manufacturers' liability came into force one week before that decision was handed down. Those amendments shifted responsibility for defective products from retailers to manufacturers and impose obligations on manufacturers relating, *inter alia*, to failure to make reasonably available spare parts and repair facilities. These and other provisions[23] of the Trade Practices Act have been significant gains in the field of consumer protection. However, it seems more than likely that claims under the Trade Practices Act, Division 2A, Part V would *not* fall within the jurisdiction of Small Claims Tribunals.

Division 2A confers jurisdiction on 'courts' of competent jurisdiction and the Tribunal is not a court. Furthermore it has been pointed out[24] that Division 2A claims arguably do not arise out of a contract but are more akin to a torts claim or, alternatively, are based on some unspecified statutory fiction created under the Trade Practices Act. Either way they would not fall within the meaning of 'small claim'. Amendments to both Acts would do much to clarify the situation and would ensure that the achievements so far gained in the field of consumer protection are maintained.

The potential of the Small Claims Tribunal as a forum which brings the oft elusive justice within easy reach of the man on the street must be encouraged and it is hoped that, in the light of *Escor*, both judicial and legislative moves will be seen to further this goal.

N. L. SCHEINKESTEL*

R. v. CHEE[1]

Theft — Evidence — Admissibility of similar fact evidence

Lance Lamuel Chee was presented on September 4 1978 at the Supreme Court (sitting in Melbourne) presided over by McGarvie J. on a presentment charging him on seven counts, two of theft of a motor car with intent to use it in connection with the commission of a felony (counts 1 and 4) and five counts of robbery (counts 2, 3, 5, 6 and 7). He pleaded not guilty to each count. Though originally charged with a co-accused (one Graeme Russell Jensen), Jensen changed his plea during the trial and pleaded guilty to counts 5, 6 and 7. The Crown entered a *nolle prosequi* in respect of the other counts. The jury, having brought in a verdict of guilty against Jensen on counts 5, 6 and 7 were discharged without verdict as to Jensen in relation to the other counts. The learned trial Judge refused an application made on behalf of Chee to discharge the jury.

The accused was found not guilty (by direction of the learned trial Judge) on count 1, but guilty on each of the remaining counts.

Chee appealed to the Full Court against conviction and applied for leave to appeal against sentence.

The robberies fell into two groups. The first, committed in October 1977 were robberies at the Totalizator Agency Board (TAB) agencies at Brunswick on October 7 (count 2) and West Footscray on October 18 (count 3) and at the Fitzroy City Council Depot on October 20. The second, committed in November 1977, were

[23] *E.g.* s. 74D Trade Practices Act which concerns those who derive title to goods through a consumer.

[24] Duggan, *op. cit.* 50.

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[1] [1980] V.R. 303. The members of the Full Court of the Supreme Court of Victoria were McInerney, Anderson and Brooking JJ.

robberies at the State Savings Bank at Seddon on November 8, and on the Commercial Banking Company of Sydney Ltd at Kingsville on November 10.

Counsel for the applicant argued three grounds of appeal:

(i) That the learned trial Judge was in error in failing to discharge the jury without verdict in relation to the applicant following Jensen's change of plea and that conviction on all counts was therefore vitiated.

(ii) That the learned trial judge was in error in allowing evidence of the similarity between the features of the robberies being the subject of counts 2 and 3 and the robbery at the Fitzroy City Council Depot.

(iii) That the learned trial judge was in error in not directing a verdict of not guilty in relation to counts 2 and 3.

The first ground of appeal was dismissed on the ground that 'there was no ground for interfering with the exercise by the trial judge of his discretion'.[2]

It is, however, the second and third grounds of appeal relating to similar fact evidence that provide the focal interest of the case.

The issue of the admissibility of similar fact evidence arose in the following way. The applicant at no stage made any admissions of complicity in relation to any of the robberies. There was, moreover, no evidence of identification of him in respect of the two robberies being the subject of counts 2 and 3.

