and the offence charged is not a prerequisite to admissibility in cases such as *Hoch*,¹⁰³ the opposite is true in instances where the similar fact evidence is tendered for the purpose of identifying the accused as the perpetrator.¹⁰⁴ This is entirely consonant with the approach under the extant common law doctrine. In cases such

⁹⁵ See *Best* [1998] 4 VR 603, 617; *Bullen* (1998) 102 A Crim R 74, 85; *R v Rajakaruna* [2004] VSCA 114 (23 June 2004) [77] (Eames AJA) (holding that s 398A operates as a rule of exclusion rather than an exercise of discretion).

⁹⁶ (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ).

⁹⁷ [1998] 4 VR 603.

⁹⁸ *Hoch* (1988) 165 CLR 292.

⁹⁹ (1995) 182 CLR 461. See *Bullen* (1998) 102 A Crim R 74; *Tektonopoulos* [1999] 2 VR 412 [23] (Winneke P); *R v GAE* [2000] VSCA 18 (25 February 2000); *R v Loguancio* [2000] VSCA 33 (24 March 2000); *R v Papamitrou*, [2004] VSCA 12 (27 February 2004); *Rajakaruna* [2004] VSCA 114 (23 June 2004).

¹⁰⁰ [2004] VSCA 114 (23 June 2004).

¹⁰¹ (1995) 182 CLR 461.

¹⁰² *Rajakaruna* [2004] VSCA 114 (23 June 2004) [76].

¹⁰³ (1988) 165 CLR 292.

¹⁰⁴ *Rajakaruna* [2004] VSCA 114 (23 June 2004) [84], [12] (Chernov JA).

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as *Hoch*,¹⁰⁵ for example, it is the pattern, underlying unity, or similarities of the allegations made by two or more complainants that afford the probative strength necessary to surmount the *Pfennig*¹⁰⁶ test. Again, in the absence of evidence pointing to collusion or unconscious influence, it is the objective improbability of two or more complainants making similar allegations against the accused by mere coincidence that allows the trial judge to conclude that there is no other rational view of the evidence that is consistent with innocence. Here, it is sufficient that the allegations are similar enough to warrant this conclusion, and this can be achieved without a demonstration that there are so-called 'striking similarities' among the various allegations. This is a classic case in which similar fact evidence is admitted on the basis of relevance independent of a propensity chain of reasoning.

Where the occurrence of the events that are alleged to comprise the similar facts is not in dispute, the accused's complicity in such events is conceded or supported by cogent evidence (meaning that the accused has either confessed to, or the facts relating to the similar events point strongly to his or her complicity therein), *and* the evidence is tendered to prove the identity of the accused as the perpetrator, the courts have required a demonstration of 'striking similarities' between the similar fact incident and the offence charged; that is, it is only when there are 'striking similarities' that the trial judge can properly find that the similar fact evidence bears no reasonable explanation consistent with innocence.¹⁰⁷ This represents a classic case in which similar fact evidence is admitted despite the fact that its relevance is derived solely from a propensity chain of reasoning. Presumably, the same is true in cases where similar fact evidence is admitted solely on the basis of propensity reasoning in order to prove a relevant relationship between the accused and the alleged victim or an accomplice - or that the acts alleged were not unintended, accidental, or fortuitous.¹⁰⁸ For a concise reaffirmation of the principles set out in *Rajakaruna*,¹⁰⁹ see *R v Dupas (No 2)*.¹¹⁰

Thus, it appears that despite the Court of Appeal's insistence that the *Pfennig*¹¹¹ test is no longer applicable under s 398A, in most instances (save, for examples, when so-called relationship or *res gestae* evidence is admitted - see below) the court is merely paying lip service to the clear intention of Parliament to supplant the 'another rational view' test. In

¹⁰⁵ (1988) 165 CLR 292.

¹⁰⁶ *Pfennig* (1995) 182 CLR 461.

¹⁰⁷ *Rajakaruna* [2004] VSCA 114 (23 June 2004).

¹⁰⁸ (1988) 165 CLR 292.

¹⁰⁹ [2004] VSCA 114 (23 June 2004).

¹¹⁰ [2005] VSCA 212 (26 August 2005).

¹¹¹ (1995) 182 CLR 461.

