Propensity Evidence, Similar Facts and the High Court

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Abstract

Notwithstanding that the High Court has considered the similar fact evidence rule in numerous cases over the last decade, there still remains uncertainty as to its theoretical basis and its practical application. In *Pfennig v R* (1995) 127 ALR 99, the High Court had yet another occasion to review the law relating to the admissibility of similar fact and propensity evidence. This article identifies the various theoretical and practical issues in the area of similar fact and propensity evidence and critically analyses the gradual resolution of those issues by the High Court culminating in the decision of *Pfennig*. By comparison, the approach by the English courts to the area is also discussed.

1. Introduction

Similar fact evidence is one area of the law of evidence which has been plagued with controversy and interest.[1] The stakes are high for both the Crown and the accused when the issue of the admissibility of such evidence arises. Some of the difficulties in this area have arisen from the debate concerning the theoretical foundation of the similar fact evidence rule and the interrelationship between the two limbs of *Makin v Attorney-General (NSW)*[2]. Contributing to this confusion has

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1 Hoffman, "Similar Fact after Boardman" (1975) 91 LQR 193; Carter, "Forbidden Reasoning Permissible: Similar Fact Evidence a Decade after Boardman" (1985) 48 MLR 29; Smith and Odgers, "Propensity Evidence — The Continuing Debate" (1987) 3 *Aust Bar Review* 77; Palmer, "The Scope of the Similar Fact Rule" (1994) 16 *Adel LR* 161.

2 [1894] AC 57.

been the misdescription of similar fact evidence and the subjective use of terminology such as propensity evidence, propensity reasoning and probability reasoning.

In *Pfennig v R*[3] the High Court had yet another occasion to review, state and apply the law relating to the admissibility of similar fact evidence, some of the members taking the opportunity to extend their comments to propensity evidence generally. Although the case does to some extent resolve theoretical issues in this area, it is unfortunate, that having regard to the number of cases which have come before the High Court in the last decade or so,[4] Their Honours still are not in complete agreement as to the appropriate test to apply to similar fact evidence and propensity evidence generally.[5]

Of further concern is the uncertainty which the case raises as to the scope of the principles, and whether a special test of admissibility applies to all evidence which the Crown wishes to lead which tends to show that the accused has been guilty of wrongful acts other than those with which the accused is charged.

This article identifies the various theoretical and practical issues in the area of similar fact and propensity evidence and analyses the resolution of those issues by the High Court.

2. Similar Fact Evidence Vs Propensity Evidence

The joint judgment of Mason CJ, Deane and Dawson JJ in *Pfennig*[6] recognised that the term "similar fact" evidence is often used in a "general but inaccurate sense". Their Honours acknowledged that there is no one term which satisfactorily describes evidence which is admitted notwithstanding it discloses the commission of offences other than those with which the accused is charged. Their Honours said:

> It is always propensity evidence but it may be propensity evidence which falls within the category of similiar fact evidence, relationship evidence or identity evidence.[7]

The learned authors of *Cross on Evidence*, also note the inaccuracy of the terminology but rather than abandon the terminology explain it as connoting evidence "showing the discreditable disposition (propensity to act, think or feel in a

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3 (1995) 127 ALR 99.

4 *Perry v R* (1982) 150 CLR 580; *Sutton v R* (1984) 152 CLR 528; *Hoch v R* (1988) 165 CLR 292; *Harriman v R* (1989) 167 CLR 590; *Thompson v R* (1989) 169 CLR 1; *S v R* (1989) 168 CLR 266; *B v R* (1992) 175 CLR 599.

5 A joint judgment was given by Mason CJ, Deane and Dawson JJ. Toohey J and McHugh J delivered separate judgments.

6 (1995) 127 ALR 99 at 101.

7 *Ibid.*

particular way) of ... usually the accused as derived from his discreditable acts, record, possessions, or reputation."[8]

Similar fact evidence in its strict sense refers to evidence which reveals that on another occasion, the accused acted in a particular way in a particular situation, which is tendered to prove that the accused acted in similar way on the occasion in question.[9]

The distinction may be more than academic. In *Pfennig*, the joint judgment shows an unwillingness to adopt the inaccurate terminology, referring throughout the judgment to both "similar fact" and "propensity evidence".[10] McHugh J suggests that a different test or at least a different standard of proof may apply as between similar fact evidence and other propensity evidence.[11] This will be pursued later. For the purposes of this article the term "propensity evidence" will be used as incorporating similar fact evidence in the strict sense.

