

SIMILAR FACTS AND CONSENT IN SEXUAL ASSAULT CASES: FILLING IN THE GAP LEFT BY THE HIGH COURT IN *PHILLIPS*

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I INTRODUCTION

A number of jurisdictions in Australia have amended their rules governing joint trials in order to encourage trial judges to join sexual assault counts in the one trial where there are multiple complainants.¹ There are good public interest reasons for joint trials, particularly given the frequency of the serial nature of sex offending.² Crime statistics show that the age group most vulnerable to sexual assault is children under the age of consent which is the group least able to protect themselves and least likely to report the abuse.³ While trial judges must consider the accused's right to a fair trial when considering whether to order joint or separate trials, legislation governing this procedural issue shows that the decision is not black or white. In other words, it is possible to hold a joint trial that does not 'prejudice or embarrass' an accused's defence.⁴

In making a decision to hold a joint trial, the competing interests of the fair trial principle and the need to prosecute sex crimes using all relevant evidence need to be balanced. In other words:

What constitutes a fair trial takes into account not only the perspective of the accused, but ... the lawful interests of ... complainants and the agencies which assist them in dealing with the trauma they may have

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- 1 For example the *Criminal Code 1899* (Qld) s 597A permits the court to order separate trials with respect to some or all of the counts on the indictment if a person 'may be prejudiced or embarrassed ... by reason of the person's being charged with more than one offence in the same indictment'. See also *Criminal Procedure Act 1986* (NSW) s 21(2); *Crimes Act 1900* (ACT) s 264; *Criminal Code 1924* (Tas) s 326(3); *Criminal Code 1983* (NT) s 341; *Criminal Law Consolidation Act 1935* (SA) s 278(2a); *Criminal Procedure Act 2004* (WA) s 133; *Criminal Procedure Act 2009* (Vic) s 194.
- 2 Serial sex offending is a phenomenon that is well-documented in the literature. See Terance D Mieth, Jodie Olson and Ojmarh Mitchell, 'Specialization and Persistence in the Arrest Histories of Sex Offenders' (2006) 43 *Journal of Research in Crime and Delinquency* 204, 207; R Karl Hanson and Kelly E Morton-Bourgon, 'The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies' (2005) 73 *Journal of Consulting and Clinical Psychology* 1154, 1160; David Greenberg et al, 'Recidivism of Child Molesters: A Study of Victim Relationship with the Perpetrator' (2000) 24 *Child Abuse & Neglect* 1485, 1486; Matthew Colton and Maurice Vanstone, *Betrayal of Trust: Sexual Abuse by Men Who Work with Children — In Their Own Words* (Free Association Books, 1996).
- 3 For a summary of the research literature on delayed complaints by children, see Annie Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68.
- 4 This is the wording of *Criminal Code 1899* (Qld) s 597A as set out in above n 1. For example, in s 597A(1AA), in determining prejudice or embarrassment 'the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion'.

suffered. What the law demands is not perfect justice, but fundamentally fair justice.⁵

Most reported sexual assault is committed against children aged 0–14 years followed by adolescents aged 15–19 years, compared to all other age groups.⁶ In fact, there has been a sustained increase in the recorded rates of sexual assault during the 1990s which has continued into the mid 2000s, compared to other crimes such as robbery.⁷ A major contributor to this increase has been a rise in the recorded rates of sexual assault of young people: ‘In the 10-year period between 1995 and 2005, the incidence of recorded sexual assault for children aged 0–14 years accounted for around 40 percent of all recorded sexual assaults’.⁸

Court statistics also show that sexual assault is more prone to attrition than other serious offences,⁹ which coupled with under-reporting, suggests that sex offences are a particular category that require a specialised approach. This raises two questions — whether the administration of justice is best served by admitting all relevant evidence about a defendant’s illegal sexual behaviour and whether the arguments in favour of doing so outweigh the competing policy arguments for protecting an accused from prejudicial but relevant evidence.

Children’s and adolescents’ vulnerability to sexual assault is reflected in the targeting practices of serial sex offenders whose ‘target selection is highly dependent on the physical environment’¹⁰ and who tend to target young victims from the same family, school class, sporting team, church group, network of friends, boarding school and so on.¹¹ These targeting practices create unique problems for the prosecution of sex offences when an accused is charged with multiple counts against two or more complainants. In such a situation, a trial judge will be faced with persuasive arguments by the prosecution about the need to hold a joint trial, and opposing arguments by the defence about prejudice to the defendant if a joint trial is held. The balance between the competing arguments may be very fine but if tipped in favour of the defence, highly probative corroborative evidence will be excluded, whilst if tipped in favour of the prosecution, prejudice to the defence may occur because of the reasoning processes it is assumed jurors will engage in.

5 *R v O’Connor* [1995] 4 SCR 411, 416 (L’Heureux-Dubé J).

6 Australian Bureau of Statistics, *Relationship of Offender to Victim, Victims of Assault and Sexual Assault by Age Group, Selected States and Territories — Supplementary Data Cubes* (2008), Tables 1–7 <www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4510.02008?OpenDocument>.

7 Samantha Bricknell, ‘Trends in Violent Crime’ (Research Paper No 359, Australian Institute of Criminology, June 2008) 3.

8 *Ibid.*

9 J Fitzgerald, ‘The Attrition of Sexual Offences from the New South Wales Criminal Justice System’ (Report No 92, NSW Bureau of Crime Statistics and Research, January 2006).

10 Eric Beauregard et al, ‘Script Analysis of the Hunting Process of Serial Sex Offenders’ (2007) 34 *Criminal Justice and Behavior* 1069, 1081.

11 M Elliott, K Browne and J Kilcoyne, ‘Child Sexual Abuse Prevention: What Offenders Tell Us’ (1995) 19 *Child Abuse & Neglect* 579; Colton and Vanstone, above n 2; Anna C Salter, *Paedophiles, Rapists, and Other Sex Offenders: Who They Are, How They Operate, and How We Can Protect Ourselves and Our Children* (Basic Books, 2003); Benoit Leclerc, Jean Proulx and Andre McKibben, ‘Modus Operandi of Sexual Offenders Working or Doing Voluntary Work with Children and Adolescents’ (2005) 11 *Journal of Sexual Aggression* 187; *Ibid.*

This article examines the way the High Court in *Phillips v R* (2006) 225 CLR 303 arrived at the decision that each complainant's evidence was not cross-admissible on the grounds of lack of relevance in a joint trial which allegedly involved serial sex offending by Phillips against six teenage girls. In coming to this decision, the High Court failed to engage with a body of case law that had previously found that similar fact evidence from one complainant could be relevant to the issue of consent by the other complainant. This failure arose because neither the Queensland Court of Appeal nor the prosecution 'cited any case in which similar fact evidence of complainants who said that they did not consent was led to show that another complainant had not consented'.¹²

Because this case law has not previously been analysed, this article compares the facts and legal issues in *Phillips* with these cases. In doing so, it reveals how the High Court misunderstood the relevance inquiry, and reviews the reasoning processes the High Court could have engaged in, in order to illustrate how subsequent cases can overcome the barrier that *Phillips* now represents to holding joint trials in some jurisdictions.

In particular, the article addresses three main legal issues that arise from *Phillips*:

- (i) the relevance of two or more complainants' evidence in a joint trial where consent is a fact in issue;
- (ii) the application of the striking similarities test to the evidence of sexual assault complainants; and
- (iii) whether the evidence is sufficiently probative to overcome its prejudicial effect.

Based on this analysis, the article concludes by making appropriate recommendations for reform in both common law and Uniform Evidence Acts ('UEA') jurisdictions.¹³

II SEPARATE VERSUS JOINT TRIALS

When the prosecution has to decide whether to proceed with a case in which two or more complainants make allegations of sexual assault against the same defendant, the main consideration will be whether a joint trial will be granted by the trial judge. If separate trials are held, there may be no other evidence to corroborate each particular complainant's evidence unless there is forensic evidence, a situation that only occurs in a minority of trials.¹⁴ As recognised in *PNJ v R*,¹⁵ this means the prosecution's case may be considerably weakened since

12 *Phillips v R* (2006) 225 CLR 303, 318 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) ('*Phillips*').

13 See *Evidence Act 1995* (NSW); *Evidence Act 1995* (Cth); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

14 Suzanne Blackwell, 'Child Sexual Abuse on Trial in New Zealand' (Paper presented at the Criminal Law Symposium, Auckland, New Zealand, November 2008).

15 *PNJ v R* (2010) 27 VR 146, 153 (Maxwell P, Buchanan and Bongiorno JJA).

each jury will be ignorant of the defendant's alleged patterns of behaviour in relation to targeting, grooming and seducing his victims.¹⁶

On the other hand, separate trials confer a significant tactical advantage on the accused whose separate trials will be conducted, from the point of view of the jury, as if there is only one complainant. The defendant will be able to conduct his defence in each trial in isolation from the other charges and will be able to more convincingly argue that each complainant has fabricated her/his evidence due to lack of corroborating evidence from other victims. Because the jury will be 'kept in ignorance of the fact that there are multiple allegations of abuse against the accused',¹⁷ some have argued that this is 'a situation which would appear to offend common sense and experience, and has the potential to cause real injustice'¹⁸ by increasing the likelihood of acquittal. If separate trials are held 'the children involved may have to give evidence numerous times' in their own trial as well as in other trials,¹⁹ a process which can duplicate the emotional stress experienced by child and adolescent complainants.²⁰

In fact, lack of corroboration is likely to account for the lower conviction rates that have been found in relation to separate trials. In NSW, Gallagher and Hickey compared the outcomes of joint trials involving multiple complainants, with separate trials involving the same accused. They found that 'the proportion of guilty and not guilty verdicts [was] quite close when there was one trial, while for multiple trials, the vast majority result[ed] in not guilty verdicts'.²¹ The critical impact of corroborative evidence on conviction rates has been demonstrated in a New Zealand survey of 137 child sexual assault cases by Blackwell who reported that guilty verdicts were significantly more likely in trials where corroborative evidence in the form of either similar fact evidence, eye witness testimony or positive medical or DNA evidence was admitted.²² Although only 10.9 per cent of cases featured similar fact evidence, of those, 86.7 per cent resulted in a conviction

16 The male pronoun is used here since both recorded crime statistics and empirical studies show that the vast majority of sex offenders are male: See Annie Cossins, 'Masculinities, Sexualities and Child Sexual Abuse' (Paper presented at the British Society of Criminology Conference, Liverpool, July 1999); Australian Bureau of Statistics, above n 6, Tables 1–7; Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview, 2004* (2004).

17 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [14.89].

18 Ibid.

19 Ibid [14.87]. For example, although a complainant's evidence may be held to be generally inadmissible in relation to the charges involving other complainants, portions of a complainant's evidence may be admissible for a non-tendency or non-propensity purpose.

20 I am not suggesting here that evidence should be admissible solely on the ground of preventing emotional distress to complainants. It is just one of the many public interest issues that arise in relation to separate versus joint trials.

21 P Gallagher, J Hickey and D Ash, 'Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales during 1994' (Research Monograph 15, Judicial Commission of New South Wales, 1997) 20.

22 Blackwell, above n 14, 12.

on at least one sexual offence.²³ This can be compared with a conviction rate at trial of 37.5 per cent for the total sample of 137 cases.²⁴

In addition to these evidentiary considerations, the decision to hold a joint trial involves important policy issues given the public interest in how trials involving an alleged serial offender should be conducted. If the judge rules in favour of a joint trial which results in one or more convictions, it is highly likely there will be an appeal against the joinder and/or the trial judge's decision to admit the propensity or similar fact evidence.²⁵ If the appeal is successful, there may be retrials with all the attendant emotional costs to the complainants and financial costs to the state and the defendant. Either way, trial judges are faced with balancing and weighing up incommensurables and making decisions that will cause some degree of prejudice or emotional turmoil to one side or the other.

III THE EVIDENTIARY DIFFICULTIES IN SEXUAL ASSAULT TRIALS

The rules governing the admissibility of tendency, propensity, similar fact and coincidence evidence (as defined below) have a significant impact on the trial process in a sexual assault trial, particularly where an accused is charged with multiple offences against one complainant or with offences against more than one complainant. Around Australia, it has been relatively common for separate trials to be held where an accused has been charged with offences against more than one child.²⁶ The admissibility of each particular complainant's evidence will normally govern the decision to hold a joint trial or separate trials. If the evidence of one complainant is considered to be inadmissible in relation to the evidence of at least one other complainant, separate trials will be ordered.²⁷ Admissibility will either be governed at common law by the principles set out in *Hoch*²⁸ and

23 Ibid. While this finding supports an argument that similar fact evidence is highly prejudicial, it assumes such evidence was used inappropriately by the juries in the trials under study. However, Blackwell's study did not investigate the reasoning processes the juries engaged in, in this sample of trials.

24 Personal communication from Suzanne Blackwell to Annie Cossins, 16 April 2009.

25 See, eg, *R v Best* [1998] 4 VR 603; *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89; *R v Rajakaruna* (2004) 8 VR 340; *R v Papamitrou* (2004) 7 VR 375; *R v PV; Ex parte A-G (Old)* [2005] 2 Qd R 325; *Tasmania v S* [2004] TASSC 84; *R v Harker* [2004] NSWCCA 427; *R v RN* [2005] NSWCCA 413; *Wood v WA* [2005] WASCA 179; *VIM v WA* (2005) 31 WAR 1; *Donaldson v WA* (2005) 35 WAR 122; *R v Fletcher* (2005) 156 A Crim R 308; *R v Ford* [2006] QCA 142; *L v Tasmania* (2006) 15 Tas R 381; *Noto v WA* (2006) 168 A Crim R 457; *Phillips* (2006) 225 CLR 303; *Rajakaruna (No 2)* (2006) 15 VR 592; *Di Lena* (2006) 165 A Crim R 482; *R v BBG* (2007) 174 A Crim R 86; *Tasmania v Y* (2007) 178 A Crim R 481; *AE v R* [2008] NSWCCA 52; *R v Inston* (2009) 103 SASR 265.