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practical terms, therefore, it may well be that s 398A has altered the common law only to the extent that it requires the trial judge to assume the truth of the similar fact evidence and, on that basis, rule on its admissibility. If that is so, then s 398A, like s 132A of the *Evidence Act 1977* (Qld) (below), does nothing more than overrule the result in *Hoch*.¹¹² If it is otherwise, then Parliament has flouted the High Court's admonition that unless the 'another rational view' test is applied, striking a proper balance between probative value and prejudicial effect 'will continue to resemble the exercise of a discretion rather than the application of a principle'.¹¹³

**A Evidence Act 1977 (Qld), s 132A;
Evidence Act 1906 (WA), s 31A(3)**

Section 132A of the *Evidence Act 1977* (Qld) provides:

In a criminal proceeding similar fact evidence, the probative value of which outweighs its prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion and the weight of that evidence is a question for the jury, if any.

Section 31A(3) of the *Evidence Act 1906* (WA) is to the same effect, though worded differently. This recently enacted legislation is specifically designed to overrule the result in *Hoch*¹¹⁴ whereby counts involving two or more complainants, despite the similarities in the allegations against the accused, must be tried separately because the real possibility of collusion and concoction precludes a finding that the evidence relating to each complainant would be cross-admissible in a separate trial involving any of the others; that is, the real possibility of collusion and concoction is, per se, another rational view of the evidence which is consistent with the innocence of the accused on the offences charged. Section 132A (and 31A(3)) effectively restores to the jury the function of deciding what, if any, credibility is to be accorded the testimony of the complainants. Thus, s 132A (and 31A(3)) is similar to s 398A of the *Crimes Act 1958* (Vic) in that the trial judge is required, in effect, to assume that the evidence relating to the similar fact incident is truthful and, on that basis, decide whether the test of cross-admissibility is satisfied.

It is noteworthy that in *R v O'Keefe*,¹¹⁵ a case decided under the law as it existed prior to the advent s 132A, the Queensland Court of Criminal

¹¹² (1988) 165 CLR 292.

¹¹³ *Pfennig* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ).

¹¹⁴ (1988) 165 CLR 292.

¹¹⁵ [2000] 1 Qd R 564.

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Appeal refused to follow the *Hoch-Pfennig*¹¹⁶ test in so far as it removes findings of credibility from the jury. In particular, the court held that while the question of whether the offence has been proved is reserved to the jury, the question of admissibility is to be determined by the judge on the basis of whether the evidence, *if believed by the jury*, is such that the jury could reasonably *exclude any hypotheses of innocence*.¹¹⁷ Stated differently, the judge must determine whether the evidence is of such a character that *if admitted and accepted as truthful*, it would open to the jury to reasonably *exclude any possibility of the accused's innocence* on the offence charged.¹¹⁸

VI THE SCOPE OF THE PFENNIG TEST

In *R v Anderson*,¹¹⁹ the Court of Appeal stated, per *obiter dicta*, that even under the common law as it existed prior to the enactment of s 398A, the *Pfennig*¹²⁰ test was inapplicable in cases where propensity evidence was admitted on the basis of relevance independent of a propensity chain of reasoning. In writing for the court, Winneke P, with whom Phillips and Chernov JJA concurred, opined:

In my opinion, they read too much into the decision in *Pfennig*. As I endeavoured to point out in *R v Tektonopoulos* [1999] VSCA 93 at [24]-[25], in determining whether evidence of prior criminal or discreditable conduct is admissible, much depends upon the purpose for which the evidence is being tendered. In *Pfennig*, supra, the evidence of other criminal conduct was being tendered, as “similar fact” evidence, to prove the fact that the crime charged had been committed and the fact that the accused was the one who had committed it. In cases like the present, the evidence is tendered as bearing on the state of mind of the accused person at the time when the undisputed act occurred. In the latter circumstance the evidence is tendered, not as propensity evidence to prove that the accused was the sort of person likely to have committed the crime charged; whereas in the former circumstance the purpose for which the evidence is being led is to identify the accused as the person who committed the crime charged. Where that is the purpose of the tender, the courts have always acted with caution and required a compelling degree of cogency, in the nature of “striking similarity” or “underlying unity”, before admitting the evidence. Where the evidence is tendered, not as evidence of propensity to commit the crime charged but

¹¹⁶ (1988) 165 CLR 292; (1995) 182 CLR 461.

¹¹⁷ *R v O'Keefe* [2000] 1 Qd R 564, [27] (Thomas JA).

¹¹⁸ See also *R v Long and McDonnell* [2002] SASC [62]-[68] (Doyle CJ) (distinguishing *Hoch* (1988) 165 CLR 292 on its facts, but without providing a satisfactory explanation as to why findings of credibility are decided by juries in some instances and not in others). But in *Phillips v The Queen* [2006] HCA 4, a recent High Court decision governed by s 132A, the Court expressly rejected the ‘any hypotheses of innocence’ formulation enunciated in *R v O'Keefe* [2000] 1 Qd R 564 and reaffirmed the *Hoch-Pfennig* test.