It is to be noted that because each of the robberies was the subject of a count on the presentment, the question which arose was one, not of the admissibility of the evidence, but of its proper use. As the Full Court noted, and as counsel conceded, the evidence of the Fitzroy robbery was clearly admissible in relation to count 5 itself; the issue was whether such evidence could be used by the jury as evidence of similar facts with respect to counts 2 and 3. However, the test is the same in each case.[3]

The Crown argued that the following similarities common to the three robberies justified the conclusion that each robbery was the work of three men — the applicant, Jensen and one Stratton (who had not been apprehended):

(1) Each robbery was committed by three men.
(2) Each of the three men wore overalls.
(3) Each of the three men wore a balaclava.
(4) Two of the men had shotguns.
(5) One of the three men carried a sledge hammer or mallet.
(6) The man with the sledge hammer (or mallet) always went to the part of the premises where the money was kept.
(7) One of the men with the shotgun went to where the money was kept.
(8) The other man with the shotgun remained in the public area to 'cover' the public entrance to the premises.
(9) The money obtained in the robbery was in each case put by the robbers into a bag, variously described as a vinyl bag or canvas bag.
(10) In each case the robbers commanded the customers in the public area and the staff to 'get on to the floor'.
(11) Each robbery was committed at a time when it could be expected that maximum funds would be available for the taking.
(12) In each case, a car was used as the means of approach and of 'getaway'.
(13) The proximity of the location and date of the robberies.

The Full Court held that all the grounds of appeal argued failed and dismissed the application for leave to appeal against the convictions. Application for leave to appeal against sentences was also dismissed.

[2] [1980] V.R. 303, 304.
[3] See *D.P.P. v. Boardman* [1975] A.C. 421, 453.

In so deciding, the Full Court made a number of statements on the question of the conditions governing the admissibility of similar fact evidence. These statements take a different view to those adopted in many recent decisions. The Court held:

> As at present advised, we are of opinion that it is not a condition of the admissibility of similar fact evidence, either in general or in cases where the evidence is tendered in relation to a particular kind of issue or issues, that the evidence shall have, not merely probative force (in the sense laid down in *R. v. Stephenson*[4]) but a high degree of probative force.[5]

The Court then proceeded to cite a number of authorities in support of the proposition that 'the test of the admissibility of similar fact evidence is whether it has probative force in relation to some fact in issue'.[6]

The view argued in *Chee* should be compared with a number of recent cases.

Lord Wilberforce in *D.P.P. v. Boardman*[7] held:

> The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence.[8]

All the Law Lords in *D.P.P. v. Boardman* made similar statements. Lord Morris of Borth-y-Gest for example, thought that '. . . evidence of "similar facts" should be excluded unless such evidence has a really material bearing on the issues to be decided'.[9] Lord Cross of Chelsea after stating the general rule excluding evidence of similar facts held that '[c]ircumstances, however, may arise in which such evidence is so very relevant that to exclude it would be an affront to common sense'.[10] A number of recent decisions of the English Court of Appeal have adopted this 'striking similarity' approach.[11]

The High Court of Australia in *Markby v. R.*[12] has also adopted certain passages from the *Boardman* decision. The relevant facts were as follows: In a trial for murder, evidence was tendered by the Crown and admitted over objection by M (the appellant) as to the involvement of M and H (his co-accused) in 'rip-off' transactions. In the first, M had been the victim of such a transaction and had handed over money for drugs but had not received the full quantity. In order to make good the loss, M engaged in a second transaction in which H offered to supply drugs to one B and to

[4] [1976] V.R. 376. The Full Court in that case defined probative force as being present when the evidence has sufficient weight 'to add or detract from the probability of the principal issue being established': [1976] V.R. 376, 381.

[5] [1980] V.R. 303, 308.