26 This is a discretionary power which is exercised by a trial judge in order to prevent prejudice to an accused. See *Criminal Procedure Act 1986* (NSW) s 21(2); *Crimes Act 1900* (ACT) s 264; *Criminal Code 1924* (Tas) s 326(3); *Criminal Code 1983* (NT) s 341; *Criminal Code 1899* (Qld) s 597A; *Criminal Law Consolidation Act 1935* (SA) s 278(2a); *Criminal Procedure Act 2004* (WA) s 133; *Criminal Procedure Act 2009* (Vic) s 194.

27 *De Jesus v R* (1986) 68 ALR 1; *R v Hoch* (1988) 165 CLR 292 ('*Hoch*').

28 *Hoch* (1988) 165 CLR 292.

Pfennig,²⁹ by the various legislative amendments to the common law, or by ss 97, 98 and 101 of the UEA.

It is useful at this point to define the terms, ‘tendency evidence’, ‘propensity evidence’, ‘similar fact evidence’ and ‘coincidence evidence’ since all can be used to refer to conduct on the part of an accused that shows that he has a tendency to engage in sexual behaviour with children. Different terminology is used at common law, under the UEA, and under particular legislative provisions that have amended the common law. There is some debate about whether relationship evidence is or is not a type of propensity evidence, and whether propensity/tendency evidence is different to similar fact evidence. In this article, the terms ‘propensity’ and ‘tendency’ evidence refer to the definition under s 97 of the UEA which is merely a codification of the common law: ‘evidence of the character, reputation or conduct of a person, or a tendency that a person has or had ... to act in a particular way, or to have a particular state of mind’.³⁰

The common law term, ‘similar fact evidence’,³¹ refers to evidence that may show, not only the identity of the offender, but also ‘the improbability of coincidence if a number of similar accounts are all true. It usually, but not always, involves an offence against a different victim’.³² For example, where two or more complainants make allegations of child sexual abuse against the same defendant, their combined evidence may be defined as similar fact evidence because of the improbability of children giving similar accounts of sexual abuse unless the incidents occurred.³³

The term ‘coincidence evidence’ is ‘an aspect of what [the] common law has regarded as the similar fact rule’,³⁴ a rule that does not rely on propensity reasoning, as such, ‘but on explaining the coincidences between events by [reference to] the perpetrator’s tendency’.³⁵ Coincidence evidence is defined under s 98 of the UEA which refers to two or more events being used to prove the improbability of the events occurring coincidentally, having regard to the similarities of the events and/or the circumstances in which they occurred.

It is also necessary to consider whether the testimony of two or more complainants in a joint sexual assault trial amounts to corroboration. Evidence is corroborative when it *confirms* other evidence although there are many different ways in which evidence can be corroborated and ‘varying *degrees* of that confirmation’.³⁶ Independent evidence ‘which affects the accused by connecting or tending to connect him with the crime’ is required for evidence to amount to corroboration but it ‘need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the

29 *Pfennig v R* (1995) 182 CLR 461 (*‘Pfennig’*).

30 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) [813].

31 *Pfennig* (1995) 182 CLR 461; *Conway v R* (2000) 98 FCR 204.

32 *R v Best* [1998] 4 VR 603, 606 (Callaway J).

33 *Hoch* (1988) 165 CLR 292, 295 (Mason CJ, Wilson and Gaudron JJ).

34 *R v Gibbs* (2004) 154 ACTR 1, 4 (Gray J).

35 Andrew Ligertwood and Gary Edmond, *Australian Evidence: A Principled Approach to the Common Law and the Uniform Acts* (LexisNexis, 5th ed, 2010) 178.

36 *Ibid* 323 (emphasis added).

crime'.³⁷ Less specifically, Brennan CJ has observed that 'it is sufficient to constitute corroboration that the evidence should strengthen the evidence to be corroborated as to a fact on which proof depends'.³⁸

Based on this definition, does one complainant's evidence amount to corroboration of another complainant's evidence? Essentially, his or her evidence will need to confirm the other complainant's testimony by 'implicating the accused in the crime charged',³⁹ that is, the counts of sexual assault involving the other complainant. This will not necessarily occur by way of direct implication but may amount to circumstantial evidence of the accused's sexual assault of the other complainant. Even so, '[t]he implication need not arise from each item of evidence considered separately' but can arise by looking at the totality of the different complainants' evidence in order to give rise to a 'corroborative inference'.⁴⁰

However, the facts in issue must be identified first. If the issue is identity then one complainant's statement that she was sexually assaulted by the defendant would only amount to corroboration if her description of the offender was similar to that of the other complainant. If the defendant has admitted the sexual act so that the fact in issue is consent, one complainant's evidence would be corroborative only if propensity or improbability reasoning was being used to justify admission — either to show that the defendant had a tendency to act in a certain way or the improbability that two or more complainants would, independently, allege sexual assault by the same person unless their evidence was true.⁴¹ In other words, if held to be cross-admissible the evidence will inevitably show patterns in the defendant's conduct.

A court has to decide whether the evidence of each complainant about being sexually assaulted by the defendant is cross-admissible in relation to the counts involving each other complainant. As stated previously, this is the threshold question in determining whether or not separate trials or a joint trial will be held since any evidence given by a complainant, the Crown or another witness about charged or uncharged acts of alleged sexual abuse is, generally, not admissible because of its prejudicial nature.⁴² This threshold question is central to understanding the High Court decision in *Phillips*.

At common law, this admissibility depends on showing that:

- (i) the evidence of each complainant is relevant to the facts in issues associated with the counts involving *each other* complainant;

37 *R v Baskerville* [1916] 2 KB 658, 667, quoted in *ibid* and applied in subsequent case law: *WLC v R* (2007) 210 FLR 378; *R v Major and Lawrence* [1998] 1 Qd R 317.

38 *S v R* (1997) 191 CLR 275, 285.

39 Ligertwood and Edmond, above n 35, 325.

40 *Ibid* 331.

41 See, eg, *S v R* (1997) 191 CLR 275 where a witness gave evidence of the same materials being offered to him by the accused for mutual masturbation as had been described by the complainant. Ultimately it is up to the trial judge to instruct the jury about which evidence is corroborative of a complainant's testimony and it is up to the jury to decide whether to accept that evidence as corroborative.

42 *Ibid*; *Gipp v R* (1998) 194 CLR 106; *HML v R* (2008) 235 CLR 334.

- (ii) the probative value of the evidence of each complainant outweighs its prejudicial effect;
- (iii) there is no rational view of the evidence of each complainant that is consistent with the innocence of the accused (the *Pfennig* test).⁴³

In sexual assault trials, the *Pfennig* test turns on whether or not there is evidence that the complainants have concocted their evidence, which, if so, would mean there was a rational view of the complainants' evidence consistent with the innocence of the accused. Some courts have required a *reasonable* possibility of concoction 'based upon some factual foundation and not merely a fanciful possibility',⁴⁴ while other courts have been satisfied of the possibility of concoction by the mere closeness of the relationship between the complainants.⁴⁵

The inadmissibility of two or more complainants' evidence adds to the fact that lack of corroboration is one of the key features of child sexual assault trials and one of the reasons for low conviction rates. Because the 'no rational view of the evidence test' sets an excessively high standard,⁴⁶ Queensland, Victoria, South Australia and Western Australia have sought to overcome the prejudicial nature of the test. They have done so by enacting provisions to prevent a trial judge from taking into account the issue of concoction or collusion when deciding whether the evidence of two or more complainants is cross-admissible in a joint trial.⁴⁷

Yet the Queensland reforms did not prevent the High Court in *Phillips* from deciding that separate trials ought to have been held in that case. In enacting reforms to increase the frequency of joint trials, the Queensland legislature was not able to predict the legal issues that arose in *Phillips* and the subsequent effect of *Phillips* in *decreasing* the frequency of joint trials.

IV THE FACTS IN PHILLIPS

Phillips was 17 years old when he was first charged with the sexual assault of a 15 year old girl he knew from school. During a police investigation, more charges were laid after five other victims came forward. The prosecution sought to join all eight counts in a joint trial under s 597A of the *Criminal Code 1899* (Qld). Although the defence argued this would be prejudicial, the trial judge disagreed

43 *Pfennig* (1995) 182 CLR 461.

44 *Tasmania v S* [2004] TASSC 84 (19 August 2004) [12] (Underwood J). See also *Tasmania v Y* (2007) 178 A Crim R 481, 493–4 (Crawford J); *R v Robertson* (1997) 91 A Crim R 388, 409 (Ambrose J); *Hickey v R* (2002) 136 A Crim R 151, 155 (Templeton J).

45 See, eg, *AE v R* [2008] NSWCCA 52, [44] (Bell JA, Hulme and Latham JJ). Using such a low standard makes it easier for a defendant to invent a story that the complainants have concocted their evidence.

46 Kenneth Arenson, 'The Propensity Evidence Conundrum: A Search for Doctrinal Consistency' (2006) 8 *University of Notre Dame Law Journal* 31, 62.

47 See sources referred to in above n 1. Some of these reforms also aim to join several counts of sexual assault in the one trial even if the evidence of two or more complainants is not cross-admissible. See, eg, *Criminal Procedure Act 2009* (Vic) ss 194(2)–(3) (formerly *Crimes Act 1958* (Vic) ss 372(3AA)–(3AB)). The success or otherwise of these provisions in achieving their objectives is discussed by Arenson, see *ibid* 43.

and conducted a joint trial in 2003 in the District Court in Rockhampton. The trial involved six complainants (with three under the age of consent), six counts of rape, one count of indecent assault and one count of assault with intent to rape, with the evidence in relation to each count being cross-admissible in relation to each other count. Some of the incidents were admitted by the defendant and some were denied. This meant that different facts in issue arose in relation to the prosecution of different counts. Phillips, who was 16 years old at the time of counts 1–4, and 17 years old from the time of count 5 onwards, admitted or denied the sexual conduct set out in Table 1.⁴⁸

Table 1
Sexual Conduct Admitted and Denied by Phillips

Admitted	Denied
<p>Counts 1 & 2: BS, aged 16, knew Phillips from school and had been invited to his home in Innisfail for a party. When she arrived only Phillips and two other males were in attendance. BS alleged two counts of rape involving oral and vaginal intercourse (with the use of force). Phillips admitted the acts constituting the offences but said they were consensual.</p>	<p>Count 3: TK, aged 16, alleged that during her birthday party Phillips (an ex-boyfriend) had had vaginal intercourse with her against her will and with the use of force. Phillips denied the sexual acts took place.</p>
<p>Count 4: ML, aged 15, was also an acquaintance of Phillips. She alleged she was drunk, had passed out at a party whilst talking to Phillips and had woken with Phillips having vaginal intercourse with her. Phillips said it was consensual.</p>	<p>Counts 6 & 7: MM, aged 15, alleged she had been threatened by Phillips (a school friend) with a baseball bat. Against her will, she performed fellatio and Phillips had sex with her on two separate occasions despite her protests. Phillips denied sexual intercourse.</p>
<p>Count 5: SW, aged 14, alleged that at her sister’s party, Phillips had vaginal sexual intercourse with her without consent and with the use of force although she had consensually engaged in fellatio.</p>	<p>Count 8: JD, aged 18, alleged she was invited to a party at his mother’s house in Brisbane but no other guests arrived. She alleged she was touched up then grabbed by Phillips against her will. He offered her money to take her shirt off, then menaced her with a thick chain before she escaped from his home after his mother interrupted them. Phillips denied the allegations.</p>

After hearing the evidence of all six complainants, the jury returned a mixture of guilty and not guilty verdicts. Phillips was found guilty in relation to three counts

48 Sexual offending by adolescents is remarkably common: J Grant et al, ‘Intrafamilial Adolescent Sex Offenders: Psychological Profile and Treatment’ (Trends and Issues in Crime and Criminal Justice No 375, Australian Institute of Criminology, June 2009), report that sexual abuse of children by other children or adolescents constitutes between 40–90 per cent of sexual offending against children.

of rape, two alternative charges of unlawful carnal knowledge and one count of assault with intent to rape. For ease of understanding, the verdicts are set out in Table 2.

Table 2
Verdicts in the *Phillips* Case⁴⁹

Count	Offence	Complainant	Age	Verdict
1	Indecent assault with circumstance of aggravation	BS	16	Not guilty
2	Rape	BS	16	Guilty
3	Rape	TK	16	Not guilty
4	Rape	ML	15	Guilty
5	Rape	SW	14	Not guilty rape; guilty unlawful carnal knowledge
6	Rape	MM	15	Not guilty rape; guilty unlawful carnal knowledge
7	Rape	MM	15	Guilty
8	Assault with intent to rape	JD	18	Guilty

A The Facts in Issue in the Trial

Because Phillips denied and admitted different sexual conduct, as set out in Table 1, this meant the trial was complicated in terms of the facts in issue and the relevance of the evidence of each complainant to each *different* fact in issue.⁵⁰

Since the conduct giving rise to the three counts of rape and assault with intent to rape was denied (counts 3, 6, 7 and 8), the facts in issue were whether or not the alleged sexual conduct actually occurred. Only if the jury was satisfied that the sexual conduct occurred would lack of consent then become a fact in issue in relation to counts 3, 6 and 7. On the other hand, Phillips admitted the sexual conduct that gave rise to counts 1 and 2 so that the only fact in issue in relation to these counts was lack of consent. This meant that the evidence of BS, the complainant in relation to counts 1 and 2, could not be admitted as propensity evidence in relation to the other counts because the issue of consent (a disputed fact) cancels out any propensity theory. The question is whether the evidence

49 Table adapted from that in *R v PS* [2004] QCA 347 (24 September 2004) [2] (Williams JA).

50 *Phillips* (2006) 225 CLR 303, 317–8 [44] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

of BS should have been admitted as similar fact evidence, as discussed further below.