And what of the term "propensity evidence" to which these special rules of admissibility apply? Is it all evidence which tends to show the commission of other offences, as McHugh J suggests[12], or is it limited to evidence of the commission of other offences where the propensity which is thereby disclosed is being relied upon to prove guilt? In considering this issue, account must be taken of the factual context in which the two statements of principle were made and the fact that propensity evidence "is objectionable not for what it proves but for the way in which it proves it".[13]

Again, this point is far from academic in its potential widening of the scope of the exclusionary rules and its variance with the current practice of criminal courts.

3. *Makin v Attorney-General (NSW)*

All discussions on the admissibility of propensity evidence have as their foundation the two statements of principle from *Makin*[14]. It has been noted that there is a

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8 Byrne and Heydon, *Cross on Evidence* Australian Edition Butterworths 1991 Volume 1 para. 21001.

9 See definition in Waight and Williams, *Evidence, Commentary and Materials* 4th Ed. The Law Book Co 1995 p387 and discussion in *Harriman v R* (1989) 167 CLR 590 at 609 per Toohey J.

10 Examples can be found at the following references: (1995) 127 ALR 99 at 109,113 and 114.

11 *Ibid* at 148.

12 *Ibid* at 137.

13 Australian Law Reform Commission, *Evidence Research Paper No. 11* (1982) at 47 quoted with approval by Murphy J in *Perry v R* (1982) 159 CLR 580 at 592.

14 [1894] AC 57 at 65 per Lord Herschell LC stated:—

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused"

tension or internal contradiction between the two statements. His Honour Justice Murphy stated it thus:

> If, despite the exclusionary rule contained in the first sentence, evidence of propensity can be admitted where it is relevant in accordance with the second sentence, the relevancy standard is so broad as to render the statement meaningless.[15]

Similarly, the joint judgment in *Pfennig* noted that the use of the word "relevant" partly created the tension as the second principle "seemed to imply that propensity evidence was not as such irrelevant(sic) to the determination of the crime charged, rather it was relevant but inadmissible for some overriding policy reason, ie that in many cases its prejudicial effect outweighed its probative effect."[16]

Early cases held that propensity evidence was inadmissible unless it went to some issue other than disposition. The Courts developed categories of exceptional cases where propensity evidence would be admitted because of its relevance otherwise than by mere propensity, for example to prove identity, knowledge or system or to rebut a defence of mistake or innocent association.

However, in *DPP v Boardman*[17] the House of Lords rejected earlier interpretations of *Makin* to the effect that propensity evidence was inherently irrelevant unless it went to some issue other than disposition as indicated in identifiable categories. Instead the House of Lords recognised that such propensity evidence may be so relevant in its own nature, that it may pass the test of admissibility, that is the prejudice to the accused is outweighed by the probative force of the evidence.[18]

In *Markby v R*[19], the position in Australia was made uncertain by reference in a reformulation of the similar fact evidence rule that to be admissible the evidence "must be relevant in some other way ... than that he has committed crimes in the past or has a criminal disposition."[20] And so the debate in Australia continued. As acknowledged in the joint judgment in *Pfennig*, the insistence on relevance to "some other issue" for the admissibility of propensity evidence "contributed to a misunderstanding of the *Makin* principles and to statements of principles which lacked a clear and coherent theoretical foundation".[21]

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15 *Perry v R* (1982) 150 CLR 580 at 593.
16 (1995) 127 ALR 99 at 109.
17 [1975] AC 421.
18 *Ibid* at 456 per Lord Cross.
19 (1978) 140 CLR 108.
20 *Ibid* at 116 per Gibbs ACJ.
21 (1995) 127 ALR 99 at 113.

4. *R v Pfennig*

4.1 The facts

Pfennig, in accordance with the above discussion is accurately described as a similar fact evidence case.

The accused was convicted of the murder of a 10 year old boy M. The case was entirely circumstantial as his body was never found. In brief, the evidence disclosed the following:— M was last seen in the Sturt Reserve on the Murray River at 2.25pm on the day in question; M's clothes, bicycle, bag and fishing rod were found neatly stacked on the same afternoon at the Thiele Reserve on the other side of the river; M had been seen talking to a man prior to his disappearance; the accused admitted talking to M at the Sturt Reserve; a white Kombie van similar to that driven by the accused was seen leaving the Sturt reserve at about 2.45pm on the relevant day and was also seen at the Thiele reserve later on that day; M was unlikely to have gone swimming at the Thiele reserve; and extensive river searches disclosed no body.

The accused's counsel conceded that the only two possible explanations for M's disappearance were that he drowned or was abducted. The trial judge found that drowning was not a reasonable possibility having regard to a number of matters including M's attitude to swimming in that location on that day and evidence from the divers that there was only a remote possibility they would have failed to find a body. That issue was not contested on appeal.