[6] *Ibid.* 309. The authorities cited were: *Makin v. Attorney-General (N.S.W.)* [1894] A.C. 57, 65; *Martin v. Osborne* (1936) 55 C.L.R. 367, 383 *per* Evatt J., 404 *per* McTiernan J.; *Cooper v. R.* (1960) 105 C.L.R. 177, 184; *Markby v. R.* (1978) 52 A.L.J.R. 626, 630 ('tend to support', 'tends to show'); *Harris v. D.P.P.* [1952] A.C. 694, 706, 710 *per* Viscount Simon; *R. v. Kilbourne* [1973] A.C. 729, 757 *per* Lord Simon; *R. v. Boardman* [1975] A.C. 421, 439, 441 *per* Lord Morris of Borth-y-Gest, 454 *per* Lord Hailsham; *R. v. Rance* (1976) 62 Cr. App. R. 118, 121; *R. v. Mansfield* [1978] 1 All E.R. 134, 139; *R. v. Scarrott* [1978] 1 All E.R. 672, 676; *R. v. Inder* (1978) 7 Cr. App. R. 143, 147 f.; *R. v. Aiken* [1925] V.L.R. 87, 89; *R. v. Yuille* [1948] V.R. 41, 46, 48; *R. v. Martin* [1956] V.L.R. 87, 89; *R. v. Forgarty* [1959] V.L.R. 594, 597; *R. v. Blackledge* [1965] V.R. 397; *R. v. Salerno* [1973] V.R. 59.

[7] [1975] A.C. 421.

[8] *Ibid.* 444.

[9] *Ibid.* 439.

[10] *Ibid.* 456.

[11] *R. v. Mustafa* (1977) 65 Cr. App. R. 26; *R. v. Tricoglus* (1977) 65 Cr. App. R. 16; *R. v. Johannsen* (1977) Cr. App. R. 101; *R. v. Novac* (1977) 65 Cr. App. R. 107.

[12] (1978) 140 C.L.R. 108.

take money from B without supplying the drugs. Both M and H shared in the proceeds. M was later assaulted, whilst H had been either threatened or assaulted.

Gibbs A.C.J. (with whom Stephen, Jacobs and Aickin JJ. agreed; Murphy J. finding it unnecessary to decide) held:

> However when in doubt a judge should remember that the admission of similar fact evidence is the exception rather than the rule. To be admissible the evidence must have 'a strong degree of probative force' (*per* Lord Wilberforce in *R. v. Boardman*[13]) or a 'really material bearing on the issues to be decided' (*per* Lord Morris of Borth-y-Gest[14]) it may not be going too far to say that it will be admissible only if it is 'so very relevant that to exclude it would be an affront to common sense' (*per* Lord Cross[15] and *per* Lord Hailsham of St Marylebone[16]). . . . In applying the test . . . practical assistance, in many cases, will be obtained by considering whether there is a 'striking similarity' between the similar facts and the facts in issue (see *R. v. Boardman*[17]).[18]
>
> The learned trial judge suggested that the evidence in this case was admissible as showing that the applicant was aware of the nature and likely consequences of an attempt to cheat or rob a person who was seeking to buy drugs, and in that way showing the applicant's motive or intent.[19]

The High Court held that, according to the above principles, the evidence could not be so admissible.

A comparison of these statements of principle with those contained in *Chee* raise a number of problems. The first is that it is highly arguable that the arguments advanced in *Chee* with respect to similar fact evidence are wrong and were made *per incuriam* because the Full Court was bound by the High Court's reasoning in *Markby*.

It is arguable that the decision in *Markby v. R.* in relation to similar fact evidence was *obiter dictum*; and thus not binding on the Victorian Full Court. Whilst Murphy J. found it unnecessary to decide the issue, Gibbs A.C.J. (with whom Stephen, Jacobs, and Aickin JJ. agreed), though it is clear he would have ordered a new trial on the misdirection in relation to manslaughter, certainly found it necessary to decide the second ground 'since a decision upon it would affect the evidence that may be given on a new trial'.[20] The Acting Chief Justice also phrased his final order in terms which relied on the reasoning on the issue of similar fact evidence: *'For the reasons given* I consider that special leave to appeal should be granted'.[21]

It is thus submitted that because the reasoning in relation to similar fact evidence was thought necessary for the purposes of the decision by the High Court, and was in fact so necessary, that the statements on the issue represent *ratio* and not *obiter* and were thus binding on the Victorian Full Court.