In relation to counts 4 and 5, the facts in issue were consent and mistaken belief as to consent since, although SW and ML were under the age of 16 years, child sexual assault charges were not laid.

B The Similarities between the Counts

Based on the submission by the prosecution, the trial judge identified various similarities between the counts:

- (a) All of the girls were aged in their early to mid teens.
- (b) All of the incidents [except one] included penis/vagina intercourse.
- (c) All of the girls were within the accused's extended circle of friends.⁵¹
- (d) In all cases each of the girls was readily able to identify the accused, and he must have known that.
- (e) In all cases the accused did not immediately commence to treat the girls violently. He made sexual advances to each of the girls of such a nature that it left the way open for them to engage in sexual activity of their own free will. ... In every case there is a common thread indicating a preference for consensual sexual intercourse and then little or no hesitation in resorting to the use of force to achieve his ultimate desire when the girl resists.⁵²

Because of the common features between the counts, the prosecution argued that the evidence of each complainant amounted to similar fact evidence, not because of 'striking similarities' but because each account demonstrated that the complaints had been made by a group of young women known to the accused, and, together, showed the objective improbability of six teenage girls independently making a false complaint of sexual assault, or assault with intent to rape against the same person. In other words, the prosecution argued improbability of lies based on broadly similar accounts. The trial judge told the jury they were only permitted to use the combined evidence of the six complainants to assess the likelihood of all of them telling a similar lie in relation to only one of the facts in issue — lack of consent:

51 This conclusion was reached even though the sixth complainant was assaulted in Brisbane, not Innisfail where Phillips had lived. He and his mother had moved to Brisbane whilst awaiting trial and during this time the defendant socialised, met new people, including JD, and allegedly assaulted JD with intent to rape whilst on bail in respect of the other charges. In this way, JD was still considered to be within the defendant's 'extended circle of friends'.

52 *Phillips* (2006) 225 CLR 303, 312 [28] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ), quoting the trial judge.

the strength of [the] probative value [of the evidence] lies in its ability to demonstrate the improbability of similar lies. That is, one girl might deliberately make up a lie that [the defendant] dealt with her sexually without consent; two might possibly make up a lie to that effect; but the chances ... that all six have made up such a lie ... becomes remote in the extreme in the absence of any real risk of concoction.⁵³

The appellant appealed against his conviction on numerous grounds, but in particular that the decision to hold a joint trial was wrong in law and that the trial judge had erred in his ruling that the evidence of each complainant was cross-admissible. The Queensland Court of Appeal held that the trial judge had not erred in ‘permitting the trial to proceed as a joint trial with respect to all the charges against the appellant and in ruling the evidence was cross-admissible’.⁵⁴ The Court of Appeal considered that the balance between the accused’s right to a fair trial and the importance of the evidence of each complainant being heard together favoured a joint trial. If separate trials were held, ‘the defence would ask the jury to conclude that the complainant girl was telling a highly improbable story in saying she did not consent’.⁵⁵

Both the trial judge and the Court of Appeal considered that any prejudice to the accused from holding a joint trial could be reduced by careful directions to the jury about the limited purpose for which they could use the evidence, that they could not engage in propensity reasoning and had to be satisfied there was no concoction between the complainants before accepting their evidence.⁵⁶

However, the High Court allowed the appeal⁵⁷ on the grounds that the evidence of each complainant was not cross-admissible as similar fact evidence since it was not relevant, and even if it was, it lacked the requisite degree of similarity for its probative value to outweigh its prejudicial effect. In effect, the High Court held that the Court of Appeal had not properly identified the legal issues on which the appeal turned.

53 Ibid 316 [39] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ), quoting the trial judge. As argued by the prosecution at trial, it is possible, in broad terms, for similar accusations to be made for a court to conclude the evidence shows the objective improbability of six girls making similar complaints *even though* each girl’s evidence might not meet the strict terms of the striking similarities test which focuses on the need for a high degree of similarities in the offender’s modus operandi (such as his strategies for targeting victims and the places in which he committed the offences) as well as the actual offending behaviour (such as the type of sexual assault, the type of weapon used, use of restraints). The striking similarities test is discussed further below.

54 *R v PS* [2004] QCA 347 (24 September 2004) [81] (Williams JA).

55 Ibid [65] (Williams JA), Cullinane and Jones JJ agreeing.

56 Ibid [67]–[69] (Williams JA).

57 The High Court ordered that separate trials be conducted in relation to counts 2, 4, 5, 6 and 8 in *Phillips* (2006) 225 CLR 303, 329 [88] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ). This would have resulted in five separate trials except that only two of the complainants were willing to participate in a re-trial.

V THE HIGH COURT'S ANALYSIS OF *PHILLIPS*: THE RELEVANCE OF THE EVIDENCE

The High Court began its analysis by identifying the facts in issue in relation to each count (see Table 1) since the admission of similar fact evidence is dependent on it being relevant to one or more of the facts in issue. The Court concluded that the trial judge had wrongly admitted the evidence of each complainant as being relevant to the issue of consent.

This meant that the admission of the evidence, ostensibly on the issue of consent, 'left open the risk of the evidence having a prejudicial effect on issues other than consent'.⁵⁸ The problem identified by the Court was the fact that '[n]ormally similar fact evidence is used to assist on issues relating only to the conduct and mental state of an accused'.⁵⁹ When evidence from multiple complainants is admitted because it is considered to be relevant to consent, the High Court said that such evidence can only be relevant to the mental state of the *complainant* (whether or not they consented) which is not a fact in issue:

To tell the jury that the evidence went to the improbability of each complainant lying or being unreliable about consent was to say that a lack of consent by five complainants tended to establish lack of consent by the sixth. ... Whether or not similar fact evidence could ever be used in relation to consent in sexual cases, it could not be done validly in this case. It is impossible to see how, on the question of whether one complainant consented, the other complainants' evidence that they did not consent has any probative value. It does not prove any disposition on the part of the accused.⁶⁰

Whilst it is true that the evidence could not be used to prove a disposition or tendency of the accused to act in a particular way with teenage girls, the High Court's argument misstates the type of inferential reasoning that is permitted in relation to the relevance test, which is the same at common law and under the UEA.⁶¹ For example, the High Court considered that:

In assessing whether the prosecution had removed any reasonable doubt [about SW's lack of consent to intercourse], of what probative value was it that BS said that nearly a year earlier she had not consented to ... vaginal intercourse after not offering him any encouragement at all? Or that TK said that four months earlier she had not consented ... ? Or that ML said that about three months earlier she had not consented ... ?⁶²

In other words, the High Court rejected the improbability of lies argument that had been argued at trial and endorsed by the trial judge. The High Court's reasoning

58 Ibid 318 [45] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

59 Ibid [46].

60 Ibid [46]–[47].

61 Ibid 319 [50].

62 Ibid 319 [48].

has been challenged by the suggestion that '[a] person who is accused of rape six times in the space of three years may be the victim of sheer bad luck, but common experience strongly suggests otherwise ... [in that it is] the person's propensity to rape that is the common cause of the multiple allegations'.⁶³ Whilst that is a tempting analysis, it was one rejected by the High Court. Whether or not Phillips *did* have a propensity to rape was one of the issues up for proof in the joint trial which, therefore, precluded any legal argument being made that the evidence of the six complainants showed that he had a tendency to rape teenage girls. The circularity of such reasoning was described by the High Court in *Sutton v R* (1984) 152 CLR 528 and *Thompson v R* (1989) 86 ALR 1 where it was emphasised that in considering similarities between two or more events, a trial judge cannot use a point of similarity which is a fact in issue in the trial and, therefore, up for proof:

It is a canon of logic, rather than of law, that one cannot prove a fact by a chain of reasoning which assumes the truth of that fact. ... When the Crown seeks to tender similar fact evidence as the foundation for inferring a fact to be proved in a trial, it is erroneous to assume the truth of the fact to be proved in determining the cogency of the evidence.⁶⁴

For example, Phillips admitted to having sexual intercourse with BS although BS said she did not consent. It is circular, therefore, to argue that Phillips' alleged sexual assault of BS shows that he has a propensity to rape since lack of consent by BS is the issue the prosecution has to prove beyond reasonable doubt. Until the jury found him guilty, Phillips was not a rapist and the evidence of BS could not be used to show he had a propensity to rape.⁶⁵ Thus, propensity or tendency reasoning, as suggested by the Tasmania Law Reform Institute, Gans and Hamer,⁶⁶ does not represent a possible reply to the High Court's objections to the evidence of the six complainants. In addition, similar fact evidence by a number of complainants is not admitted for the purposes of assessing the number of people a defendant may or may not have had sexual relations with or the success of those relations.⁶⁷

The alternative argument is based, not on propensity reasoning, nor on the improbability of lies argument used by the prosecution in the trial. In fact, this article argues that the evidence can be conceptualised in a different way by

63 Jeremy Gans, 'Similar Facts after Phillips' (2006) 30 *Criminal Law Journal* 224, 229. See also David Hamer, 'Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious' (2007) *UNSW Law Journal* 609, 621–2; Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper No 15 (2009) 80.

64 *Sutton v R* (1984) 152 CLR 528, 552 (Brennan J). See also *Thompson v R* (1989) 169 CLR 1, 12 (Mason CJ and Dawson J).

65 It is only where the propensity evidence in question (if admissible) has been proved by way of a prior conviction *or* where the propensity evidence is given by a witness who is not a complainant in the trial that the evidence can be used to show propensity. See, eg, the facts in *Thompson* (1989) 169 CLR 1 (previous convictions for murder) and *Joiner v R* (2002) 133 A Crim R 90 (witnesses who gave evidence of the defendant's violent behaviour in domestic relationships).

66 See above n 63.

67 See Gans, above n 63.

showing the improbability of consent being given in a particular *context* which, in *Phillips*, involved a pattern of predatory behaviour. In other words, if the evidence is led to go to a fact in issue *other than* consent, even if irrelevant to consent, it will still be admissible.⁶⁸ The key feature of the evidence of the six complainants in *Phillips* is that it reveals a pattern of sexual aggression, force and/or violence on the part of the defendant. Arguably, this pattern was a *fact relevant* to each of the three facts in issue:

consent;

- mistaken belief as to consent; and
- the actus reus.

This pattern of aggression included:⁶⁹

- BS said that Phillips ‘forced her mouth over his penis’, ‘tried to pull her pants down and became fairly aggressive’ then lay on top of her with his hand over her mouth and had sex with her while she yelled ‘loudly for him to stop’;
- TK reported that he threw her onto a bed, forcibly removed her clothing then held her down on the bed as he penetrated her although she cried and told him to stop;
- ML gave evidence that she passed out due to alcohol consumption and woke up with Phillips having sexual intercourse with her, that she screamed and swore at him, and was left with marks and scratches on her back;
- SW, who was a virgin, testified that she had initially engaged in sexual relations with Phillips consensually although she said ‘he made her put her mouth’ over his penis, and she became scared when he pushed her head down and pushed him away. Phillips then penetrated her vaginally although she told him to stop and was crying;
- MM said that Phillips raised a baseball bat towards her, ordered her to get into a room and take off her shirt and threatened her with the bat when she refused to take off her clothes. She began to cry and he again threatened her with the bat until she performed fellatio on him and took her pants off whereupon Phillips pushed her onto a bed and had sex with her;
- JD alleged that Phillips touched her without her consent, offered her money to take her shirt off and then threatened her with a thick chain. When she tried to leave his house he blocked her way, grabbed her wrists, picked her up, carried her to a garden shed and tried to push her through the window of the shed until his mother interrupted him because of JD’s screaming and swearing.

But is there any authority for the argument that it was improbable for consent to be given in a context of violence, force and aggression?

68 *WA v Osborne* [2007] WASCA 183, [27] (Wheeler JA).

69 *R v PS* [2004] QCA 347 (24 September 2004) [7]–[41] (Williams JA).

VI A COMPARISON OF THE APPROACH IN *PHILLIPS* WITH OTHER JURISDICTIONS — THE RELEVANCE INQUIRY

In *Phillips*, ‘[n]either the courts below nor counsel for the respondent cited any case in which similar fact evidence of complainants who said that they did not consent was led to show that another complainant had not consented’.⁷⁰ This appears to have been something that counsel for the Crown was not able to adequately prepare for since the issue was ‘raised by the Court’ rather than defence counsel.⁷¹ Because of this, the High Court’s analysis proceeded on the basis that no such cases existed. Yet a body of case law on the admission of similar fact evidence in joint sexual assault trials can be found in other jurisdictions, most notably England and Canada.

An examination of this case law would, arguably, have produced a different outcome in *Phillips*. The lack of any such analysis in *Phillips* means that it is important that this case law be documented here, including the different reasoning processes the High Court might have engaged in had it referred to these cases. The importance of this analysis is evident from recent comments made by Kellam J in *R v Hakeem* [2006] VSC 265. In referring to the above quote from *Phillips* and the apparent lack of applicable case law, His Honour held that even though the prosecution sought to argue that the evidence of multiple complainants was cross-admissible in relation to the issue of consent, the authority of *Phillips* meant that ‘such evidence is not probative and is irrelevant’.⁷² What this article considers in the following analysis is whether this view is correct, particularly in light of the recent acknowledgement by Heydon J that:

Phillip’s Case is one of the most criticised decisions of the High Court of all time. There are other authorities that support it and there are other authorities that are out of line with it. It may be that they are all reconcilable, but *Phillip’s Case* is not a sort of granite mountain that is sharp and immovable.⁷³

70 *Phillips* (2006) 225 CLR 303, 318 [47] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

71 Hamer, above n 63, 617.

72 *R v Hakeem* (2006) 163 A Crim R 549, 564 [99] (Kellam J). This case involved eight complainants and 37 counts of sexual assault, violence and robbery. It is only in relation to some of the counts that consent was the fact in issue. Where the defendant denied the charges, identity was the main fact in issue. Other cases that have followed the reasoning in *Phillips* include: *R v MAP* [2006] QCA 220; *Bellemore v Tasmania* (2006) 16 Tas R 364, [110] (Slicer J); *R v Forbes* [2006] ACTSC 37, [3]–[6] (Gray J); *R v BBG* (2007) 174 A Crim R 86; *R v WAH* [2009] QCA 263; *R v Pazmino* [2010] ACTSC 148, [90] (Higgins CJ). Cases that have distinguished *Phillips* include *R v Nagi* [2009] NSWDC 77; *JMP v R* [2010] QDC 162; *Osborne v Western Australia* [2007] WASCA 183; *R v Wallace* (2008) 100 SASR 119; *Horsman v Western Australia* (2008) 187 A Crim R 565; *Stublely v Western Australia* [2010] WASCA 36, although Pullen JA in dissent followed *Phillips*. The WA Court of Appeal has largely distinguished *Phillips* on the grounds that the *Evidence Act 1906* (WA) s 31A has modified the common law and *Phillips* was a case that did not examine the changes made by s 31A.