The issue that was in dispute and the subject of appeal was the admission of the evidence of H, a 13 year-old boy who, on the accused's own plea of guilty, was abducted and raped by the accused 12 months after M's disappearance. Relevant facts of this offence included, the use of a white Kombie van to abduct H and his bicycle and the placing of H's bike some distance away from the pick up location, apparently to lay a false trail. H managed to escape from the accused's home where he had been held against his will. The trial judge admitted this evidence, and that of the accused's wife that the accused had told her, in respect to the H incident, he had been "thinking" about doing "it" for 12 months and did it because he was lonely.

His Honour admitted the evidence on the basis that its high probative value transcended its prejudicial effect. The test which His Honour applied to come to that conclusion was "the same test as a jury must apply in dealing with circumstantial evidence, and ask whether there is a rational view of the evidence that is inconsistent with the guilt of the accused."[22] The trial judge admitted the evidence with the instruction to the jury that it could not be used to prove there had been an abduction. However, if the jury rejected drowning as a reasonable possibility and accepted that M was abducted and murdered, they could use the evidence of H to determine whether it was the accused who committed those offences.

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22 *Ibid* at 107 per Mason CJ, Deane and Dawson JJ citing the trial judge.

In relation to this direction, McHugh J considered that too narrow a view was taken and that the evidence could have been used to establish both the identity of the offender and the fact of abduction.[23] The joint judgment also expressed doubt as to the correctness of the limitation.[24]

The accused appealed on the basis that H's evidence was wrongly admitted because the evidence did not prove guilt on any basis other than propensity as there was an absence of striking similarity between the conduct disclosed by H's evidence and the alleged offence. The grounds of appeal make a number of assumptions: that propensity evidence can not found a basis of guilt; that evidence must be relevant to an issue on a basis other than propensity; and that striking similarity is a pre-requisite to the admission of similar fact evidence.

4.2 High Court judgments

All judges considered that the evidence was correctly admitted and dismissed the appeal. An examination of the various judgments reveals both consensus and disagreement as to the theoretical and practical approaches to be adopted to similar fact evidence and propensity evidence in general.

4.2.1 The joint judgment

The joint judgment of Mason CJ, Deane and Dawson JJ, is a straight forward judgment, approving and applying the principles as reformulated and authoritatively stated in *Hoch*.[25]

Their Honours approved statements in *Hoch*[26] that the basis for admission of similar fact evidence lies in its possessing a particular value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged. Mason CJ, Deane and Dawson JJ said:[27]

> In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged.

This criterion of admissibility appears at variance in its specificity to the more general test previously put forward by the High Court that the probative force of the evidence must clearly transcend the mere prejudicial effect.[28] This greater specificity was seen as necessary because otherwise "striking the balance will

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23 *Ibid* at 152.
24 *Ibid* at 119–120.
25 (1988) 165 CLR 292.
26 *Ibid* at 294 per Mason CJ, Wilson and Gaudron JJ.
27 *Pfennig* (1995) 127 ALR 99 at 113.
28 *Perry* (1982) 150 CLR 580 at 609; *Sutton* (1984) 152 CLR 528 at 548–9; *Harriman* (1989) 167 CLR 590 at 633; *Hoch* (1988) 165 CLR 292 at 300.

continue to resemble the exercise of a discretion rather than the application of a principle".[29]

In narrowing the test for admissibility, the circumstantial nature of propensity evidence has played a dominant role. Thus it should not be used to draw an inference adverse to the accused unless it is the only reasonable inference in the circumstances and ought not be admitted if, viewed in the context of the prosecution case, there is a reasonable view of it which is consistent with innocence.[30] Only if there is no such view can one conclude that the probative force of the evidence outweighs its prejudicial effect.[31]

The potential prejudice which the joint judgment identified was the "undue impact, adverse to an accused, that the evidence may have on the mind of the jury over and above the impact that it might be expected to have if consideration were confined to its probative force."[32] In particular, an ordinary person may think that a person who has an established propensity may yield to that propensity in the particular case and may ignore the possibility that persons of like propensity may have committed the offence.[33] In Their Honours' view propensity evidence has always been treated as evidence which has or is likely to have this prejudicial effect.[34]