The Full Court appeared to question the decision in *Markby v. R.* on two grounds. Firstly, that the expressions in *DPP v. Boardman* cited by Gibbs A.C.J. omitted 'the qualification expressed by Lord Wilberforce ("of the kind now in question") and saying of the observation of Lord Cross that it "might not be going too far to make that assertion" '.[22] The implication is thus that the Full Court regarded *Markby* as having improperly interpreted *DPP v. Boardman*.

[13] [1975] A.C. 421, 444.
[14] *Ibid.* 439, citing *Harris v. D.P.P.* [1952] A.C. 694, 710.
[15] *Ibid.* 456.
[16] *Ibid.* 452 f.
[17] *Ibid.* 439, 441, 442, 452, 454 and 462.
[18] (1978) 140 C.L.R. 108, 117..
[19] *Ibid.* 117.
[20] *Ibid.* 114.
[21] *Ibid.* 118. Italics added.
[22] [1980] V.R. 303, 308.

It is submitted these grounds for not following *Markby* are tenuous. The first ground — namely, that the High Court omitted the qualification expressed by Lord Wilberforce 'of the kind now in question' — is not sustainable because it is difficult, if not impossible, to give any real meaning to these words of 'qualification'. Having distinguished a number of 'different contexts'[23] *not* raised in the *Boardman* case (cases of 'system' or 'underlying unity'; cases involving proof of identity or an alibi and so on), Lord Wilberforce states that:

> This is simply a case where evidence of facts similar in character to those forming the subject of the charge is sought to be given in support of the evidence of that charge.[24]

It is submitted this is the 'limitation' to which his Lordship refers when he seeks to restrict the statement of his 'basic principle' to 'cases of the kind now in question'. The difficulty, however, is that it is, with great respect, almost impossible to postulate a case involving the admissibility of similar fact evidence where evidence of facts similar in character to those forming the subject of the charge is *not* sought to be given in support of the evidence of that charge.

An alternative view may be that his Lordship's qualification was intended to restrict his test to cases involving allegations of homosexual conduct (as was the case in *Boardman*). This seems unlikely, however, firstly because his Lordship (along with the rest of the Law Lords in that case) deny that there is a special rule or principle applicable to homosexual offences and secondly because his Lordship stresses that '*the general rule* is such that evidence (that is of similar facts) cannot be allowed, it requires exceptional circumstances to justify the admission'.[25]

The second ground on which the Full Court questioned *Markby* — namely that the High Court said of the observation of Lord Cross that 'it might not be going too far to make that assertion' (and that therefore the statement was clearly *obiter*) — simply ignores the imperative language used by Gibbs A.C.J. earlier in the paragraph. Gibbs A.C.J., it is submitted, made two statements intended to set an absolute minimum standard of relevance — namely, that the evidence of similar fact '*must* have "a strong degree of probative force" or "a really material bearing on the issues to be decided" '.[26] The fact that his Honour later said it might not be going too far to say something else cannot, it is submitted, detract from the clear meaning of the opening passage.

Secondly, the Full Court questions these passages in *Markby* because of other references in the case. Indeed, as we have seen, two passages from the judgment of Gibbs A.C.J. were referred to by the Full Court in support of the *Chee* view. It is advisable to set out the passages in full:[27]

> The second principle (of the rule in *Makin v. Attorney-General (N.S.W.)*[28]) which is a corollary of the first, is that the evidence is admissible if it is relevant in some

[23] [1975] A.C. 421, 442.
[24] *Ibid.* 443.
[25] *Ibid.* Italics added.
[26] (1978) 140 C.L.R. 108, 117. Italics added.
[27] The *Chee* judgment does not.
[28] The rule in *Makin v. Attorney-General for N.S.W.* states: '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' [1894] A.C. 57, 65.