73 Transcript of Proceedings, *Stublely v State of Western Australia* [2010] HCATrans 269 (20 October 2010) 23. What *Phillips* had to say about relevance and consent was also used in argument before the High Court: at 269. The High Court quashed Stublely’s convictions and ordered a re-trial but the judgment has not yet been handed down.

In *R v Wilmot*,⁷⁴ the English Court of Appeal took a different approach to the High Court in relation to the admissibility of the evidence of six complainants who had alleged that Wilmot had raped them. At the outset, Glidewell LJ observed that ‘it has been suggested sometimes that such evidence can never be admissible in relation to the defence of consent’.⁷⁵ However, His Lordship considered that where a defendant admits or it is proved that he had sexual intercourse with a number of different women, ‘the question whether it is proved that one of them did not consent may in part be answered by proving that another of the women did not consent if the circumstances bear a striking similarity’.⁷⁶

In *Wilmot*, five out of the six complainants were prostitutes and all had been picked up by the defendant on the street. However, like *Phillips*, identity was not a fact in issue since the defendant admitted to picking them up, having consensual sex then robbing them. The prosecution argued that the similarities between each complainant’s evidence arose out of the similar circumstances surrounding each sexual assault where each woman was taken to a quiet and secluded place and subjected to violence inflicting physical injury then theft of her belongings.⁷⁷

In relation to these similarities, the trial judge had observed that it:

is as plain as a pikestaff that violence in relation to any one of these complaints, if proved, will be powerful evidence of non-consent, as indeed will the proof of robbery ... The real and acid question is whether proof of violence and/or robbery in one case is properly admissible in proving lack of consent in another case where evidence will be given both of violence and robbery.⁷⁸

This ‘acid question’ was answered in the negative with the trial judge holding that the evidence was not cross-admissible because evidence from complainant A did not prove lack of consent in relation to complainant B.⁷⁹ On appeal, Glidewell LJ described the similarities in the complainants’ evidence as a distinctive pattern which on their own might not be striking but when added together gave the evidence its relevance:

In each case, the defendant was in a car ... [H]e picked up a girl; he took her to a quiet place [of his choosing]; it was one of two places in each case ... In every case, save one, the girl was a prostitute. So far it may properly be said that there is nothing very out of the ordinary in what he did ... But the other features which appear ... are less usual. They are the use of violence before having sexual intercourse — the use of whatever weapon he had to inflict the violence ... and theft of the girl’s belongings. That pattern is consistent in [all] the accounts ... [and] is sufficiently unusual

74 *R v Wilmot* (1989) 89 Cr App R 341.

75 *Ibid* 345.

76 *Ibid* (Glidewell LJ).

77 *Ibid*.

78 *Ibid*, quoting the trial judge.

79 The initial decision of the trial judge was that the evidence was not cross-admissible, a decision that was later reversed on the second day of the trial: *ibid* 346 (Glidewell LJ).

and sufficiently strikingly similar for it ... to be said that the evidence of one incident was properly admissible in order to prove the offence in another incident ... and so throughout the pattern. It is the pattern of behaviour ... which is all important [and its admission] was necessary in the interests of justice.⁸⁰

This reasoning is the type of analysis that was rejected by the High Court in *Phillips* on the basis that the evidence of the state of mind of one complainant was not relevant to the state of mind of another complainant about whether or not she consented. However, Glidewell LJ clearly characterised the relevance inquiry quite differently. Because it was held that the evidence of the appellant's pattern of behaviour was sufficiently strikingly similar for it to be cross-admissible, His Lordship, therefore, considered the evidence to be relevant as corroborative evidence.⁸¹ In other words, each complainant's account of violence and theft was held to corroborate the evidence of violence and theft by each other complainant which was *a fact relevant* to the fact in issue, namely consent.

It could be argued that *Wilmot* is not applicable to a case like *Phillips* because the cases are distinguishable on the facts. But that would be a superficial analysis which does not recognise the distinct similarities between the cases as well as the legal principle that *Wilmot* stands for. It is also an argument that does not recognise that differences arise, in part, by categorising the sexual conduct of the defendant as generally similar or specifically different. This type of manipulation means that, in any two cases, a defendant's conduct can appear quite dissimilar or completely similar.

For example, when comparing the facts in *Phillips* and *Wilmot*, *Wilmot* can be distinguished because it concerned complainants unknown to the defendant, most of whom were prostitutes picked up in the defendant's car. Robbery was also involved in each alleged sexual assault. To consider that *Wilmot* has no application because of these dissimilarities compared to the facts in *Phillips* would be to ignore the common legal issue in the two cases and the similarities that the sex offender literature would identify. In other words, the facts in *Wilmot* and *Phillips* reveal the alleged serial nature of the sex offending by each defendant. This is not for the purposes of showing the defendant had a propensity to rape but to show that the allegations occurred in a particular context of violence, aggression or force from which it is inferred that the complainants did not consent. Importantly, the two cases grappled with the same legal reasoning — to show how, in a joint trial, the evidence of each complainant was cross-admissible to prove lack of consent by explaining the similarities in the circumstances by reference to the defendant's conduct.

These similarities were also apparent in the Victorian Court of Appeal case of *Rajakaruna* [2004] VSCA 114 which held that the evidence of one rape complainant could be used as similar fact evidence to support the evidence of the

80 Ibid 348.

81 The evidence of multiple complaints was also held to be relevant to the issue of lack of consent in *R v Z* [2000] 2 AC 483, 487 (Lord Hope).

other rape complainant. Both women were prostitutes who had been taken by the defendant to the same garage beneath a block of flats. In each case, he had refused to pay for sex and had sexually assaulted the women using force. Similar to the reasoning in *Wilmot*, the Court of Appeal considered that:

the similarity of the circumstances of the offending as described by both rape complainants was such as to provide powerful probative force, over and above any prejudicial effect, and to support a conclusion that it was so improbable that they were both liars that the offences had been proved to the appropriate standard.⁸²

Although Eames JA did not further expand on the reasoning behind this finding, His Honour's focus on the circumstances in which each alleged sexual assault occurred suggests a link was being made between those circumstances (violence and force used to obtain sex for free from two prostitutes) and the unlikelihood of the complainants consenting in such circumstances so that each complainant's evidence of violence and force was considered to corroborate the other complainant's evidence of violence and force. This may be described as 'a classic case in which similar fact evidence is admitted on the basis of relevance independent of a propensity chain of reasoning'.⁸³

By far the most detailed account of why similar fact evidence from two or more complainants is relevant to consent in a sexual assault trial has been given by the Canadian Supreme Court in *R v Handy* [2002] 2 SCR 908. The accused was charged with sexual assault causing actual bodily harm after the complainant said she had consented to vaginal intercourse but not hurtful or anal sex. The trial judge had admitted similar fact evidence 'from the accused's former wife to the effect that the accused ha[d] a propensity to inflict painful sex, including anal sex, and when aroused [would] not take no for an answer'.⁸⁴ The Crown had argued that the 'common thread' in the evidence of the complainant and the ex-wife was that the accused 'derives pleasure from inflicting pain on a sexual partner and insists on sex "his way" irrespective of consent' from which it can be inferred that 'he proceeded wilfully in this case knowing the complainant did not consent'.⁸⁵

The Canadian Supreme Court took a different approach to the High Court in *Phillips* when it examined whether the evidence of the accused's ex-wife could be admissible as similar fact evidence. Like the High Court in *Phillips*, the Supreme Court considered that identification of the 'issue in question' was an 'important control' in relation to the admissibility of similar fact evidence. In other words, 'whether or not probative value exceeds prejudicial effect can only be determined in light of the *purpose* for which the evidence is proffered'.⁸⁶

The evidence from the accused's ex-wife, which showed that the defendant refused to take no for an answer, was held to be relevant to whether the accused

82 *R v Rajakaruna* (2004) 8 VR 340, 365 (Eames JA), Smith AJA agreeing.

83 Arensen, above n 46, 50.

84 *R v Handy* [2002] 2 SCR 908, 909.

85 *Ibid* [24]–[26] (Binnie J).

86 *Ibid* [69] (Binnie J) (emphasis in original).

proceeded to ignore the *complainant's* refusal to have anal sex and to proceed against her wishes. Although the evidence from the ex-wife in this case was ultimately held to be inadmissible because its probative value was not considered to be sufficiently high to overcome its prejudicial effect, the reasoning as to *why* it was relevant was similar to that used in *Wilmot* and *Rajakaruna*. In other words, the ex-wife's evidence that the defendant enjoyed painful sex and refused to take no for an answer was relevant to whether the defendant ignored the complainant's refusal to have anal sex and proceeded against her wishes. It was relevant as corroborative evidence by supporting the complainant's account and increasing the probability that the complainant did not consent 'in closely comparable circumstances'.⁸⁷ Thus, the purpose for admitting the evidence was *not* to show the defendant had a propensity to rape but to use the evidence as being relevant to a fact (the context or circumstances in which the alleged assault occurred) which, in turn, was relevant to the fact in issue (lack of consent) since the circumstances in which alleged sexual assault occurs is always relevant to whether or not a complainant consented. As well, the context or circumstances are important to show the nature of the relations between the victim and defendant within which the alleged sexual assault occurred since sexual assault does not come out of nowhere — victims tend to be specifically targeted or groomed.⁸⁸

On the issue of the probative value of the evidence versus its prejudicial effect, the Supreme Court had regard to the similarities between the evidence of the complainant and the evidence of the ex-wife. At the same time, the Court observed that it was important to distinguish between the degree of similarity required when the identity of the offender is in issue, and when the issue is not identification but the *actus reus* of the offence. On this point, the Court observed:

[it] is not that the degree of similarity in such a case must be *higher* or *lower* than in an identification case. The point is that the issue is *different*, and the drivers of cogency in relation to the desired inferences will therefore not be the same.⁸⁹

The Court recognised that when it comes to sex, 'sexual activity may not show much diversity or distinctiveness'⁹⁰ such that the search for a particular 'signature' or hallmark in relation to sex offending is quite unrealistic. It is also unrealistic because:

when people seek sexual gratification, they do not do so in precisely the same way on every occasion. There is plainly a range of different types of acts which will be engaged in by a person, during the course of a sexual encounter, or during the course of a number of sexual encounters.⁹¹

87 Ibid [120] (Binnie J).

88 Sex offenders tend to target particular groups of women, men or children, even though they may differ in their chosen targets. Miethe, Olson and Mitchell, above n 2, 207; Hanson and Morton-Bourgon, above n 2, 1154, 1160; Greenberg et al, above n 2, 1486.

89 *R v Handy* [2002] 2 SCR 908, [78] (Binnie J) (emphasis in original).

90 Ibid [127] (Binnie J).

91 *Western Australia v Osborne* [2007] WASCA 183, [18] (Wheeler JA).

For these reasons, the similarities must be looked for in the circumstances of the offending rather than being confined to the actual sexual behaviour itself, a mistake made by the High Court in *Phillips* when they characterised the sexual behaviour of Phillips with six complainants as being ‘entirely unremarkable’ and lacking sufficient similarities.⁹²

When the Canadian Supreme Court in *Handy* analysed the circumstances as described by the complainant and the defendant’s ex-wife, it rejected the ex-wife’s evidence as similar fact evidence because the sexual behaviour alleged by the ex-wife ‘occurred in the course of a long-term dysfunctional marriage whereas the charge relate[d] to a one-night stand following a chance meeting of casual acquaintances in a bar’.⁹³ In other words, the *circumstances* were not considered to be sufficiently similar. Unlike the High Court in *Phillips*, the Supreme Court undertook a detailed analysis of a series of ‘connecting factors’ derived from the case law. These factors included:

- (i) the proximity in time of the similar acts — ‘the evidence of the [accused’s] inability to take no for an answer gains cogency both from its repetition over many years and its most recent manifestation a couple of months before the offence charged’;⁹⁴
- (ii) the extent to which other acts are similar in detail to the charged conduct — although the Court recognised that the search for similarities is a question of degree, ‘[s]exual activity may not show much diversity or distinctiveness’;⁹⁵
- (iii) the number of occurrences of the similar acts — ‘[a]n alleged pattern of conduct may gain strength in the number of instances that compose it’;⁹⁶
- (iv) the circumstances surrounding or relating to the similar acts;
- (v) any distinctive feature(s) unifying the incidents — the sexual behaviour and the surrounding circumstances were not considered to be ‘highly distinctive’. Rather, ‘[c]ogency was said to derive from repetition rather than distinctiveness’.⁹⁷

Using the Canadian Supreme Court’s list of ‘connecting factors’ it is possible to make a similar analysis in relation to the facts in *Phillips*. At the same time, it is recognised that where a defendant is known to the complainant, the defendant’s use of violence, threats or force is likely to vary depending on the reaction of the complainant in question as well as the different social settings in which each complainant is targeted and the number of other people in the vicinity. This analysis shows five key similarities in the evidence of the six complainants in *Phillips*:

92 *Phillips v The Queen* (2006) 22 CLR 303, 321 [56] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

93 *Handy* [2002] 2 SCR 908, [129] (Binnie J).