Their Honours approved the approach in the landmark decision of *DPP* v *Boardman*[35] where the House of Lords rejected earlier interpretations of *Makin* to the effect that propensity evidence was inadmissible unless it went to some issue other than disposition as indicated in identified categories, such as to negative accident or mistake, or prove identity.[36] In *Pfennig*, Their Honours approved Dawson J's interpretation in *Harriman v R*[37] that Lord Herschell was pointing to the high degree of relevance required to render propensity evidence admissible rather than to the requirement of relevance of a different kind.[38]

To achieve this enhanced relevance, the evidence of propensity needs to have "a specific connection" with the commission of the offence charged.[39] That connection may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it.[40] Their Honours noted that "striking similarity, underlying unity or "signature" pattern common to the incidents" may provide

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29 *Pfennig* (1995) 127 ALR 99 at 115.
30 *Ibid* at 116.
31 *Ibid* at 114.
32 *Ibid* at 118.
33 *Ibid.*
34 *Ibid.*
35 [1975] AC 421.
36 *Ibid* at 456 per Lord Cross.
37 (1989) 167 CLR 590 at 598–9.
38 *Ibid* at 115.
39 *Ibid* at 115–116 and 118.
40 *Ibid* at 116.

that cogency.[41] However Their Honours rejected that such descriptions were an essential pre-requisite to the admission of propensity evidence[42], noting that such approach conforms with the current position in the United Kingdom[43], New Zealand[44] and Canada[45].

The possibility of concoction or collusion may adversely affect the cogency of the evidence[46]. The state of dispute concerning the facts proving the similar fact or propensity evidence impacts on the cogency of the evidence. Obviously the probative value of disputed similar facts is less than the probative value those facts would have if undisputed.[47] So too where the facts constituting the offence at hand are proved by direct evidence, the cogency of the propensity evidence is greater than where the Crown case is circumstantial and inferential as in *Pfennig*[48].

In relation to the required connection between the propensity evidence and the offence at hand, Their Honours found that H's evidence and the wife's evidence disclosed that the accused had a disposition to abduct boys for sexual purposes and was prepared to put effect to that disposition when an opportunity arose. The evidence of events at the Reserve, if accepted, established that such an opportunity did arise at the time M disappeared.[49] Their Honours found, although previously noting that it is not a pre-requisite characteristic of propensity evidence, that there was a pattern of similarity or underlying unity between the two incidents involving H and M, notwithstanding there was but one other incident and that it occurred 12 months later.[50]

In relation to the overall probative force of the evidence, Their Honours concluded that H's evidence (which was not disputed) had the requisite degree of probative force such, that once M's drowning was excluded, there was no reasonable view of the evidence which was consistent with the accused's innocence.[51] H's evidence demonstrated not only propensity and criminality but also established the accused's modus operandi.

Although, the case was one of similar fact evidence, Their Honours tend to treat propensity evidence and similar fact evidence as requiring the same test of

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41 *Ibid* at 120.
42 *Ibid* at 115.
43 *DPP v P* [1991] 2 AC 447.
44 *R v McIntosh* (1991) 8 CRNZ 514; *R v Accused* (1991) 7 CRNZ 604.
45 *R v B(CR)* (1990) 55 CCC (3d) 1.
46 *Hoch* (1988) 165 CLR 292; *Pfennig* (1995) 127 ALR 99 at 114. *cf R v H* [1995] 2 All ER 865, where it was held that the possibility of collusion was not sufficient to warrant exclusion. Evidence is admissible where a jury could accept that it was not contaminated and the similarity is sufficiently strong to support the truth of the charge.
47 *Pfennig* (1995) 127 ALR 99 at 114; *Hoch* (1988) 165 CLR 292 at 295 per Mason CJ, Wilson and Gaudron JJ.
48 *Ibid* at 118.
49 *Ibid* at 117.
50 It is clear that it does not matter whether "similar facts" occurred earlier or later. *Ibid* at 119 approving *Thompson* (1989) 169 CLR 1.
51 *Ibid* at 119.

admissibility. However, Their Honours acknowledge that their probative value varies "not only as between themselves but also in relation to the circumstances of particular cases".[52] Their Honours contrast evidence of mere propensity such as general criminal disposition with no identifiable hallmark, which lacks cogency but is prejudicial, with evidence of a particular propensity demonstrated by acts which has specific connection or relation to the issue at hand, which has greater cogency.[53]

4.2.2 Toohey J

In relation to the critical interrelationship between the two statements of principle in *Makin*, Toohey J rejects an approach which proceeds upon an assumption that propensity evidence is relevant and prima facie admissible unless the prejudicial effect of the evidence outweighs its probative force. Thus Toohey J outlines as the threshold test for admissibility of propensity evidence, a test of relevance[54]. Relevance is subsumed in the approach adopted by the joint judgment, rather than being identified as a separate step. It would appear His Honour recognises this by his acceptance of the "no rational explanation" test later in his judgment.[55]