> other way, that is, *if it tends to show* that he (the accused) is guilty of the crime charged for some reason other than that he has committed crimes in the past or has a criminal disposition.[29]
>
> To hold that evidence that a person accused of one crime had committed a similar crime is admissible because it shows his knowledge or experience would virtually destroy the fundamental exclusionary rule embodied in the first of the principles stated in *Makin v. Attorney-General (N.S.W.)*. To say that evidence that the accused had been the victim of a similar crime was admissible for the same reason would be even less acceptable, because, without more, the evidence simply does not *tend to support* the case against the accused.[30]

It is submitted, with respect, that these passages are simply not capable of supporting the proposition argued in *Chee*. The second passage is directed not towards the issue of the grounds on which similar fact evidence is admitted, but rather to a situation in which such evidence certainly *cannot* be admitted. To deduce from the statement that evidence is inadmissible because 'it does not tend to support the case' that Gibbs A.C.J. intended to lay down a strict test that similar fact evidence will be admissible where it merely tends to support the case is doubtful. It is even more doubtful (and this reasoning is equally applicable to the first passage) because there is no indication that Gibbs A.C.J. was at that stage directing his mind to the question of the formulation of the rule governing the degree of relevance required for admissibility. The expressions 'tend to support' and 'tend to show' must, it is submitted, be read as being subject to — and defined by — the crucial passage insisting upon 'strong probative force' or 'a really material bearing on the issues to be decided'. To do otherwise is to make nonsense of what is a clear and unequivocal and, it is submitted, binding, statement of principle by the High Court.

Strictly speaking, one cannot say that the actual decision in *Chee* was incorrect, because though the Full Court makes what appear to be a number of confident statements of principle, the reasoning with respect to the admissibility of similar fact evidence is *obiter dictum*. The Full Court stated:

> It is unnecessary for us to express a final view on the question whether 'probative force' or, on the other hand 'a strong degree of probative force' is necessary before the jury may be permitted to use the evidence as evidence of similar facts, for, in our opinion, the evidence in this case did possess as strong degree of probative force.[31]

Thus the issue properly phrased, is whether the *obiter* reasoning is incorrect because it is inconsistent with *Markby*. The issue remains an important one, most especially for a trial judge in formulating his jury direction.

A variety of other questions still remain. For example, if the view that the reasoning in *Chee* is wrong because the Full Court is bound by *Markby* is incorrect, the question must then be asked whether the authorities quoted in *Chee* support the proposition that the test of admissibility of similar fact evidence is whether it has probative force in relation to some fact in issue. That is an enormous task and not within the scope of this note, though three important points should be made.

Firstly, it is impossible to elicit a clear principle of law from the two High Court authorities cited in *Chee* — *Martin v. Osborne* and *Cooper v. R.* Statements in the former case go both ways on the degree of relevance required. Starke J. for example, insists that to be admissible the evidence of similar facts should 'exclude every other hypothesis than the one under consideration'.[32] In the latter case, the High

[29] (1978) 140 C.L.R. 108, 116. Italics added.
[30] *Ibid.* 117 f. Italics added.
[31] [1980] V.R. 303, 308.
[32] (1936) 55 C.L.R. 367, 372.

Court held evidence of the so-called similar facts inadmissible on the ground that it had no relevance whatsoever to the issue in question.[33]

Secondly, it must be noted that all the authorities cited in *Chee* are (with the exception of the decisions of the English Court of Appeal) pre — *Boardman* decisions — a case generally regarded as 'the most important decision on similar fact evidence since *Makin v. Attorney-General (N.S.W.)*'.[34]

It is not clear, however, whether the Full Court takes the view that *Boardman* is not so important or whether they simply regard many crucial passages as being incorrect (though highly persuasive, the Full Court is certainly not bound by the House of Lords). It is clear that, at least in relation to the speech of Lord Cross, the Full Court has taken the latter view. They state:

> If Lord Cross intended to convey that similar fact evidence is not admissible unless it is so very relevant that to exclude it would be an affront to common sense and if by an 'affront to common sense' his Lordship meant more than 'not sensible, having regard to the probative force of the evidence', then, with great respect, we are not as at present advised in agreement with his Lordship's opinion.[35]

Another ground for not following *Boardman* was that their Lordships did not intend to lay down a code governing the admissibility of similar fact evidence:

> We would add that the expressions used by the several judges who have dealt with the question of the probative force of evidence in many of the cases referred to all must be read in the context of the particular situations being discussed. To quote Lord Hailsham *R. v. Boardman*,[36] 'These are all highly analogical not to say metaphorical and should not be used pedantically'. None of the judges was seeking to prescribe a code; they were each dealing with a particular matter in hand possessing its own peculiar features, and they were not legislating.[37]

It is submitted that in relation to the *Boardman* decision this limitation is, with respect, not correct. Lord Wilberforce, for example, refers to 'The basic *principle* . . . that the admission of similar fact evidence is exceptional'.[38] Lord Cross of Chelsea preceded his discussion of admissibility by stating that the question 'must always be' as he formulated the rule.[39] Lord Salmon was equally emphatic that 'the test must be' as he phrased it.[40] Though it is impossible to extract a clear *ratio* from *DPP v. Boardman* it is submitted that to restrict the case to its facts and insist that the discussion of the admissibility of similar fact evidence was never intended to be an enunciation of principle is unrealistic in the extreme. The very significance of the decision lies in the fact that the House of Lords emphasized that the admissibility of similar fact evidence depends not, as the older authorities suggested, on whether the evidence could be accommodated within a recognized *category* of admissibility, but simply on whether the evidence is sufficiently relevant. To read down the decision of the sufficiency of relevance therefore decries the focal point of the decision. It is submitted that the High Court in *Markby* followed the fundamental reasoning in *Boardman* and chose to adopt as the test governing admissibility that of either a 'strong degree of probative force' or 'a really material bearing', and that these tests, though obviously not binding on the Full Court when made in the House of Lords, are so when made the High Court as part of the *ratio decidendi*.

[33] (1960) 105 C.L.R. 177, 184.
[34] Hoffmann L. H., 'Similar Facts after Boardman' (1975) 91 *Law Quarterly Review* 193.
[35] [1980] V.R. 303, 309.
[36] [1975] A.C. 421, 452.
[37] [1980] V.R. 303, 309.
[38] [1975] A.C. 421, 444. Italics added.
[39] *Ibid.* 457.
[40] *Ibid.* 462.

Thirdly, the recent decisions of the English court of Appeal — *R. v. Rance; R. v. Mansfield; R. v. Scarrott; R. v. Inder* — are not inconsistent, in my submission, with the crucial reasoning in *Markby*. It is important to distinguish between two questions — that of the degree of relevance or probative value required before evidence of similar facts is admitted and the degree of similarity required before that degree of relevance can be said to be reached. The two issues are intrinsically related but logically distinct. In *Markby* Gibbs A.C.J. clearly recognized the distinction and in doing so rejected the expression 'striking similarity' as a strict test of admissibility and the expression is merely one from which 'practical assistance, in many cases, will be obtained'.[41]

It is submitted that the decisions of the English Court of Appeal quoted in *Chee* in support of the proposition that mere probative value will suffice merely warn against using the 'striking similarity' expression as a strict test. Notwithstanding this, all the statements of principle contained in the decisions are consistent with the view that something more than mere probative value is required — 'positive probative value' is used. In *R. v. Rance*, the Court of Appeal held:

> It seems to us that one must be careful not to attach too much importance to Lord Salmon's (in *DPP v. Boardman*) vivid phrase 'uniquely or strikingly similar'. The gist of what is being said both by Lord Cross and by Lord Salmon (in *Boardman*) is that evidence is admissible as similar fact evidence if, but only if, it goes beyond showing a tendency to commit crimes of this kind and is positively probative in regard to the crime now charged.[42]

In *R. v. Scarrott* it was held: 'Hallowed though by now the phrase "strikingly similar" is . . . it is no more than a label. . . . Positive probative value is what the law requires, if similar fact evidence is to be admissible.[43] In *R. v. Inder*, the Court of Appeal stated, after citing the crucial passage from the speech of Lord Salmon in *Boardman*: 'I draw attention to that passage to indicate the strength of the case which has to be put forward in order to justify the admission of what is now called "similar fact evidence".'[44]

All these statements, it is submitted, though not as strict as those contained in other recent decisions of the Court of Appeal,[45] are not inconsistent with *Markby*. What is clear from all of them is that before evidence of similar facts can be admitted something more than mere probative value must be shown.