94 *Ibid* [122] (Binnie J).

95 *Ibid* [127].

96 *Ibid* [128].

97 *Ibid* [131].

- (i) the proximity in time of the similar acts — the evidence of Phillips' inability to take no for an answer gains cogency because of its repetition over a two and a half year period and its most recent manifestation (assault with intent to rape) even after he had been charged in relation to the other five complaints;
- (ii) the extent to which other acts are similar in detail to the charged conduct — while 'sexual activity may not show much diversity or distinctiveness', five complainants alleged sexual behaviour with the use of force, violence or threats of violence; the count involving assault with intent to rape also involved force and violence;
- (iii) the number of occurrences of the similar acts — because 'an alleged pattern of conduct may gain strength in the number of instances that compose it' the evidence gains part of its cogency from repetition — eight counts over a two and a half year period;
- (iv) the circumstances surrounding or relating to the similar acts — as argued by the prosecution, all the complainants were within Phillips' extended circle of acquaintances and all similar acts occurred at a party they and Phillips had attended, or an invented party to which Phillips had invited the complainant;
- (v) any distinctive feature(s) unifying the incidents — although the sexual conduct itself was not 'highly distinctive', it was associated with distinctive *behaviour* in the form of force, violence or threats of force.

Arguably, the similarities in the *circumstances* of each count of sexual assault were sufficient to give the evidence of all six complainants in *Phillips* the required degree of connection to be admissible as relevant similar fact evidence.

The analysis by the Canadian Supreme Court, together with that in *Wilmot* and *Rajakaruna*, shows that the relevance inquiry in relation to multiple complaints is more complex than the way it was characterised by the High Court in *Phillips* and in subsequent case law.⁹⁸ The approach in *Handy* focuses on similarities in the circumstances of the alleged sexual assaults rather than in the sexual conduct itself. This is more in tune with the reality of the phenomenon of sexual assault which does not necessarily show the high degree of similarity that many judges, perhaps influenced by the more graphic cases of sexual assault, expect.

When informed about the actual range of behaviour of serial sex offenders, it can be argued that the evidence from two or more complainants about an alleged serial offender's sexual proclivities, his treatment of the complainants and/or his use of weapons or other forms of violence must be relevant to more than merely the mental states of the complainants, as argued by the High Court in *Phillips*.

For example, does evidence that the defendant has been the subject of five other allegations of sexual assault involving aggression, force and/or violence over two

98 See above n 72. This was recently recognised by Wheeler JA in *Western Australia v Osborne* [2007] WASCA 183, [27], Miller JA agreeing.

and a half years rationally affect the assessment of the probability that the first complaint occurred in *circumstances* of aggression and force? Arguably, it does since relevance is a relatively low threshold test.⁹⁹ This fact is, in turn, relevant to the probability of the existence of lack of consent (where Phillips said the sexual relations were consensual) or to the probability that the sexual acts occurred (where Phillips denied the sexual acts).

In other words, the evidence illustrates a pattern of behaviour by Phillips which is inconsistent with consent having been given by each complainant because it shows the objective improbability that so many women would have described sexual behaviour involving aggression and force and yet have given their consent. It is clear that a person's behaviour during the sexual interaction (such as crying, screaming or resisting) as well as the accused's behaviour (such as the use of force or weapons) is relevant to consent because it is reasoned that consent is less likely to occur when there is evidence of either force, resistance or both.¹⁰⁰

Using this chain of reasoning it can be argued that the evidence from the complainants TK, ML, SW, MM and JD about Phillips' use of violence, threats or force corroborates the testimony of BS that she was subject to violence and force. Their evidence increases the probability that the defendant used force in relation to BS which, in turn, is relevant to whether or not BS consented.¹⁰¹ This conclusion is able to be sustained because the complainants did not know each other and there was no evidence of collusion or contamination of their evidence.

This chain of reasoning can also be used in relation to the other fact in issue in relation to some of the counts in *Phillips* — did the sexual intercourse occur?¹⁰² For example, does the sexual pattern of aggression and force described by BS (forced oral sex, forced undressing) make it more likely that the sexual pattern of aggression described by TK occurred (forced undressing, thrown on bed and held down on bed) and that, in turn, the non-consensual sexual act alleged by TK occurred? Arguably, BS' evidence increases the likelihood that the sexual pattern of aggression described by TK occurred which in turn increases the likelihood that the sexual act complained of by TK occurred.

A recent decision in which *Phillips* was distinguished can be understood on the basis of this reasoning in relation to whether or not the evidence of three women who complained of being violently sexually assaulted by the defendant should have been cross-admissible.¹⁰³ Although the appellant argued there were

99 *Papakosmas v R* (1999) 196 CLR 297.

100 As noted in *R v Wilmot* (1989) 89 Cr App R 341, 345 (Glidewell LJ), quoting the trial judge: 'it is plain as a pikestaff that violence in relation to ... complaints, if proved, will be powerful evidence of non-consent'.

101 Although Hamer, above n 63, 616 states that Phillips' disposition to have sexual contact with threats or force was clearly relevant to lack of consent of a particular complainant, he does not explain how the relevance inquiry works in relation to consent, nor does he explain the significance of the evidence of each complainant as corroborative evidence.

102 Whether or not the sexual conduct occurred was the first fact in issue for counts 3, 6, 7 and 8 (which involved complainants TK, MM and JD).

103 *R v Wallace* (2008) 100 SASR 119.

significant differences between the three complainants' accounts, Vanstone J considered that:

some differences are inevitable in circumstances such as these where the way events developed depended not only on the appellant and his conduct, but also on the reactions to him of all the complainants ... The use of the plastic bag and tie in relation to C₃ was an important difference, but on the other hand, could have represented an escalation of the appellant's conduct, or could have been perceived by him to be necessary because of her reaction to his conduct. It did not necessarily represent a deviation from the pattern ... I agree ... that, here, the relevance of the evidence went beyond the issue of consent. Therefore *Phillips*' case is distinguishable. In my opinion, notwithstanding the differences, there was indeed a pattern common to all three episodes such as to raise, as a matter of common sense and experience, the objective improbability of the events having occurred other than as alleged by the prosecution.¹⁰⁴

Although Vanstone J did not say so specifically, arguably the evidence of the similar way in which the defendant approached the women, the place where the sexual assaults took place, the marked change in the defendant's manner from pleasant and friendly to being like 'an animal', the violence accompanying the assaults and the defendant's odd behaviour afterwards were all relevant to show the context in which the sexual assaults occurred. Based on the improbability of three women giving consent in the circumstances of violence they described, each complainant's evidence was relevant (and, therefore, cross-admissible) to show lack of consent by each other complainant.

VII SUFFICIENT SIMILARITIES — THE PROBATIVE VALUE OF THE EVIDENCE

Even though the High Court concluded that the evidence of each complainant was *not* cross-admissible because of lack of relevance, there was another issue examined by the High Court in *Phillips*. The issue of striking similarities arose because the Court decided to examine the prosecution's argument that the evidence of each complainant gained its probative value not from any 'unusual hallmark' but from the number of complaints made of a particular type of sexual assault.¹⁰⁵ In fact, this type of argument made by the prosecution in *Phillips*, asserting that the evidence of each complainant was relevant as similar fact evidence, is typical of sexual assault cases where the victims know their offender:

The present cluster of relevant similarities between each complainant's version becomes compelling not through any unusual hallmark but

¹⁰⁴ Ibid 136–7 [95]–[98].

¹⁰⁵ *Phillips* (2006) 225 CLR 303, 320 [51] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ). Once the striking similarities test has been satisfied, only then is the *Pfennig* test applied (which assesses the probative value of the evidence versus its prejudicial effect). They are two separate stages or tests.

because, out of all the infinite variety of allegations and descriptions that could be invented, this combination of features of a particular type of sexual assault is repeated by so many different women from within a defined group, but independent of each other.¹⁰⁶

The High Court rejected this argument because of the lack of a ‘pattern’ or ‘common thread’ to the evidence since ‘a fundamental aspect of the requirements for admissibility ... [is] the need for similar fact evidence to possess ... “a strong degree of probative force.”’¹⁰⁷ While the striking similarities test is a test of ‘probative strength’,¹⁰⁸ it is not necessary to point to striking similarities or to an underlying unity between the propensity evidence and the charged event.¹⁰⁹ However, there must be a ‘specific connection’¹¹⁰ or a ‘sufficient nexus’¹¹¹ between the two bodies of evidence which ‘illustrat[es] the high degree of probative value required. Because without such a nexus it is hard to imagine how so demanding a test for admissibility could be met’.¹¹²

However, the process of looking for striking similarities or an underlying unity is not a mathematical exercise but an inquiry based on subjective experience which will be particularly important in sexual assault trials because of the variety of views that people, including judges, hold about normal versus abnormal sexual behaviour. For example, in *Pfennig*, Mason CJ, Deane and Dawson JJ observed:

the prejudicial effect that the law is concerned to guard against is the possibility that the jury will treat the similar facts as establishing an inference of guilt where neither *logic nor experience* would necessitate the conclusion that it clearly points to the guilt of the accused.¹¹³

Both logic and experience will vary depending on judges’ beliefs about the phenomenon of sexual assault in Australian society. In *Phillips*, the High Court considered that the evidence did not have the specific connection with the commission of the offence charged to give it the strong probative value required:

Take count 8, assaulting JD with intent to rape her. Where is the strong degree of probative force necessary to permit the exceptional reception of evidence that in earlier years the appellant had indecently assaulted or raped five other complainants? ... What was there about the prejudicial evidence which showed that on five earlier occasions the appellant had a strong desire for sexual intercourse (with consent if he could get it, without

106 Ibid 320 [51] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

107 *Phillips* (2006) 225 CLR 303, 320 [54] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ), quoting *DPP (UK) v Boardman* [1975] AC 421, 444 (Lord Wilberforce).

108 Ligertwood and Edmond, above n 35, 165.

109 *Pfennig* (1995) 182 CLR 461, 484 (Mason CJ, Deane and Dawson JJ).

110 Ibid 485 (Mason CJ, Deane and Dawson JJ).

111 *Phillips* (2006) 225 CLR 303, 320 [54] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

112 *R v Curran* [2006] SASC 388 (21 December 2006) [11] (Vanstone J).

113 *Pfennig* (1995) 182 CLR 46, 482 (emphasis added).

it if he could not) which caused its probative value clearly to transcend the prejudicial effect?¹¹⁴

From a different subjective viewpoint, however, the evidence in this case does meet all the standards set by the High Court, particularly given the more realistic view that ‘sexual activity may not show much diversity or distinctiveness’.¹¹⁵ The High Court was disturbed by the fact that the similarities in the evidence were not ‘striking’ and ‘were entirely unremarkable’.¹¹⁶ This view raises the question why the Court, comprised of five male judges, considered it was entirely unremarkable for a male teenager to allegedly seek sex with teenage girls using force, violence or threats of violence when Phillips’ alleged behaviour shows all the hallmarks of a serial sex offender.¹¹⁷ Since the ‘striking similarities’ test assesses the strength of the probative value of the evidence, it is merely another, albeit more exacting, relevance test. It is, therefore, incumbent on courts to recognise the subjectivity inherent in the test and to consider the limitations of their knowledge about sex offenders and how they operate.

What is remarkable about the evidence is that it demonstrates a pattern of predatory behaviour whereby each complainant was targeted by the defendant, manipulated into being alone with him, including the invention of a party where necessary, approached sexually and subject to either force, violence or threats if she did not comply with his wishes. This predatory behaviour is entirely remarkable, in that it represents the behaviour of a serial sexual offender who targets particular victims, rather than the expected behaviour of a teenage boy negotiating sex with peers, and shows a pattern of behaviour that was premeditated and planned. As argued by the Queensland Director of Public Prosecutions on appeal to the High Court, Phillips’ behaviour showed an escalation in violence and the use of force over time.¹¹⁸ In fact:

Such behaviour is, clearly ‘remarkable’ in any ordinary usage of the word. Most men will never engage in it. ... Behaviour of that kind, while all too commonly seen in the criminal courts, is, nevertheless, very remarkable, unusual, and widely condemned.¹¹⁹

Where identity is not a fact in issue, is it necessary to use the high standard represented by the ‘striking similarities’ test when determining the probative value of two or more complainants’ evidence in a sexual assault trial?

That question can be informed by what is known about the phenomenon of sexual assault in Australia. Contrary to popular belief, the majority of sexual

114 *Phillips* (2006) 225 CLR 303, 321 [55] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

115 *R v Handy* [2002] 2 SCR 908, [127] (Binnie J).

116 *Phillips* (2006) 225 CLR 303, 321 [56] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

117 Salter, above n 11; Cossins, above n 16; Beaugard et al, above n 10.

118 Transcript of Proceedings, *Phillips v R* [2005] HCATrans 919 (11 November 2005).

119 *Western Australia v Osborne* [2007] WASC 183 (5 September 2007) [35] (Wheeler JA). See also Gans, above n 63, 229; Hamer, above n 63, 626.

assaults are not perpetrated by strangers¹²⁰ and are committed against young girls between the ages of 0–19 years, with the majority of victims being under the age of 16 years. Most perpetrators are known to the victim, with strangers accounting for between 3.6 per cent to 30.8 per cent of perpetrators, depending on the age group, as shown in Table 3.¹²¹ This means that in the majority of sexual assault cases involving young victims, identity will not be a fact in issue.