On the other hand, Toohey J does not reject that evidence of propensity may be relevant to an issue, citing *Makin* as an example.[56] Further he acknowledges that in *Thompson v R*[57] it was the accused's disposition which was regarded as throwing light on the issue, however that issue was described.[58] His Honour thus accepts that propensity evidence "is placed within the area of similar fact evidence" provided there is the necessary relationship between the evidence in question.[59]

His Honour does not adopt the general test of admissibility that the probative force must outweigh its prejudicial effect, with its assumption that propensity evidence is always relevant. Instead His Honour prefers a combination of two other approaches which he considers show a consistency in approach.[60]

The first is that of Mason CJ, Wilson and Gaudron JJ in *Hoch*[61] where the test of admissibility is stated as being that the evidence must be of such probative value that "if accepted, it bears no reasonable explanation other than the inculpation of the accused person in the offence charged." Secondly, His Honour approved of the approach taken by the House of Lords in *Director of Prosecutions v P*[62]. In

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52 *Ibid* at 114–5.
53 *Ibid* at 115.
54 *Ibid* at 127.
55 *Ibid* at 131.
56 *Ibid* at 128.
57 [1975] AC 421.
58 (1995) 127 ALR 99 at 129.
59 *Ibid* at 130.
60 *Ibid* at 131.
61 (1988) 165 CLR 292 at 294.
62 [1991] 2 AC 447.

that case the accused was charged with rape and incest against his two daughters. Evidence of each daughter of the offences against her were held to be admissible in relation to offences against the other. The evidence disclosed no striking similarity but disclosed a prolonged course of conduct involving force and domination against each girl and the fact that the defendant paid for abortions in respect of both girls. Lord Mackay of Clashfern with whom the other Law Lords agreed, rejected that striking similarity was an essential element in such cases. Instead, the evidence must be "so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it notwithstanding the prejudicial effect of admitting the evidence".[63] That relationship may include "striking similarity" but in His Lordship's view is not so confined and may include time and other circumstances. His Lordship concluded that there was sufficient connection between the circumstances spoken of by the two girls, that if accepted, would so strongly support the truth of the charge that it was fair to admit it notwithstanding its prejudicial effect.[64]

With respect to His Honour, although both statements of principle do emphasise the required relationship between the propensity evidence and the evidence at hand, the standard or degree of that relationship differs, with the House of Lords' approach being a more loose relationship. That is, the House of Lords' approach requires a relationship between the evidence from which "strong enough support to make it just" is derived whereas the *Hoch* approach requires a relationship of objective improbability to a high standard.

In any event, Toohey J combines these two approaches by stating that the admissibility of propensity evidence "be tested against the criteria identified in *Hoch*, read in the light of *Director of Prosecutions v P.*"[65] This would seem to suggest a two-step approach (although this is not apparent in His Honour's later application of the test to the facts at hand). First, the basis for admissibility is the probative force of the evidence in accordance with the criterion from *Hoch*.[66] Second, the evidence may be admitted notwithstanding its inevitable prejudicial effect if the trial judge considers it just to admit the evidence.[67] "Just" refers to not only the interests of the accused, but the interests of the Crown and the community.[68]

Although this second step appears to resemble a residuary discretion, it does seem that His Honour was proposing a secondary test of admissibility.[69] Although it could be wondered when evidence which would satisfy the *Hoch* test would

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63 *Ibid* at 462.
64 *Ibid*.
65 (1995) 127 ALR 99 at 131.
66 *Ibid* at 131.
67 *Ibid* at 132.
68 *Ibid* at 131–132.
69 It is noted that McHugh J was not prepared to give the trial judge this same concession: *Pfennig* (1995) 127 ALR 99 at 151–2.

nevertheless be unjust to admit.[70] The incorporation of "just" into the test of admissibility, creates a situation which the joint judgment expressly intended to avoid, that is, "that the application of the test will resemble the exercise of a discretion rather than the application of a principle."[71]

In applying the test for admissibility as described, Toohey J found that the trial judge was correct in admitting the evidence as the H incident and the circumstances surrounding M's disappearance "raised as a matter of commonsense and experience, the objective improbability of someone other than the appellant, on the day and about the time in question, abducting Michael from Sturt Reserve."[72] Interestingly, His Honour did not consider, as a separate issue, whether it was "just" to admit the evidence.