¹¹⁹ [2000] VSCA 16 (25 February 2000).

¹²⁰ (1995) 182 CLR 461.

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as bearing on the accused's state of mind at the relevant time, the judge must be satisfied that the evidence is relevant to a fact in issue, and must warn the jury that they cannot use the evidence for the impermissible purpose of demonstrating a propensity on the part of the accused to commit that crime.¹²¹

Winneke P relied heavily on the High Court's decision in *R v Wilson*.¹²² But *Wilson*¹²³ was decided twenty-five years prior to *Pfennig*¹²⁴ and, even more importantly, at a time when the High Court was struggling to formulate a clear, consistent, and coherent approach to the admissibility of similar fact evidence in criminal prosecutions. Moreover, Winneke P's judgment overlooks the fact that High Court's decision in *Hoch*¹²⁵ represents unmistakable evidence that it did not intend for the 'another rational view' test to be limited to cases in which the relevance of the similar fact incident is derived solely on the basis of propensity reasoning.

In addition, *Wilson*,¹²⁶ as in the *Tektonopoulos*¹²⁷ case cited in the above passage, did not deal with similar fact evidence; rather, it was concerned with a special category of propensity evidence that is commonly referred to as relationship evidence. Though the relationship species of propensity evidence will be discussed below, suffice it to state for present purposes that some state courts have narrowly circumscribed the *Pfennig*¹²⁸ test by holding that it was never intended to apply to relationship evidence.¹²⁹ Although the precise nature of relationship evidence has been the subject of much controversy, it is generally regarded as evidence of prior uncharged criminal or other discreditable acts on the part of the accused which is admissible for the limited purpose of showing the type of relationship that existed between the accused and the alleged victim leading up to the events at issue - in order to place the alleged victim's testimony in proper context, thereby rendering it more understandable and credible in the eyes of the jury.¹³⁰ Thus, it is thought that proper directions to the jury, which include separate consideration, substitution, and propensity warnings, are

¹²¹ *R v Anderson* [2000] VSCA 16 (25 February 2000) [34].

¹²² (1970) 123 CLR 331 (*Wilson*).

¹²³ (1970) 123 CLR 331.

¹²⁴ (1995) 182 CLR 461.

¹²⁵ (1988) 165 CLR 292.

¹²⁶ (1970) 123 CLR 331.

¹²⁷ [1999] 2 VR 412.

¹²⁸ (1995) 182 CLR 461.

¹²⁹ *R v Nieterink* (1999) 76 SASR 56; *R v Vonarx* [1999] 3 VR 618; *R v White* [1998] 2 QD R 531; *R v LSS* [2000] 1 Qd R 546; but see *KRM v R* (2001) 206 CLR 221, [24]-[31] (McHugh J) (expressing the view that whether or not the *Pfennig* test is applicable to relationship evidence is unclear).

¹³⁰ *R v DCC* (2004) A Crim R 403 (15 December 2004), 405 (*DCC*).

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adequate to safeguard the accused from any unfair prejudice.¹³¹ On this view, relationship evidence differs markedly from similar fact evidence which, by definition, is tendered as circumstantial evidence of one or more of the constituent elements of the conduct at issue in the case.

On another view, *Wilson*¹³² and various other cases relied upon by Winneke P did not limit the admission of relationship evidence for the sole purpose of supporting the credit of the complainant. To the contrary, they support the proposition that this type of evidence can be admitted whenever it has logical relevance in the case, including logical relevance in proving motive or the state of mind of the accused and/or the alleged victim. Yet in instances where so-called relationship evidence is tendered for a purpose other than merely supporting the credit of the complainant, it becomes indistinguishable from similar fact evidence which, under the current Australian common law doctrine and s 398A, is inadmissible unless it has substantial relevance to an *issue in the case*.

The better view is that relationship evidence is admissible for the sole purpose of buttressing the credit of the complainant and, therefore, constitutes a species of ‘character’ or ‘propensity’ evidence that is separate and distinct from similar fact evidence. If one accepts this view, then by its very nature relationship evidence could never satisfy the *Pfennig*¹³³ criterion for admissibility, nor could it satisfy the criterion for the admissibility of similar fact evidence under s 398A. This view is supported by the fact that there are numerous state court decisions subsequent to *Pfennig*¹³⁴ in which relationship evidence has been admitted for the limited purpose of placing the complainant’s evidence in proper context, thereby rendering it more believable.¹³⁵ In *R v GAE*,¹³⁶ *R v Loguancio*,¹³⁷ and *R v DCC*,¹³⁸ the Victorian Court of Appeal clearly applied s 398A in upholding the admission of relationship evidence. These results are consistent with the Court of Appeal’s construction of the term ‘propensity evidence’ in the context of s 398A. In addressing this issue in *Best*,¹³⁹ Calloway JA opined:

I return briefly to the meaning of “[p]ropensity evidence” in sub-s.(2). I said earlier that the legislature is taken to have intended that expression

¹³¹ *R v Grech* [1997] 2 VR 609; *DCC* (2004) A Crim R 403, 408.