Table 3

Strangers as a Proportion of Perpetrators of Sexual Assault in Relation to Children & Adolescents¹²²

Jurisdiction	Children aged 0–9 years (%)	Children aged 10–14 years (%)	Adolescents aged 15–19 years (%)
New South Wales	3.6	10.0	22.2
Victoria	6.4	10.2	18.9
Queensland	15.7	21.3	28.9
South Australia	7.3	14.6	20.7
Tasmania	9.1	12.5	28.1
Northern Territory	8.7	4.5	30.8
Australian Capital Territory	0.0	9.3	26.7

The requirement of ‘striking similarities’¹²³ partly developed in relation to a group of cases where the identity of the accused was a central fact in issue and where the specific features of the offender’s conduct in other circumstances as well as the circumstances giving rise to the charges in question were used to establish a sufficient degree of similarity for identity to be proved. Similar fact evidence has often been admitted in murder or attempted murder cases in which there are striking similarities or unusual features in terms of the modus operandi of the perpetrator, such as babies buried in backyards,¹²⁴ gunshot wounds to the head and incineration with petrol,¹²⁵ the attempted abduction of a hitch-hiker near

120 This fact is evident from both victim-report studies, see Cossins, above n 16, and recorded crime statistics, see: Australian Bureau of Statistics, above n 6, Tables 1–7; Australian Bureau of Statistics, above n 16, 46.

121 The data for Tasmania, the Northern Territory and the Australian Capital Territory on the proportion of strangers as perpetrators are likely to be more variable because of the lower *relative* number of sexual assaults reported in those jurisdictions compared to New South Wales and Victoria.

122 Percentages calculated using data from Australian Bureau of Statistics, above n 6, Tables 1–7. No data for Western Australia was available.

123 *DPP v Boardman* [1975] AC 421 is considered to be the ‘turning point’ for allowing for the admissibility of evidence based on striking similarities: Ligertwood and Edmond, above n 35, 142–3.

124 *Makin v A-G (NSW)* [1894] AC 57.

125 *Thompson v R* (1989) 169 CLR 1.

the forest where other hitch-hikers' bodies were found¹²⁶ and child abduction in a white Kombi van.¹²⁷

Similarity of conduct does not play the same role in cases where there is no dispute about the identity of the offender, particularly where the defendant admits the acts alleged but denies consent or intention.¹²⁸ The 'striking similarities' test ought to be discarded in cases where identity is not a fact in issue for the reasons set out by Lord Mackay in *Director of Public Prosecutions v P*:

Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called ... a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle.¹²⁹

When it comes to child sexual assault, for example, similarity ought to be assessed by reference to what the research literature tells us — that evidence of any sexual practices with a child is predictive of an offender engaging in sexual practices with another child irrespective of the sex or the age of the child.¹³⁰ Nonetheless, common law cases¹³¹ show that some judges have engaged in an artificial analysis of the particular types of sexual conduct with one victim compared to another victim (oral versus anal sex, vaginal versus anal sex and so on) in order to decide whether the evidence of two or more complainants is admissible. Yet the search for a particular 'signature' in terms of sexual behaviour is incongruent with the variability of sex offending behaviour.

Where identity is not a fact in issue, the artificiality of the 'striking similarities' test means that, in assessing the probative value of the evidence of sexual assault complainants, there will be higher or lower degrees of similarity depending on what a judge knows about sex offending behaviour. Because each offender's sexual behaviour will depend on the age and the sex of the victim, the degree

126 *R v Milat* (Unreported, Supreme Court of New South Wales, Hunt CJ, 5 September 1996).

127 *Pfennig* (1995) 182 CLR 461.

128 See, eg, the facts in *R v Hakeem* (2006) 163 A Crim R 459 where the defendant, a stranger to all eight complainants, admitted some sexual acts and denied others. Where he denied them, the fact in issue was identity.

129 [1991] 2 AC 447, 462. The striking similarities test has been abolished in England under the *Criminal Justice Act 2003* (UK) c 44, s 109 and in Western Australia under the *Evidence Act 1906* (WA) s 31A.

130 In an analysis of 61 recidivism studies involving nearly 29 000 sex offenders, Hanson and Bussière identified the factors that significantly correlated with recidivism: R Karl Hanson and Monique T Bussière, 'Predictors of Sexual Offender Recidivism: A Meta-Analysis' (Research Paper, Department of the Solicitor General of Canada, 1996); R Karl Hanson and Monique T Bussière, 'Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies' (1998) 66(2) *Journal of Consulting and Clinical Psychology* 348. These included sexual arousal to children, any deviant sexual preference and prior arrests or convictions for sex offences. Another study involving 400 male child sex offenders found that one of the best predictors of sexual recidivism is a previous sex offence, irrespective of the age and sex of the child: Greenberg et al, above n 2, 1485.

131 See, eg, *R v KP; Ex parte A-G (Qld)* [2006] QCA 301 (22 August 2006); *R v Rajakaruna* (2004) 8 VR 340; *Phillips* (2006) 225 CLR 303; *R v BBG* (2007) A Crim R 86. Cf *R v Ford* [2006] QCA 142 (5 May 2006).

of access to the victim, and the victim's reactions, there is generally a *range* of sexual conduct and grooming behaviour that any one offender engages in which may include the phenomenon of escalation.¹³² A trial judge who is largely ignorant of this information may look for greater degrees of similarity in the evidence compared to a judge who is aware of the variety of ways in which sex offenders gain a victim's trust and affection and the different sexual practices an offender will engage in as a function of opportunity as well as the sex and age of the victim.¹³³ For example, where the victim is a child, the offender will often begin with 'accidental' sexual touching of the genitals while the child is clothed, progressing to exposure of his genitals, asking the child to touch him, touching of the child's genitals, digital penetration and then perhaps penile penetration.

An offender may be interrupted at any of these stages and/or the child may appear to acquiesce in relation to certain sexual touching and object to others. This pattern was evident, for example, in *R v KP; Ex parte Attorney-General (Qld)*,¹³⁴ a case which illustrates the complexity of sex offender behaviour since it involved four different children. Three were male and all were of different ages. The two older boys were unrelated to the defendant whilst the two younger ones, a two year old girl and a six month old baby boy, were the defendant's children. Nonetheless, the Queensland Court of Appeal focused on the need to find that the sexual practices of the defendant with the oldest complainant, a 12 year old boy, were more or less identical to the sexual practices of the defendant with the younger children before their evidence would be considered to be cross-admissible in a joint trial. This approach illustrates the Court of Appeal's lack of knowledge about the grooming practices of child sex offenders and the way in which sexual contact with children escalates from minor touching to more serious forms of abuse such as penetration over a period of time.

VIII PROBATIVE VALUE VERSUS PREJUDICIAL EFFECT

The answer to this article's claim that the striking similarities test should be discarded in sexual assault trials will be met with the counter-claim that this test ensures that similar fact evidence has the required degree of probative value to make it just to admit it notwithstanding its prejudicial effect. In other words:

The 'admission of similar fact evidence ... is exceptional and requires a strong degree of probative force'. ... It is only admissible where its

132 Lucy Berliner and Jon R Conte, 'The Process of Victimization: The Victims' Perspective' (1990) 14(1) *Child Abuse & Neglect* 29; Colton and Vanstone, above n 2; John Jay College of Criminal Justice, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States* (United States Conference of Catholic Bishops, 2004).

133 Jon R Conte, Steven Wolf and Tim Smith, 'What Sexual Offenders Tell Us about Prevention Strategies' (1989) 13(2) *Child Abuse & Neglect* 293; Berliner and Conte, above n 132; Colton and Vanstone, above n 2; John Jay College of Criminal Justice, above n 132; Joe Sullivan and Anthony Beech, 'Professional Perpetrators: Sex Offenders Who Use Their Employment to Target and Sexually Abuse the Children with Whom They Work' (2002) 11(3) *Child Abuse Review* 153.

134 [2006] QCA 301 (22 August 2006).

probative force ‘clearly transcends its merely prejudicial effect’. ... The probative force must be ‘sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused’.¹³⁵

Since we do not have access to jury deliberations, jury verdicts are one measure of the prejudicial impact of the evidence. For example, if the evidence was as prejudicial as the High Court claimed, why did the jury not find Phillips guilty on *all* counts? Whilst common sense dictates that this type of evidence is highly prejudicial because of the danger of improper use of the evidence by the jury, and there is some empirical evidence to support this view,¹³⁶ there has been very little acknowledgement by judges of the opposing evidence that shows that jurors hold a range of beliefs and prejudices that favour the accused in a sexual assault trial.¹³⁷

In particular, two recent jury studies have shown that jurors’ pre-existing attitudes about sexual assault influence their decisions *more than* the facts of the case and the manner in which the evidence was given.¹³⁸ Coupled with the finding from another study that jurors in child sexual assault trials did not consider the testimony of the complainant to be evidence,¹³⁹ as well as the impact of the CSI-effect on juries,¹⁴⁰ the influence of pre-existing attitudes on juror decision-making cannot be discounted, including the possibility that the prejudicial effect of propensity and similar fact evidence may be counteracted by jurors’ beliefs and expectations. Prejudicial evidence given by multiple complainants is only one of many issues taken into account by juries, and the possible discounting of complainants’ evidence, as reported by Blackwell, cannot be ignored. It is also worth noting a joint trial can be advantageous to a defendant where counsel decides to run a defence based on concoction between the complainants since the presentation of such a defence only makes sense if ‘put before the same jury’.¹⁴¹

135 *Phillips* (2006) 225 CLR 303, 320 [54] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) (citations omitted).

136 See Jill Hunter, Camille Cameron and Terese Henning, *Litigation II: Evidence and Criminal Process* (LexisNexis Butterworths, 7th ed, 2005) 1309–10. Note that the jury studies mentioned here were not conducted in relation to sexual assault trials.

137 Douglas D Koski, ‘Jury Decisionmaking in Rape Trials: A Review and Empirical Assessment’ (2002) 38(1) *Criminal Law Bulletin* 21; Natalie Taylor and Jacqueline Joudo, ‘The Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study’ (Research and Public Policy Series No 68, Australian Institute of Criminology, 2005); Natalie Taylor, ‘Juror Attitudes and Biases in Sexual Assault Cases’ (Trends & Issues in Crime and Criminal Justice No 344, Australian Institute of Criminology, 2007); Anne Cossins, ‘Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us’ (2008) 15(1) *Psychiatry, Psychology and Law* 153.

138 Taylor, above n 137.

139 Blackwell, above n 14.

140 Crime programs on television, such as ‘CSI’, have been shown to influence laypeople’s expectations and their assessment of the validity of certain types of evidence presented in trials: N J Schweitzer and Michael J Saks, ‘The CSI Effect: Popular Fiction about Forensic Science Affects the Public’s Expectations about Real Forensic Science’ (2007) 47 *Jurimetrics* 357; Jane Goodman-Delahunty and David Tait, ‘DNA and the Changing Face of Justice’ (2006) 38(2) *Australian Journal of Forensic Sciences* 97.

141 *R v WAH* [2009] QCA 263 (8 September 2009) [41] (Keane JA).

Essentially, ‘the test of prejudicial effect is whether [the evidence] involves the risk of an unfair trial’.¹⁴² There is a growing judicial view that such evidence is not likely to be as prejudicial as is claimed — the reasoning that there is a real risk that a jury will focus on allegations of other criminal conduct by the accused fails to recognise that juries are capable of making rational decisions, if properly instructed as to the use to which the evidence can be put and warned about impermissible forms of reasoning.¹⁴³

Although the High Court stated that ‘the prejudice to the fair trial of the appellant was substantial’ if the evidence of all six complainants was admitted in one trial,¹⁴⁴ this view is not supported by the jury’s findings. Because of the mixed verdicts delivered by the jury, the Queensland Court of Appeal noted that ‘the jury did differentiate between complainants as evidenced by the “not guilty” verdicts’.¹⁴⁵ This suggests that juries in a joint trial are capable of assessing the evidence that pertains to each count separately, rather than using prejudicial propensity reasoning to arrive at their verdicts as Wheeler JA observed:

it is the common experience of the Court that, in cases of sexual offences where a number of counts are joined ... juries will return verdicts of guilty in relation to some, and verdicts of not guilty in relation to others. To that extent, experience teaches that a direction warning against impermissible reasoning is likely to be accepted [by the jury].¹⁴⁶

Similarly, in *R v Wallace*, Vanstone J acknowledged:

The fact that there were acquittals in relation to some of the charges ... demonstrates the care with which the jury were instructed to, and did, apply the evidence of each complainant in relation to the others and the particular attention given by the jury to the matter of consent on each occasion.¹⁴⁷

The other issue that arises as a result of the decision in *Phillips* is the High Court’s reaffirmation of the *Pfennig* test (the ‘no rational view of the evidence’ test) as the test of admissibility for similar fact evidence once it has been shown to have ‘striking similarities’. Inferentially, this also means that, when a court is considering whether there is a rational view of the evidence consistent with the innocence of the accused, the High Court reaffirmed that one of the factors to be

142 *R v PWD* [2010] NSWCCA 209 (17 September 2010) [71] (Beazley JA), Buddin J and Barr AJ agreeing. See also Ligertwood and Edmond, above n 35, 163.

143 *R v PWD* [2010] NSWCCA 209 (17 September 2010) [90] (Beazley JA), Buddin J and Barr AJ agreeing. See also *R v H* [1995] 2 AC 596; *WKD v WA* (2005) 31 WAR 122; *VIM v WA* (2005) 31 WAR 1; *Di Lena v WA* (2006) 165 A Crim R 482. The question as to whether juries should receive instructions which counteract their prejudices and beliefs is of course another issue which is not within the scope of this article but is addressed elsewhere: Jane Goodman-Delahunty, Anne Cossins and Kate O’Brien, ‘Enhancing the Credibility of Complainants in Child Sexual Assault Trials: The Effect of Expert Evidence and Judicial Directions’ (2010) 28(6) *Behavioral Sciences & the Law* 769.

144 *Phillips* (2006) 225 CLR 303, 327 [78] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

145 *R v PS* [2004] QCA 347 (24 September 2004) [79] (Williams JA).