Also of interest is His Honour's assertion that the "relationship" cases of *Harriman*[73] and *S v R*[74] were not "truly" cases on similar fact or propensity evidence. In His Honour's view, the evidence was admissible for the light it threw on the association between the accused and another.[75] But if the focus is on the relationship between the evidence in question as Toohey J suggests, those cases are in fact propensity cases as it was the accused's propensity which made it more likely than not that the accused was guilty of the offence charged.

4.2.3 McHugh J

McHugh J traces the development of the law relating to similar fact evidence and propensity evidence generally, noting that the Court's reasoning in *Harriman v R*[76] shows that the principles concerning the admissibility of evidence revealing other acts of misconduct are not confined to so called similar facts but apply whenever the Crown "wishes to lead evidence tending to show that the accused has been guilty of wrongful acts other than those with which the accused is charged."[77] This statement of itself does not indicate whether the principles are limited to cases where it is the propensity which is being relied on to establish relevance. His Honour's later comments would indicate that he considers that the principles are not so limited.

His Honour's starting point is *Markby*[78] which he considers is authority for the view that "evidence relevant for a reason other than that it shows the criminal or discreditable propensity of the accused is admissible as a matter of law,

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70 The same comment has been made in this area, in relation to the residuary "fairness" discretion and its possible application after the threshold test of admissibility is applied: *Harriman v R* (1989) 167 CLR 590 at 594–595 per Brennan J; *Sutton v R* (1984) 152 CLR 528 at 564 per Dawson J.

71 *Pfennig* (1995) 127 ALR 99 at 114 per Mason CJ, Deane and Dawson JJ.

72 *Ibid* at 132–133

73 (1989) 167 CLR 590.

74 (1989) 168 CLR 266.

75 (1995) 127 ALR 99 at 131.

76 (1989) 167 CLR 590.

77 *Pfennig* (1995) 127 ALR 99 at 136.

78 (1978) 140 CLR 108.

notwithstanding that it discloses that propensity of the accused, if the evidence is strongly probative of that person's guilt".[79] His Honour notes that on this view there is no requirement to balance the respective probative and prejudicial effects of the evidence to determine admissibility, a test which the recent cases have emphasised.[80] However His Honour further notes that if the test proposed in recent cases is the correct test, no scope remains for the exercise of the discretion to exclude probative evidence in criminal trials on the ground that it is unduly prejudicial to the accused.[81]

His Honour identifies the further refinement of the law in relation to similar fact evidence, that is, the "no rational explanation" test as adopted by the joint judgment in the case at hand. He, critically it seems, notes that the requirement of probative value transcending prejudice becomes superfluous as the evidence either meets the "no rational explanation" test or it does not. As his Honour states "the law has already done the weighing".[82] This, as previously discussed, is the result which the joint judgment intended and, saw as desirable.

The question whether exclusionary rules concerning evidence of criminal propensity extends beyond similar fact evidence was answered in the positive but His Honour had strong doubts as to whether the test for admissibility in all cases was the "no rational explanation" test.[83] Instead, in his view, the standard of proof required to admit evidence disclosing a person's criminal or discreditable propensity varied according to "the reasoning process to be employed, the nature of the evidence, and the degree of potential risk to a fair trial".[84]

In relation to the reasoning process to be employed, McHugh J stated that since *Markby*[85], propensity reasoning, that is the use of an accused person's propensity to commit crime as a reasoning factor to determine guilt, was not a legitimate form of reasoning. In that case, Gibbs ACJ said that the evidence is only admissible "if it is relevant in some other way".[86] In His Honour's view none of the subsequent cases had overruled or were inconsistent with that principle.[87] His Honour finds justification for this conclusion by differentiating between "probability reasoning" and "propensity reasoning".[88] In His Honour's view, *Sutton*[89], *Hoch*[90] and *Thompson*[91] are all examples of the admissibility of similar fact evidence through

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79 *Pfennig* (1995) 127 ALR 99 at 137.
80 *Ibid* at 137.
81 *Ibid* at 138.
82 *Ibid.*
83 *Ibid.*
84 *Ibid* at 139.
85 (1978) 140 CLR 108.
86 *Ibid* at 116.
87 *Pfennig* (1995) 127 ALR 99 at 141.
88 *Ibid.*
89 (1984) 152 CLR 528.
90 (1988) 165 CLR 292.
91 (1989) 169 CLR 1.

probability and not propensity reasoning.[92] However, His Honour later acknowledges that *Boardman*[93] plainly authorises the use of propensity reasoning in appropriate cases[94] and further that *R v Ball*[95], *Thompson v R*[96], *R v Straffen*[97] and the relationship cases, make it impossible to maintain that the Anglo-Australian law of evidence prohibits the use of propensity reasoning in all cases.[98]