¹³² (1970) 123 CLR 331.

¹³³ (1995) 182 CLR 461.

¹³⁴ (1995) 182 CLR 461.

¹³⁵ See, eg, *R v White* [1998] 2 QD R 531; *R v Nieterink* (1999) 76 SASR 56, 76 (Doyle CJ); *R v LSS* [2000] 1 Qd R 546; *R v GAE* [2000] VSCA 18 (25 February 2000); *R v Loguancio* [2000] VSCA 33 (24 March 2000); *R v DCC* (2004) A Crim R 403.

¹³⁶ [2000] VSCA 18 (25 February 2000).

¹³⁷ [2000] VSCA 33 (24 March 2000).

¹³⁸ (2004) A Crim R 403.

¹³⁹ [1998] 4 VR 603.

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in the broader of the two senses explained by Mason, C.J., Deane and Dawson, J.J. in the opening paragraph of their judgment in *Pfennig's Case*. See also pp.513-514 per McHugh, J. In expressing that view I am not taking sides in the controversy as to whether the *Pfennig* test applies to relationship evidence. Compare *R v Ritter* with *R v Wackerow* [1998] 1 Qd.R. 197. That is a controversy into which this Court need not enter. Our task is to construe s.398A. It must, however, be pointed out that the difficulties of applying the *Pfennig Case* to relationship evidence do not apply to the test in sub-s.(2). So long as the qualifications expressed earlier are not forgotten, it is appropriate that any division of propensity evidence be inadmissible unless its probative value makes it just to admit the evidence despite any prejudicial effect it may have on the accused. Mere background evidence (cf. *Gipp v R* [1998] H.C.A. 21 at 179 and 181-182 per Callinan, J.) is unlikely to meet the test but legitimate evidence of relationship will usually be admitted. That is because, if the proper directions are given, the probative value of such evidence ordinarily outweighs its prejudicial effect.¹⁴⁰

Thus, it appears that such evidence can be admitted without offending the strictures of s 398A. One must bear in mind, however, that this view is predicated on the rather dubious supposition that separate consideration, substitution, and propensity warnings will be adequate to safeguard the accused from any unfair prejudice that may otherwise result through a propensity chain of reasoning.¹⁴¹

VII GUILTY PASSION AND RES GESTAE EVIDENCE AS PROPENSITY EVIDENCE

Apart from propensity evidence in the form of similar fact evidence and relationship evidence, evidence which reveals that the accused has previously engaged in conduct similar to that now alleged is admissible in two other circumstances: where it is evidence of 'guilty passion' and where it forms part of the *res gestae*.

A *Guilty Passion*

A special type of relationship evidence is that of so-called 'guilty passion' evidence. Although this phrase is regularly invoked, its meaning is unclear. It is generally used in the context of relationship evidence and it often appears that the terms are being used interchangeably. It appears more accurate to state, however, that it refers to a specific type of relationship evidence whereby the sexual fondness of the accused towards the complainant is 'directly relevant to proving that the offences were committed by the accused because of her or his particular propensity'.¹⁴²

¹⁴⁰ *Best* [1998] 4 VR 603, 611-612.

¹⁴¹ *R v DCC* (2004) A Crim R 403.

¹⁴² *B v R* (1992) 175 CLR 599, 602, 605, 609-611, 618.

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The paradigm guilty passion case is *Ball*,¹⁴³ where evidence of an earlier sexual relationship was admitted between a brother and sister who were charged with incest after sharing a house with one double bed. In *Ball*,¹⁴⁴ this evidence was held to be admissible

[t]o establish a guilty passion towards each other, and that therefore the proper inference from their occupying the same bedroom and the same bed was an inference of guilt, or — which is the same thing put another way — that the defence of innocent living together as brother and sister ought to fail.¹⁴⁵

Accordingly, guilty passion evidence seems to denote evidence of a sexual fondness towards the complainant which is so pointed to the matters in issue that it is directly relevant to guilt. Given that guilty passion evidence is directly relevant to the facts in issue, it effectively constitutes a particular species of similar fact evidence and, as such, its admissibility should be governed by the normal rules concerning similar fact evidence. This appears to be the case in all jurisdictions, including those where the uniform Evidence Acts operate.¹⁴⁶