The great danger in admitting evidence of similar fact is that it is inevitably prejudicial to the accused. The question to be decided in each instance, though, is whether that prejudice sufficiently outweighs the probative value of the evidence to justify its exclusion. In *Chee*, the Full Court has apparently taken the view that the element of prejudice can be dealt with by the exercise of the general discretion vested in the trial judge to exclude any evidence that, though legally probative, is unfair to the accused, and that it is not necessary to raise the threshold level of probative value. The Court stated:

> It is difficult to see why, in principle, a stronger degree of probative force should be necessary for the reception of evidence of similar facts than for the reception of other circumstantial evidence. True it is that evidence of similar facts will often be highly prejudicial to the accused; on the other hand, it will not always be so, and if Gibbs A.C.J., in *Markby v. R.*, was intending to lay it down in relation to

[41] (1978) 140 C.L.R. 108, 117.
[42] (1976) 62 Cr. App. R. 118, 121. This case was adopted in *R. v. Mansfield* [1978] 1 All E.R. 134, 135.
[43] [1978] 1 All E.R. 672, 676.
[44] (1978) 67 Cr. App. R. 143, 148.
[45] *R. v. Mustafa* (1977) 65 Cr. App. R. 26; *R. v. Tricoglus* (1977) 65 Cr. App. R. 16, *R. v. Johannsen* (1977) 65 Cr. App. R. 101, *R. v. Novac* (1977) 65 Cr. App. R. 107.

> all kinds of case that a strong degree of probative force is necessary for evidence of similar facts to be admissible, the reason for such a rule of universal application is unlikely to be the highly prejudicial tendency that will be present in many but by no means all cases. Probative force can always be weighed against prejudice in the exercise of the discretion to reject admissible evidence.[46]

This passage is crucial to the reasoning underlying the judgment. It is submitted that the view that evidence of similar facts 'will often' be highly prejudicial but that 'it will not always be so' is incorrect. It is difficult, if not impossible, to think of any situation in which the admission of similar fact evidence does not have a highly prejudicial element. It is *ex hypothesi* prejudicial because the evidence seeks to show that the accused committed act X by leading evidence that he also committed acts A, B and C. As Cowen and Carter in their seminal work *Essays on the Law of Evidence*[47] state: 'On the not inconsiderable number of occasions in which this problem arises the effect of its solution is often virtually decisive of the whole case'.[48] It is submitted that it is this highly prejudicial tendency that the rule in *Markby*, and that such reasoning justified the test therein postulated.

It could be argued that whether the *Markby* test (that of 'strong probative force') — also, of course, subject to the judicial discretion to exclude unfair evidence[49] — or the *Chee* ('mere probative value') view is applied, the result in most instances will be the same — under the former evidence sufficiently prejudicial to warrant exclusion may be ruled inadmissible because it lacks sufficient probative value and under the latter because, though admissible, it is unfair to the accused. However, such an argument — and, it is submitted, the view argued by the Full Court in *Chee* — ignores the fact that in relying on the discretionary exclusion and not the rule governing admissibility, the onus of proof changes. Where it is sought to invoke the discretion, the onus rests on the accused to show that the prejudicial value of the evidence outweighs its probative value. Under the exclusionary rule, relating to admissibility, the onus is on the Crown to prove the evidence has sufficient relevance. Because the onus is different the two tests will thus produce different results as to whether the evidence will go to the jury. It is submitted that because evidence of similar facts is inevitably highly prejudicial, the onus from the outset must remain with the Crown to establish a strong degree of probative force.

It is submitted that the conclusions reached by the Full Court in *Chee* are justified neither by the authorities nor on principle; and that though the discussion was *obiter dictum*, such discussion was made *per incuriam* because of the binding authority of the High Court in *Markby*.

D. O'CALLAGHAN*

[46] [1980] V.R. 303, 308 f.
[47] Carter P. B. and Cowen Z., *Essays on the Law of Evidence* (1956).
[48] *Ibid.* 108.
[49] *Markby v. R.* (1978) 140 C.L.R. 108, 116, 117.
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