Thus, McHugh J accepts that the court must modify its statements of principle from *Markby*, to reflect these developments. In his view, the evidence is admitted because the interests of justice require its admission, that is "the probative force 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."[99]

The evidence will have the required degree of probative force, where "it is relevant for a reason other than proof of propensity or because it colours one's perception of the other evidence to such an extent that it can be confidently inferred that the accused gave effect to the propensity on the occasion in question."[100] The inference may arise through evidence of striking similarity, or the circumstantial force of the other evidence together with the propensity evidence.[101]

Interestingly, His Honour cites *Ball*[102] as an example of the latter — the combination of the propensity evidence and the other evidence pointed irresistibly to incest having occurred, an inference based on probability reasoning and not similar facts.[103] This is a good example of the ambiguity in the classification earlier adopted between probability and propensity reasoning. *Ball* is cited on two other occasions as an example of propensity reasoning.[104]

This nomenclature contributes to confusion in this area of the law. A further example is the differing classifications of *Makin v Attorney-General (NSW)*[105] provided by McHugh J and Dawson J. McHugh J considered the case one of probability reasoning not propensity reasoning.[106] In his view the accused's propensity

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92 *Pfennig* (1995) 127 ALR 99 at 141–142.
93 [1975] AC 421.
94 *Pfennig* (1995) 127 ALR 99 at 144.
95 [1911] AC 47.
96 [1918] AC 221.
97 [1952] 2 QB 911.
98 *Pfennig* (1995) 127 ALR 99 at 147.
99 *Ibid.*
100 *Ibid* at 148.
101 *Ibid.*
102 [1911] AC 47.
103 (1995) 127 ALR 99 at 145.
104 *Ibid* at 145 and 148.
105 [1894] AC 57.
106 *Pfennig* (1995) 127 ALR 99 at 149.

was only established by the verdict. In contrast, Dawson J in *Harriman*[107] saw the case as one where the probative value of the evidence depended on the established disposition to engage in baby-farming activities.

In any event, McHugh J then purports to equate levels of risk of prejudice to the nature of the case. Earlier, His Honour had identified the various forms that prejudice may take, including: undue suspicion, ready assumptions that past conduct is an accurate guide to contemporary conduct, jury bias and functional reasons.[108] In His Honour's view where the case depends entirely on propensity reasoning the evidence will need to be very cogent as the danger is high that the tribunal will convict simply because of the accused's propensity. However apparently where the evidence is relevant for a reason other than propensity, the risk of prejudice is very small and it will be sufficient if the evidence is merely "probative of guilt"[109] as opposed to "so cogent that, when related to the other evidence, there is no rational explanation of the prosecution case that is consistent with innocence."[110]

Consequently, His Honour was unable to agree with other statements of the High Court that suggest that evidence which discloses the criminal propensity of the accused cannot be admitted unless that evidence together with the other evidence satisfies the "no rational explanation test". That test would be appropriate where the Crown is relying entirely on the accused's criminal propensity, but a lower standard of proof may suffice where the propensity evidence explains evidence implicating the accused as in the relationship cases or where the propensity is disclosed but is not the basis of any reasoning process.[111]

In the case at hand, McHugh J does not assist with a classification, but presumably he considered the case one where the Crown was relying on propensity reasoning, as he seemingly agrees with the trial judge that the no rational explanation test was the standard for admitting the evidence.[112] His Honour concluded that there was such a nexus between the other facts in the present case and the manner in which the accused's propensity manifested itself in the H incident that evidence of his propensity had significant probative value such that there was no rational explanation consistent with the innocence of the accused.[113] As mentioned earlier, His Honour considered that the propensity evidence was admissible not only to prove the identity of the killer as directed by the trial judge, but also to prove the abduction itself and the purpose of the abduction.[114]

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107 (1989) 167 CLR 590 at 600.
108 *Pfennig* (1995) 127 ALR 136–7.
109 *Ibid* at 149.
110 *Ibid* at 148.
111 *Ibid* at 150.
112 *Ibid* at 152. In fact His Honour found that the trial judge's approach was erroneous in that he treated prejudice as going to the issue of discretion rather than to admissibility. However the error did not affect the admissibility as the "no rational explanation" test was applied.
113 *Ibid* at 157.
114 *Ibid* at 153.

5. Theoretical basis of propensity and similar fact evidence rule

There would now seem to be a clear consensus in the High Court as to the theoretical basis of the propensity and similar fact evidence rule. There is an acknowledgment that evidence of an accused's disposition or propensity to commit crime or a particular kind of crime is not inherently irrelevant. McHugh J and the joint judgment show a willingness to accept a prima facie relevance with an in-built requirement of relevance in the test of admissibility. Toohey J on the other hand would require some prima facie nexus, although it would seem that this would have a low threshold and would be easily satisfied.