B *Res Gestae*

The final basis for the admission of evidence of specific conduct disclosing propensity is the *res gestae* doctrine. It is rare for the *res gestae* exception to be expressly invoked as a basis for admitting propensity evidence; rather, the courts normally admit the evidence as background evidence or because it is 'intertwined with relevant facts'.¹⁴⁷ But in these circumstances the strict legal basis for the reception is the *res gestae* doctrine. The cases suggest that where evidence of an uncharged act forms part of the *res gestae*, it is beyond the scope of the similar fact evidence rule of exclusion. In *R v Harriman*,¹⁴⁸ for example, McHugh J opined:

If evidence which discloses other criminal conduct is characterized as part of the transaction which embraces the crime charged, it is not subject to any further condition of admissibility. Evidence which directly relates to the facts in issue is so fundamental to the proceedings that its admissibility as a matter of law cannot depend upon a condition that its probative force transcends its probative value. ... Consequently it is a matter of great importance whether the evidence is classified as part of the *res gestae* or as circumstantial evidence tending to prove the facts in issue.¹⁴⁹

¹⁴³ [1911] AC 447.

¹⁴⁴ [1911] AC 447.

¹⁴⁵ [1911] AC 447.

¹⁴⁶ *R v AH* (1997) 42 NSWLR 702.

¹⁴⁷ *R v FJB* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Charles and Buchanan JJA, 26 May 1999).

¹⁴⁸ (1989) 167 CLR 590.

¹⁴⁹ (1989) 167 CLR 590, 628-34.

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It is important to emphasise that the dangers associated with acts disclosing propensity which occur contemporaneously with the acts charged are generally far less acute than those involved with other types of propensity evidence. Specifically, the reduced prejudicial effect evidence stems from the fact that the charged and uncharged acts are alleged to have occurred contemporaneously and, therefore, it is likely that the fact-finder will either accept or reject the evidence relating to the entire episode. Stated differently, given the close temporal nexus between the alleged charged and uncharged acts, the evidence relating to the latter lacks an independent inculpatory weight. In these instances, there is only a fanciful risk that the jury may engage in a propensity chain of reasoning.

Moreover, it is quite common for the prosecution to refrain from charging every conceivable offence disclosed by the evidence. In murder cases, for example, assaults or abductions which precede the killing are often not charged. Similarly, in many rape cases evidence is given of preliminary uncharged assaults or sexual misconduct. In such cases, a propensity evidence warning is not given. In *O'Leary v R*,¹⁵⁰ for example, an accused charged with murder was alleged to have committed a series of serious drunken assaults prior to the killing. The High Court held that the evidence of the earlier conduct was admissible as being a 'connected series of events ... which should be considered as one transaction'¹⁵¹ and that the purpose of admitting the evidence was to provide a full and proper context for the events that were in issue.¹⁵²

VIII PROPENSITY EVIDENCE UNDER THE UNIFORM EVIDENCE ACTS

The treatment of propensity evidence under the uniform Evidence Acts is broken down into 'tendency' evidence and 'coincidence' evidence.

97. The tendency rule

- (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had

¹⁵⁰ (1946) 73 CLR 566.

¹⁵¹ (1946) 73 CLR 566.

¹⁵² *R v O'Leary* (1946) 73 CLR 566, 577 (Dixon J); see also *Martin v Osborne* (1936) 55 CLR 367, 375; *R v Twist* [1954] VLR 121 (CCA); *R v O'Malley* [1964] Qd R 266 (FC); *R v Richards* (1965) Qd R 354 (FC); *R v Vidic* (1986) 41 SASR 176 (FC); *R v MacFarlane* [1993] 1 Qd R 202 (FC); *R v Goulden* [1993] 2 Qd R 534 (FC). Although the above discussion of the *res gestae* doctrine refers to 'uncharged' acts, there is no reason that acts forming part of the *res gestae* could not be similarly charged in the same presentment or indictment on the basis that they satisfy the cross-admissibility criterion.

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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, if:

- (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
 - (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
- (2) Paragraph (1)(a) does not apply if:
- (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
 - (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

98. The coincidence rule

- (1) Evidence that 2 or more related 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 if:
 - (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
 - (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
- (2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:
 - (a) they are substantially and relevantly similar; and
 - (b) the circumstances in which they occurred are substantially similar.
- (3) Paragraph (1)(a) does not apply if:
 - (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
 - (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

101. Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
- (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the *evidence substantially outweighs any prejudicial effect* it may have on the defendant.
- (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
- (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant (emphasis added).