146 *Western Australia v Osborne* [2007] WASCA 183 (5 September 2007) [39].

147 (2008) 100 SASR 119, [98].

taken into account is whether or not the evidence was affected by concoction or collusion.¹⁴⁸

IX THE REFORM ISSUES ARISING FROM *PHILLIPS*

Phillips has been followed or affirmed in a number of cases¹⁴⁹ and the case has already had an impact on the frequency of joint trials in some jurisdictions. In Queensland, it is now considered that *Phillips* ‘emphasises that *ordinarily* there will be separate trials of sexual allegations’.¹⁵⁰ For example, in *R v MAP* [2006] QCA 220, the reasoning in *Phillips* was used by the Queensland Court of Appeal to order separate trials in relation to two complainants whose descriptions of the alleged sexual assaults by the defendant were remarkably similar. In making this decision, Keane JA (with whom McMurdo P and Jones J agreed) stated that the issue of cross-admissibility ‘is to be determined in accordance with the principles stated’ in *Pfennig* and *Phillips*.¹⁵¹ Arguably, however, the Court of Appeal went too far in its literal interpretation of the principles in *Phillips* and what the case stands for. Because the facts in *MAP* involved the alleged sexual assault of two young teenage girls, aged 15 years, in a bedroom while other people were sleeping, Keane JA considered that:

it is significant for the proper determination of this appeal that the High Court in *Phillips* ... specifically regarded as insufficient for this purpose similar fact evidence indicative of an accused’s ‘recklessness in persisting with [offending] conduct near other people who might be attracted by vocal protests’. On the approach taken ... in *Phillips* ... the brazen opportunism in which the appellant engaged in this case, if the complainants are to be believed, *would be characterised as ‘unremarkable and not uncommon’* for the purpose of determining whether this evidence had sufficient [striking similarities and] probative force to displace the exclusionary rule.¹⁵²

148 Although the High Court, in *Phillips* (2006) 225 CLR 303, 322–3 [59]–[62] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ), criticised the Queensland Court of Appeal’s re-interpretation of the *Pfennig* test in *R v O’Keefe* [2000] 1 Qd R 564, the *Pfennig* test was not a barrier to admissibility since there was no evidence that the six complainants had concocted their evidence. The barrier to admissibility was the apparent lack of relevance and lack of ‘striking similarities’ in the sexual conduct of the defendant. The High Court did not engage in any criticism of the *Pfennig* test as it has been applied in sexual assault trials, most notably in *Hoch* (1988) 165 CLR 292. Note that even though the Court of Criminal Appeal in *R v Ellis* (2003) 58 NSWLR 700 considered that the *Pfennig* test was not to be used as a substitute for the balancing test under s 101(2) of the UEA, Spigelman CJ acknowledged that the *Pfennig* test will not always be *inappropriate* in the construction of s 101(2) since ‘[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’: at 718 [96]. Such cases include those in which the issue of concoction or collusion arises. In fact, the *Pfennig* test has been applied in several New South Wales, Australian Capital Territory and Tasmanian cases since *R v Ellis*.

149 See above n 72.

150 *R v MAH* [2009] QCA 263 (8 September 2009) [21] (Keane JA), quoting the trial judge (emphasis added).

151 *R v MAP* [2006] QCA 220 (21 June 2006) [38] (*‘MAP’*).

152 *Ibid* [44] (emphasis added) (citations omitted).

Not only is this an uncalled for interpretation of *Phillips*, it is contradictory in that ‘brazen’ conduct is apparently unremarkable and common. It also sends a message to prosecutors that it will be difficult, if not impossible, to join allegations involving teenagers who are sexually assaulted by their peers because of the so-called unremarkability of the sexual assaults which may mean such cases do not proceed to trial. Yet, according to the Australian Bureau of Statistics, in Queensland victims in the age range 15–19 years are more likely to be sexually assaulted by a partner or acquaintance than any other type of offender.¹⁵³ Unfortunately, for teenagers in Queensland who experience sexual assault, it appears that only ‘remarkable’ sexual behaviour will pass the new *Phillips* test for determining whether or not joint trials ought to be held. As a result of the decision in *Phillips* and its interpretation in subsequent cases, it is likely that joint trials will become less frequent in Queensland and elsewhere, resulting in more separate trials and more acquittals.¹⁵⁴

The Western Australian Parliament recognised that a common sense approach to serial sex offending ought to be taken to the issue of joint trials when it introduced a package of reforms in 2004.¹⁵⁵ They were specifically designed to address the limitations of the criminal justice system when dealing with sexual assault, to encourage more women and children to report and to improve victims’ experiences during the court process. In his Second Reading Speech, the then Western Australian Attorney-General stated that the reforms were ‘unashamedly for victims’ by ensuring that victims of sexual assault would not be re-victimised.¹⁵⁶ In particular, it was envisaged that the amendments would change the way that sexual assault trials were conducted where there is an alleged serial offender in order to prevent the jury from operating ‘in a vacuum’ by being unaware that the accused has been charged with multiple offences involving more than one complainant.¹⁵⁷ Because the amendments were specifically designed to overcome the tests in *Hoch* and *Pfennig*,¹⁵⁸ it was expected that more joint trials would be conducted leading to more propensity/similar fact evidence being admitted in sexual assault trials.

In Western Australia, a judge need not automatically order separate trials of particular offences simply because evidence in relation to some of the charges is not cross-admissible in relation to others. Section 133(5) of the *Criminal Procedure Act 2004* (WA) envisages that the risk of impermissible propensity

153 This is also the case in all other states and territories: Australian Bureau of Statistics, above n 6, Tables 1–7. Whether the Queensland Court of Appeal realised it or not, its application of *Phillips* to the facts in *MAP* allows the objectives of s 597A of the *Criminal Code 1995* (Qld) and s 132A of the *Evidence Act 1977* (Qld) to be circumvented, which, together, aim to prevent courts from taking into account the possibility of concoction when deciding whether to order a joint trial.

154 In order to determine the frequency of joint trials post-*Phillips*, it would be necessary to undertake an empirical study.

155 *Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004* (WA). These reforms took effect on 1 January 2005.

156 Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 June 2004, 4610 (John McGinty, Attorney-General).

157 *Ibid.*

158 *Ibid.*; *Di Lena* (2006) 165 A Crim R 482, 492 [49] (Roberts-Smith JA).

reasoning by juries and, hence, prejudice to the accused can be corrected by an appropriate direction to the jury.¹⁵⁹

The Western Australian Court of Appeal has held that once a trial judge concludes that the evidence of two or more complainants is cross-admissible, there is no other basis on which to find that there would be any likelihood of prejudice and no basis for ordering separate trials. In other words, a finding of cross-admissibility ‘cures’ the prejudice that would otherwise result from impermissible reasoning by the jury.¹⁶⁰ Although the appellant in *Donaldson* had argued that ‘there may yet be particular categories of cases (for example, offences against children) which arouse prejudice of that kind and which therefore should not be tried together even though the evidence may be mutually admissible’,¹⁶¹ the Court of Appeal held that the clear intention behind s 133 was to eliminate such distinctions and enable juries to hear all relevant evidence by holding joint trials.¹⁶²

The other reforms in Western Australia that enhance the likelihood that a joint trial will be held include abolition of the ‘striking similarities’ test and elimination of the issue of concoction when considering the cross-admissibility of propensity evidence.¹⁶³ The Western Australian Court of Appeal has released itself from ‘the bondage of “striking similarity”’,¹⁶⁴ as a result of reforms in Western Australia, by accepting that the evidence of two or more complainants need not show ‘striking similarities’ or sexual interference by the defendant in a particular way.¹⁶⁵ If the evidence in question reveals an underlying unity, system or pattern, that will be sufficient to establish that the evidence has significant probative value under s 31A(2) of the *Evidence Act 1906* (WA), ‘irrespective of what physical acts [were] individually involved’.¹⁶⁶ The Western Australian Court of Appeal has also observed that while the High Court in *Phillips* ‘indicated that intermediate and trial courts should continue to apply *Pfennig*’ in relation to the admissibility

159 *Donaldson v Western Australia* (2005) 31 WAR 122, 151 [146] (Roberts-Smith JA). When considering the likelihood of prejudice, the trial judge *cannot* take into account that the evidence of two or more complainants or witnesses may be the result of collusion or suggestion: *Criminal Procedure Act 2004* (WA) s 133(6).

160 *Donaldson v Western Australia* (2005) 31 WAR 122, 150 [141] (Roberts-Smith JA), Wheeler JA and Miller AJA agreeing.

161 *Ibid* 151 [144] (Roberts-Smith JA).

162 *Ibid* 151 [146] (Roberts-Smith JA). A decision to order or refuse to order separate trials is reviewable on appeal such that the trial will be adjourned until the appeal is determined: *Criminal Procedure Act 2004* (WA) s 133(7). Both the defence and the prosecution can appeal against a decision to refuse or to grant a separate trial, respectively: *Criminal Appeals Act 2004* (WA) s 26. However, leave to appeal is required: at s 27. If convicted, an accused cannot later appeal against his conviction on the grounds that a joint trial was held *if* he has already exercised that right of appeal before his trial: at s 26(4).

163 *Evidence Act 1906* (WA) s 31A. This provision was enacted to deal specifically with the problem associated with admitting propensity evidence in a joint trial. Section 31A(3) overturns the decision in *Hoch* by removing the issue of concoction from the admissibility equation and leaving it to the jury when deciding the weight to be given to the propensity evidence in question: *Wood v Western Australia* [2005] WASCA 179 (20 September 2005) [41]; *Donaldson v Western Australia* (2005) 31 WAR 122, 143 [108] (Roberts-Smith JA); *Di Lena v Western Australia* (2006) 165 A Crim R 482, 493 [51] (Roberts-Smith JA).

164 *R v H* [1995] 2 AC 596, 626 (Lord Lloyd).

165 *Donaldson v Western Australia* (2005) 31 WAR 122, 152 [149] (Roberts-Smith JA).

166 *Ibid*.

of propensity evidence, that decision has no applicability in WA because of the operation of s 31A.¹⁶⁷

Because of:

- (i) the outcome in *Phillips* and the High Court's reinforcement of the strictness of the 'striking similarities' test in sexual assault trials;¹⁶⁸
- (ii) appeal courts' continued applicability of the 'striking similarities' test at common law;
- (iii) the importance of multiple complaint evidence as corroborative evidence in serial offender cases; and
- (iv) the fact that 'sexual activity may not show much diversity or distinctiveness' it is necessary to consider the reform options to overcome the effect of *Phillips*.

On the issue of consent, *Phillips* applies in all jurisdictions in relation to the relevance of multiple complaints of sexual assault to the issue of consent. Because the High Court has decided that the evidence of multiple complainants is not relevant to consent, and, therefore, not cross-admissible, future trials involving multiple complaints where consent is in issue may be more likely to be conducted as separate rather than joint trials.¹⁶⁹ The mistake of course would be to extend this reasoning to child sexual assault trials, the majority of which involve charges where consent is not a fact in issue (unlike *Phillips*). Where the fact in issue is merely whether the defendant committed the sexual conduct alleged, multiple complaints may have the required degree of relevance via tendency reasoning¹⁷⁰ or via improbability reasoning although, as discussed above, the determination of cross-admissibility will be subject to the 'striking similarities' test.

X RECOMMENDATIONS FOR REFORM

In order to remove the 'striking similarities' test as a test of admissibility, the most radical option would be to make evidence of a defendant's charged or uncharged acts of sexual assault prima facie admissible, thus eliminating questions of 'striking similarity', as is the case under rr 413 and 414 of the US *Federal Rules of Evidence* (2010):

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

- (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

¹⁶⁷ *Western Australia v Osborne* [2007] WASCA 183 (5 September 2007) [24] (Wheeler JA).

¹⁶⁸ For reasons of space, the applicability of the 'striking similarities' test under the UEA is not dealt with here, but is the subject of another article.

¹⁶⁹ See above n 72.

¹⁷⁰ *R v PWD* (2010) 205 A Crim R 75.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

- (b) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

The legislative history of these provisions 'is well documented as a quid pro quo to obtain the final vote needed for passage of then President Clinton's expansive crime bill'.¹⁷¹ In the wake of the high-profile William Kennedy Smith rape trial, they were 'intended to carve out exceptions to the traditional character prohibition' on the grounds that sex offences demonstrate a particular disposition not seen in most people.¹⁷² When they were introduced in July 1995, rr 413 and 414 were resisted by the American Bar Association and have been the subject of much academic criticism in the US, particularly given their use to admit character evidence about the accused.¹⁷³ In fact, Imwinkelried considers that rr 413 and 414 and their state counterparts 'represent the sharpest attack ever mounted against the character evidence prohibition in the United States'.¹⁷⁴

Rules 413 and 414 have the potential to admit not only similar fact evidence from multiple complainants but also evidence of previous convictions and charges that are unrelated to the proceedings in question. As such, it is unlikely that similar provisions would be acceptable in Australian evidence law because of the common law's concern to ensure that propensity and similar fact evidence is only admitted where its prejudicial effect is outweighed by its probative value. As well, because rr 413 and 414 incorporate the requirement that the evidence should be relevant, these provisions would not necessarily counteract the effect of *Phillips* on the issue of relevance and consent in sexual assault trials.

Alternatively, a reform option could be drafted in accordance with the reasoning of the Canadian Supreme Court in *Handy*, with the recognition that multiple complaints of sexual assault can be corroborative in nature where there is a sufficient connection in the circumstances associated with the complaints. In this way, it is possible to deal with the two issues raised by the decision in *Phillips* — the need to abolish the striking similarities test in sexual assault trials where the offender is known to the victim and the need to recognise the relevance and, hence, the cross-admissibility of multiple complaints — in the one recommendation as

171 Myrna S Raeder, 'Litigating Sex Crimes in the United States: Has the Last Decade Made Any Difference?' (2009) 6(2) *International Commentary on Evidence* Article 6, 25.