The distinction encompassed in ss 97 and 98 is between 'tendency' evidence that derives its relevance solely through a propensity chain of

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reasoning, and 'coincidence' evidence that has relevance independent of propensity or dispositional reasoning.¹⁵³ In order for tendency or coincidence evidence to be admitted, it must have significant probative value (pursuant to ss 97 and 98) *and* satisfy the test set out in s 101(2). This rather amorphous test was clarified in *R v Ellis*.¹⁵⁴ Spigelman CJ, with whom Sully, O'Keefe, Hidden and Buddin JJ concurred, began by acknowledging that the preponderance of previous authority in New South Wales had construed the words 'substantially outweighs' in s 101(2) as nothing more than a statutory reaffirmation of the *Hoch-Pfennig*¹⁵⁵ test.¹⁵⁶ Spigelman CJ then opined that a different view has been adopted in the Australian Capital Territory:

In the ACT, where the *Evidence Act 1995* (Cth) applies, the same issue has arisen. The position taken in this State has not been adopted. (See *W v R* (2001) 189 ALR 633 especially per Miles J at [53] and Madgwick J at [101]). To similar effect is the approach of the Full Court of the Family Court in *WK v SR* (1997) 22 Fam LR 592 at 604-605 and the Full Court of the Federal Court in *Conway v The Queen* (2000) 98 FCR 204 at [97] and [102]. The preponderance of authority outside of this State supports the direct application of the terms of the statutory test and not the application of the *Pfennig* test. Tasmania has recently adopted the *Evidence Act*, but the issue has not arisen in that State.¹⁵⁷

Spigelman CJ ultimately concluded that while the New South Wales Parliament had sought to achieve the same objective as that of the common law (to exclude 'tendency' and 'coincidence' evidence unless its probative force exceeds its prejudicial effect), its intention was to supplant the *Hoch-Pfennig*¹⁵⁸ test with a different criterion for determining when that objective has been satisfied; that is, the probative value of the evidence must *substantially outweigh* any prejudicial effect it may have on the accused.¹⁵⁹ The remaining question to be decided, therefore, was how and to what extent this criterion differs from the 'another rational view' test enunciated in *Hoch-Pfennig*.¹⁶⁰ In addressing this issue, Spigelman CJ relied on a passage from McHugh J's dissenting opinion in *Pfennig*.¹⁶¹ Spigelman CJ opined:

¹⁵³ *R v Ellis* [2003] NSWCCA 319, [75] (Spigelman CJ; Sully, O'Keefe, Hidden and Buddin JJ concurred); Ligertwood, above n 1, 135-137.

¹⁵⁴ [2003] NSWCCA 319. For a discussion of the tendency and coincidence rules and their scope and application, see *R v Nassif* [2004] NSWCCA 422. See also *R v Harker* [2004] NSWCCA 427; *R v Sukkar* [2005] NSWCCA 54; *R v Folbigg* [2005] NSWCCA 23; *R v Quach* [2002] NSWCCA 519.

¹⁵⁵ (1988) 165 CLR 292; (1995) 182 CLR 461.

¹⁵⁶ *R v Ellis* [2003] NSWCCA 319 [48].

¹⁵⁷ *R v Ellis* [2003] NSWCCA 319 [51].

¹⁵⁸ (1988) 165 CLR 292; (1995) 182 CLR 461.

¹⁵⁹ *R v Ellis* [2003] NSWCCA 319 [88]-[90].

¹⁶⁰ (1988) 165 CLR 292; (1995) 182 CLR 461.

¹⁶¹ (1995) 182 CLR 461.

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I find the following reasoning of McHugh J in *Pfennig* at 516 compelling: "If evidence revealing criminal propensity is not admissible unless the evidence is consistent only with the guilt of the accused, the requirement that the probative value 'outweigh' or 'transcend' the prejudicial effect is superfluous. The evidence either meets the no rational explanation test or it does not. There is nothing to be weighed - at all events by the trial judge. The law has already done the weighing. This means that, even in cases where the risk of prejudice is very small, the prosecution cannot use the evidence unless it satisfies the stringent no rational explanation test. It cannot use the evidence even though in a practical sense its probative value outweighs its prejudicial effect."¹⁶²

In holding that s 101(2) involves a balancing exercise of the type specifically set out therein, Spigelman CJ emphasised that this section operates as an evidentiary rule of exclusion rather than an exercise of discretion.¹⁶³ He then added that '[t]here may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the "no rational explanation" test were satisfied'.¹⁶⁴ The Chief Justice's opinion was conspicuously devoid of any suggestion that the balancing exercise required under s 101(2) is to be undertaken on the assumption that the evidence in question is truthful.¹⁶⁵

Though Spigelman CJ's judgment is important in so far as it rejects the 'another rational view' test and makes clear that s 101(2) represents a *rule of exclusion* that is predicated on a balancing exercise that does not *require* the trial judge to assume the truth of the disputed evidence, many difficult questions remain. For example, despite the Court's pronouncement that this section is an evidentiary rule rather than a statutory discretion,¹⁶⁶ how much, if at all, does its required balancing test differ from the *Christie*¹⁶⁷ type discretion? Assuming there is a significant distinction, is it fair to say that the Court's construction of s 101(2) does little to assuage the High Court's admonition that in the absence of the 'another rational view' test or something similar, such an approach will 'continue to resemble the exercise of a discretion rather

¹⁶² *R v Ellis* [2003] NSWCCA 319 [91].

¹⁶³ *R v Ellis* [2003] NSWCCA 319 [95].

¹⁶⁴ *R v Ellis* [2003] NSWCCA 319 [96].

¹⁶⁵ The High Court granted special leave to appeal *Ellis* on 24/8/2004. In *Ellis v The Queen* [2004] HCA Trans 488 (1 December 2004) Gleeson CJ, speaking for the High Court, concluded the court's decision to rescind the leave to appeal by commenting: 'We would add that we agree with the decision of Chief Justice Spigelman on the construction of the *Evidence Act 1995* (NSW)'. This High Court approval of *Ellis* was noted by the NSWCCA in *R v KF* [2005] NSWCCA 23 [148], and also in *R v Anna Zhang* [2005] NSWCCA 437 [136].

¹⁶⁶ *R v Ellis* [2003] NSWCCA 319 [95].

¹⁶⁷ *R v Christie* [1914] AC 545, 564.

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than the application of a principle'?¹⁶⁸ If so, can s 101(2) be applied with any semblance of fairness and consistency? In practical terms, will application of the 'substantially outweighs' criterion yield results that differ from those that would result from an application of the 'another rational view' test? If so, in what types of fact patterns would differences arise?

It may well be that s 101(2) will operate in much the same manner as s 398A, save for the fact that the balancing exercise under the former need not be predicated on an assumption that the disputed evidence is reliable. Thus, in instances where conduct disclosing propensity is tendered via a propensity chain of reasoning,¹⁶⁹ it is likely that a demonstration of striking similarities between the disputed evidence and the acts charged will be required in order to surmount the strictures of s 101(2). Where the conduct disclosing propensity is tendered on the basis of relevance independent of a propensity chain of reasoning,¹⁷⁰ something less than striking similarities will be sufficient. But in cases such as *Hoch*¹⁷¹ where two or more complainants make similar allegations against an accused who alleges collusion and fabrication among his or her accusers, on what basis will the courts undertake the balancing exercise mandated by s 101(2)?

If the courts ultimately decide that the balancing exercise must be predicated on the assumption that the disputed evidence is truthful, s 101(2) would, for practical purposes, operate as a mirror image of s 398A. Alternatively, the courts could adopt the approach taken by the High Court in *Hoch*¹⁷² and order separate trials whenever the evidence discloses a real possibility of collusion and fabrication among the complainants. As noted earlier, many find this approach objectionable on the grounds that it creates an excessively rigorous standard for admission and allows judges to encroach on the province of juries in deciding issues of credibility.¹⁷³ Another option would be for the trial judge to conduct an evidentiary hearing to determine the strength of the accused's allegation. Under this approach, separate trials should only be ordered if the trial judge makes a determination that there is credible evidence to support the accused's claim of collusion and fabrication. This approach is laden with difficulties, not the least of which are

¹⁶⁸ *Pfennig* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ).

¹⁶⁹ To prove identity, a relevant relationship between the accused and the alleged victim or an accomplice, or that the acts alleged were not unintended, accidental, or fortuitous.

¹⁷⁰ See, eg, *Hoch* (1988) 165 CLR 292.

¹⁷¹ (1988) 165 CLR 292.

¹⁷² (1988) 165 CLR 292.

¹⁷³ K J Arenson, above n 35, 273-274.