172 Edward J Imwinkelried, 'Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research' (2008) 36 *Southwestern University Law Review* 741, 744. William Kennedy Smith was acquitted in a trial in which the judge had refused to admit evidence from three other women about their experiences of being sexually assaulted by the defendant. A subsequent campaign resulted in the eventual enactment of rr 413 and 414 to address the perceived unfairness of the trial judge's decision to admit the type of allegations made about Kennedy Smith.

173 *Ibid*; Raeder, above n 171.

174 Imwinkelried, above n 172, 744. Despite criticisms of the provisions, Imwinkelried concedes that the United States 'stands virtually alone [in the common law world] in adhering to a strict ban on character reasoning': at 745.

set out below. This recommendation is drafted to apply to both common law and UEA jurisdictions. While there is conflicting authority about whether the striking similarities test applies in UEA jurisdictions,¹⁷⁵ the balance of the case law is in favour of applying this test. For this reason, the following recommendation ought to be considered in UEA jurisdictions, since the relevance requirement is the first hurdle to the admission of the evidence of multiple complainants, whether or not striking similarities is the appropriate test for assessing the degree of probative value.

Recommendation 1

That the following provision be enacted in the relevant criminal procedure legislation of all States and Territories:

- (1) This section applies to proceedings in respect of a prescribed sexual offence and despite any other rule of law to the contrary if two or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].
- (2) In a joint trial involving two or more counts, the evidence of one complainant (the ‘first complainant’) about the alleged sexual acts and behaviour of the defendant, and/or the circumstances giving rise to the sexual acts, is admissible as corroborative evidence in relation to the issue of lack of consent by another complainant (the ‘second complainant’), if there is a sufficient relationship,¹⁷⁶ in terms of the circumstances and events giving rise to the offences, between the evidence of the first and second complainants. These circumstances can include but are not limited to:
 - (i) the proximity in time of the sexual acts;
 - (ii) the number of occurrences of the sexual acts;
 - (iii) the behaviour accompanying the sexual acts, including evidence of the use of intoxicating substances, pornography, force, violence or threats of force or violence; and
 - (iv) the social context surrounding or relating to the sexual acts.
- (3) In considering whether a sufficient relationship exists for the purposes of sub-s (2), it is not open to the court to decide that a sufficient relationship does not exist merely because of an absence of striking similarities in the evidence of the first and second complainants about the sexual acts of the defendant.

175 Some cases have used the test as an essential test of admissibility under the UEA: *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89; *R v Milton* [2004] NSWCCA 195 (18 June 2004); *R v Harker* [2004] NSWCCA 427 (2 December 2004); *R v Fletcher* (2005) 156 A Crim R 308; *R v GAC* (2007) 178 A Crim R 408; *KJR v R* (2007) 173 A Crim R 226; *AE v R* [2008] NSWCCA 52 (20 March 2008); *PNJ v Director of Public Prosecutions* (2010) 27 VR 146. Cf *R v PWD* (2010) 205 A Crim R 75.

176 What amounts to ‘a sufficient relationship’ will vary from case to case depending on the unique facts in each case. However, like other words in other tests at common law and under the UEA, such as ‘striking’ or ‘significant’, the word ‘sufficient’ is not a mathematical formula. Its meaning will develop over time according to the four criteria set out in sub-s (2).

Since the above recommendation applies to sexual assault trials where consent is a fact in issue (which may include cases where the complainant is just under the age of consent), a further reform option is required to abolish the striking similarities test in child sexual assault trials; that is, where consent is *not* a fact in issue. This is necessary since, as already discussed, the striking similarities test has been reaffirmed by *Phillips*. At common law (excluding Western Australia), it will still operate as another test of relevance in relation to the admission of similar fact evidence in child sexual assault trials. Recommendation 2 is based on s 31A(2) of the *Evidence Act 1906* (WA) and is drafted to take into account the behaviour of sex offenders as documented in the psychological literature and discussed in this article. It is designed to abolish the striking similarities test at common law and under the UEA in child sexual assault trials. There is, however, greater controversy in making such a recommendation to amend the UEA given the already existing scheme under the Acts for the admission of tendency and coincidence evidence¹⁷⁷ and the expected reluctance to amending this scheme for child sexual assault trials only.

Recommendation 2

That the following provision be enacted in the relevant criminal procedure legislation of all States and Territories except Western Australia:

(1) This section applies to proceedings in respect of a prescribed child sexual offence and despite any other rule of law to the contrary if two or more counts charging sexual offences involving different complainants are joined in the same indictment [information, presentment].

(2) Definitions:

In this section propensity and tendency evidence means —

evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, to act in a particular way, or to have a particular state of mind;

In this section similar fact evidence means¹⁷⁸ —

evidence which shows the improbability of children giving similar accounts of sexual abuse unless the incidents occurred;

In this section coincidence evidence means¹⁷⁹ —

two or more events being used to prove the improbability of the events occurring coincidentally, having regard to the similarities of the events and/or the circumstances in which they occurred.

177 See UEA pt 3.6.

178 This definition only applies to common law jurisdictions.

179 This definition only applies to UEA jurisdictions.

- (3) In considering whether evidence about the sexual conduct of the defendant is admissible as propensity, tendency, similar fact or coincidence evidence, the court must decide whether:
 - (a) it has significant probative value; and
 - (b) the probative value of the evidence compared to the degree of risk of an unfair trial is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.
- (4) In considering whether evidence about the sexual conduct of the defendant has significant probative value for the purposes of sub-s (2), the court must not have regard to whether the evidence has striking similarities or distinctive recurring features with other evidence about the sexual conduct of the defendant.
- (5) For the purposes of sub-s (2), it will be sufficient for evidence about the sexual conduct of the defendant to have significant probative value if it shows that the defendant has committed charged or uncharged acts of a sexual nature against a child, irrespective of whether the acts involve the same or different sexual conduct on the part of the defendant.

XI CONCLUSION

From a public interest point of view, the community expects the police to investigate cases involving serial sex offending to prevent other children and adolescents from becoming victims. There is also a public interest in encouraging the victims of a serial sex offender to report the assaults to the police. Arguably, the public has an expectation that courts will not only have the ability to deal with cases of serial sex offending but will categorise such cases appropriately by holding joint trials so that juries are aware of the context in which each charge arose.

At the same time, this article has discussed how prejudice to the accused from holding joint trials can be addressed by appropriate and clear directions to jurors about impermissible types of reasoning and how they should use cross-admissible evidence. The important message from Western Australia — a jurisdiction that permits joint trials to be held even if the evidence of two or more complainants is not cross-admissible — is that prejudice to the accused is not inevitable in joint trials, particularly in light of the empirical evidence that shows that jurors hold a range of beliefs about sexual assault that favour the accused.

Despite the public interest reasons for holding joint trials, reforms to increase the frequency of such trials have been circumvented by the High Court decision in *Phillips*. Because the High Court's interpretation of the relevance inquiry in the joint trial in *Phillips* did not take account of existing case law, the ability to hold joint trials in common law jurisdictions in relation to cases of alleged serial sex offending has been affected, according to recent appeal cases.

In order to fill in the gap left by the High Court's failure to refer to applicable case law, this article undertook a detailed analysis of those cases which have allowed the evidence of two or more complainants to be cross-admissible in relation to the issue of consent in a joint trial. While previous critiques of *Phillips* have focused on propensity, this article has demonstrated the circular reasoning involved in that approach. Based on the case law analysis in this article it was possible to show how the relevance inquiry in a joint trial is based on a particular chain of reasoning. This reasoning recognises that *how* an alleged serial sex offender behaves with each complainant and the circumstances and social context of each alleged offence are facts which are relevant to what is often the main fact in issue in a sexual assault trial — lack of consent.

Despite the High Court's characterisation of Phillips' alleged behaviour as 'unremarkable', the evidence of each complainant demonstrated a pattern of predatory behaviour which was entirely remarkable, in that it represented the behaviour of a serial sexual offender whose sexual assaults were premeditated and planned. This indicated that the six complainants' evidence was inconsistent with consent. The evidence was relevant because it corroborated each complainant's story that sex occurred in circumstances of violence, force or threats of force. Thus, the evidence was admissible, not for the purposes of showing the state of mind of each complainant as the High Court argued, but as corroborative evidence to prove the context of violence which was a fact *relevant* to each of the three facts in issue in *Phillips*. Using this chain of reasoning, it was shown that the probability that one complainant did not consent in circumstances of force or aggression was increased by the evidence of five other complainants describing how Phillips used force, violence, threats of violence and aggression with them.

At the same time, the High Court in *Phillips* reinforced the striking similarities test as another, albeit more exacting, test of relevance at common law for the admission of similar fact evidence. Such a high standard is not only unnecessary when identity is not a fact in issue but the search for similarities in the sexual acts of a defendant does not take account of the fact that the behaviour of sex offenders will differ depending on the age and sex of the victims, the degree of access the offender has to the victim, the frequency of the sexual assaults (one-off compared to sexual abuse over months or years), as well as the victim's reactions to sexual touching. This means that a search for similarities must be at a greater level of generality, including a focus on the circumstances of the offending rather than being confined to the actual sexual behaviour itself. At the same time, where the sexual assaults are one-off, the sexual behaviour 'may not show much diversity or distinctiveness',¹⁸⁰ so that courts will not always find the desired hallmark or signature behaviour in cases of serial sexual assault. Using the approach of the Canadian Supreme Court in *Handy* and its list of connecting factors, the similarities in the circumstances of each sexual assault in *Phillips* were, arguably, sufficient to give the evidence of all six complainants the required degree of connection to be admissible as similar fact evidence.

180 *R v Handy* [2002] 2 SCR 908, [127] (Binnie J).

If our highest court is incapable of dealing with the cultural phenomenon of serial sex offending, then it is time for Parliaments around the country to step in. In order to facilitate that, two recommendations are contained in this article which would overturn the decision in *Phillips* regarding consent and abolish the striking similarities test.

Recommendation 1 creates a ‘sufficient relationship’ test, including a list of criteria, for determining whether the evidence of one complainant is relevant to the facts in issue involving another complainant, in particular, lack of consent. This test, based on the factors in *Handy*, focuses on the circumstances surrounding the alleged sexual assault, rather than the similarities in the sexual conduct of the defendant. This test more appropriately addresses the realities of sexual assault by recognising that sexual behaviour ‘may not show diversity or distinctiveness’. If the test is met the evidence of two or more complainants would be cross-admissible as relevant propensity, similar fact or coincidence evidence in a joint trial.

Recommendation 2 introduces a significant probative value test, based on the Western Australian reforms, in order to abolish the striking similarities test in child sexual assault trials involving multiple complainants; that is, in trials where consent is not a fact in issue. In particular, it is based on the psychological literature that shows that any previous sexual behaviour with children is predictive of future sexual behaviour with children.

If enacted, these recommendations are likely to increase the number of joint trials where there is evidence of serial sex offending. This would achieve the desirable public interest goal of prosecuting offences of a serial nature in one trial. This is likely to increase the number of such cases prosecutors send to trial as well as encouraging complainants to report serial sexual assaults and give evidence at trial. From the Western Australian experience, it does not appear that holding more joint trials impedes the defendant’s right to a fair trial since careful directions by trial judges about how juries should use the evidence of two or more complainants is considered to counteract any prejudice to the accused.

Those who are continually sceptical about women and girls who report sexual assault will object to the recommendations made in this article. However, for too long, courts, including the High Court, have made key decisions about the admissibility of evidence in, and the conduct of, sexual assault trials in ignorance of the reality of sexual assault in the Australian community: those who are most vulnerable to sexual assault (children and adolescents), the behaviour of sex offenders and the frequency of serial sex offending. It is as if some courts remain stuck in the nineteenth century in terms of the social problem that sexual assault represents in the Australian community.

Serial offending is remarkably common, with offenders either repeatedly assaulting one victim or having multiple victims.¹⁸¹ In recent times, policing practices have changed to recognise this fact with the establishment of specialist

181 Cossins, above n 16; Salter, above n 11.

crime squads to police serial offenders.¹⁸² It is likely that because of these policing practices, more serial offending cases, involving multiple victims, will come to light. While joint sexual assault trials were made easier by legislative reform in Queensland, Western Australia and Victoria, they are dependent on the finding that the evidence of each complainant is cross-admissible, that is, that the evidence of each complainant is relevant to the facts in issue in relation to the charges involving each other complainant. Unless reform of the type recommended in this article occurs to overturn the decision in *Phillips*, the investment in policing serial sex offenders will be wasted, prosecutors may be less inclined to argue for joint trials and children and adolescents may be at greater risk of sexual assault as a result of the documented lower conviction rate in separate trials.

After the High Court decision in *Phillips*, Daniel Phillips continued his so-called 'unremarkable' sexual behaviour. Although only two re-trials were held, the first resulted in a hung jury while Phillips was convicted of rape in the second trial in 2007. After the second trial, 'sentencing was delayed, as fresh charges had been laid in the meantime. Phillips subsequently pleaded guilty to having twice raped a young woman on 21 May 2006, while on bail following the success of his High Court appeal'.¹⁸³

The Australian community needs a better deal from its High Court than the outcome in *Phillips*.

182 For example, the Child Protection and Sex Crimes Squad in New South Wales was established soon after the Wood Royal Commission handed down its findings in 1997: New South Wales, Royal Commission into the New South Wales Police Service, *Final Report — Volumes I–V: The Paedophile Inquiry* (1997). In addition to New South Wales, there are specialist sex crimes squads in Victoria (the Sexual Crimes Squad), Western Australia (the Police Force has a Sex Crimes Division which includes a Sex Assault Squad) and South Australia (the Sexual Crime Investigation Branch which includes a Paedophile Task Force). Most have been established to police serial sex offenders.

183 Hamer, above n 63, 610.