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deciding who bears the onus of proof on this issue, by what standard, and formulating a workable definition of what constitutes credible evidence. For example, if the accused's claim is based solely on his or her eyewitness testimony that is controverted solely by the eyewitness accounts of his or her accusers, would that constitute credible evidence? If so, there will be instances in which an accused can obtain separate trials by fabricating a claim of collusion and fabrication, thereby depriving the fact finder of highly probative evidence. If it does not constitute credible evidence, there will be instances in which the accused will be forced, despite his or her meritorious claim, to run the gauntlet of highly prejudicial evidence emanating from multiple complainants making similar allegations. And in these and many other circumstances, is it not fair to say that the determination of whether there is credible evidence would effectively be decided on the basis of credibility findings by trial judges that are virtually impervious to appellate review? If so, is it realistic to expect that s 101(2) can be applied with the fairness and consistency that the interests of justice demand?

In so far as the status of relationship and *res gestae* evidence under ss 97, 98 and 101(2) is concerned, the courts have adopted the general view that neither falls within the purview of 'tendency' and 'coincidence' evidence as defined under ss 97 and 98 respectively.¹⁷⁴ Thus, the admissibility of relationship and *res gestae* evidence under the uniform Evidence Acts is governed by the same common law principles noted earlier.¹⁷⁵

IX CONCLUSION

As the length and complexity of the foregoing discussion demonstrate, the underpinning of the various common law and statutory approaches to the admissibility of similar fact, relationship, and *res gestae* evidence

¹⁷⁴ *R v Lock* (1997) 91 A Crim R 356; *R v Patsalis and Spathis (No 4)* [1999] NSWCCA 715 [14], [23]-[25] (Kirby J); *R v MM* (2000) 112 A Crim R 519; *R v AN* (2000) 117 A Crim R 176; *R v Toki (No 3)* (2000) NSWSC 999; *Conway v R* (2000) 98 FCR 204; *R v Clark* [2001] NSWCCA 494 [134]-[148] (Heydon JA); *R v Quach* [2002] NSWCCA 519; see also Ligertwood, above n 1, 137: '[U]nder the uniform legislation, evidence revealing an accused's tendency is only presumptively inadmissible if tendered as tendency evidence or if it takes the form of evidence of "similar facts". This prohibition does not embrace all evidence within the ambit of the exclusionary principle, that is, all evidence revealing an incriminating...propensity of the accused. In that it does not, the evidence must be excluded, if at all, under the residual discretion, remembering that it is...the accused who bears the burden of persuading the court to exercise that discretion: s 137.'

¹⁷⁵ *Evidence Act 1995* (NSW), s 9; *Evidence Act 2001* (Tas), s 9; *Evidence Act 1995* (Cth), s9(3)(a).

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is that its probative value must transcend its tendency to unfairly prejudice the accused's right to a fair trial via a *propensity* or *dispositional* chain of reasoning. While there appears to be near universal agreement on this point, the courts and legislatures remain divided on how best to formulate a rule for determining when evidence disclosing propensity reaches that threshold in any given fact pattern. In the view of this observer, the Australian common law and statutory approaches to the admissibility of each of these categories differ in form rather than substance, save for the type of scenario presented in cases such as *Hoch*¹⁷⁶ where offences involving two or more complainants making similar allegations are sought to be joined in a single presentment or indictment. In these instances, the approach of the common law (and probably that of the uniform Evidence Acts) is one that is carefully crafted to not only attain the maximum degree of consistency, but do so in a manner that is consonant with the objective sought to be achieved by both the presumption of innocence and the prosecution's heavy burden of proof: namely, to eliminate, to the fullest extent possible, the potential for wrongful conviction.

The approach of the legislation in Victoria, Queensland, and Western Australia, on the other hand, is one that is less deferential, if not inimical, to that objective. While this legislation represents a laudable attempt to overrule the result in *Hoch*¹⁷⁷ in so far as it invites the accused to manufacture spurious claims of collusion and concoction, obtain separate trials, and thereby deprive the fact finder of highly probative evidence of guilt - it is laden with the potential for wrongful conviction in cases where the accused, for any number of reasons, lacks the evidence to substantiate his or her meritorious claim. And while it is impossible to ascertain the percentage of cases in which this danger is present, it is important to remember that the aforementioned objective is predicated on the notion that it is indeed better that a thousand guilty persons go free than to convict one innocent person. Thus, if one accepts that the fundamental purpose of our adversarial system of criminal justice is to serve as a vanguard against wrongful conviction, a cogent argument can be made that the legislation in Victoria, Queensland, and Western Australia has achieved its worthy goal at the expense of one of the most basic tenets of any free society. Whether one agrees or disagrees with this argument, this piece has endeavoured to examine all facets of the current status of similar fact, relationship, and *res gestae* evidence in Australia and in so doing, bring some semblance of clarity to what has long been regarded as one of the most difficult, confusing, and esoteric areas of the law.

¹⁷⁶ (1988) 165 CLR 292.

¹⁷⁷ (1988) 165 CLR 292.