Propensity evidence is thus generally excluded as a matter of policy, most particularly on "one of the fundamental theses of the common law" that on a criminal charge guilt is not to be inferred from the character and tendencies of the accused.[115]

Propensity evidence is not excluded and is admissible if it satisfies the enhanced relevance test as formulated by the High Court. On this approach, the propensity evidence rule can be seen as a special rule of admissibility whereby propensity evidence that fails to satisfy the test of admissibility will be inadmissible.

The advantages of this approach are that the two statements of principle from *Makin* are not interpreted as containing contradictory inclusionary and exclusionary rules and there is no need to consider the "not entirely satisfactory refinement in the area of similar fact evidence — the distinction between excluding the evidence because it is insufficiently relevant, and excluding it because its prejudicial effect exceeds its probative force."[116]

An essential component of this approach is an acceptance that propensity evidence may be admissible to prove guilt notwithstanding that its relevance is as evidence of propensity. This was accepted by all judges in *Pfennig*[117], albeit with some reluctance by McHugh J. This consensus represents the culmination of judicial pronouncements moving away from the proposition in *Markby v R*[118] which required that propensity evidence be relevant in some other way. Dawson J has been a vocal advocate on this issue. In *Harriman*[119] he said:

> A close examination of the cases decided in an effort (ultimately unsuccessful) to avoid the forbidden chain of reasoning will show that when propensity evidence was admitted it was in general because of its relevance as propensity evidence, whatever other label was put upon it.

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115 *Pfennig* (1995) 127 ALR 99 at 135 per McHugh J.
116 *Harriman* (1989) 167 CLR 590 at 610 per Toohey J.
117 (1995) 127 ALR 99.
118 (1978) 140 CLR 108.
119 (1989) 167 CLR 590 at 600.

Mason CJ, Deane and Dawson JJ approved the approach taken by the House of Lords in *DPP v Boardman*[120] and the explanation by Dawson J in *Harriman*[121] that Lord Herschell was pointing "to the high degree of relevance required to render propensity evidence admissible rather than to the requirement of relevance of a different kind." The degree of relevance depends on probabilities. The propensity evidence will have a high degree of relevance where it raises as a matter of common sense and experience the objective improbability of some event having occurred other than as alleged by the prosecution. McHugh J in his initial reluctance to accept relevance through propensity asserts a distinction between propensity reasoning and probability reasoning. However as indicated in the earlier analysis of his judgment, these terms are used inconsistently within his own judgment and are at variance with other judges' interpretations of cases.

The Australian Law Reform Commission has commented that the distinction between propensity reasoning and non-prohibited reasoning was unsatisfactory and required artificial and unrealistic distinctions to be made.[122]

The better view is that the two types of reasoning are interlinked. Where propensity reasoning is allowed it is because of its enhanced relevance through probability reasoning, that is the proven propensity together with the other evidence makes it objectively improbable, to the required high standard, that the accused was not guilty of the crime charged. Otherwise the evidence remains mere propensity evidence and inadmissible.

Similarly, it could be argued that the coincidence cases such as *Makin*[123] and *Perry*[124] are not devoid of propensity reasoning, as a step in the reasoning process is the finding of a propensity to commit criminal acts, ie murder babies or poison others.[125]

The joint judgment approach has merit in that it avoids the artificial and subjective classifications that have been given to propensity evidence admitted in various cases over the years. The ambiguous use of terms propensity and probability reasoning should be abandoned. It is submitted that the term "mere propensity" should continue to be utilised as referring to inadmissible propensity evidence that has little or no relevance in so far as it has little impact on the probability of guilt and its relevance is limited to the issues of character and credibility.

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120 [1975] AC 421.
121 (1989) 167 CLR 590 at 598–9.
122 Australian Law Reform Commission, *Report No. 26 Interim Evidence* (1985) Vol 1 Para 400.
123 [1894] AC 57.
124 (1982) 150 CLR 580.
125 Byrne and Heydon, supra n. 8, para. 21060. Note McHugh J's contrary view at n 106.

6. The test for admissibility of propensity and similar fact evidence

6.1 Similar fact evidence

It seems beyond dispute that in true similar fact cases, the test for admissibility is the "no rational explanation" test as formulated in *Hoch*[126]. Thus, similar fact evidence is only admissible if the trial judge concludes that on the whole of the evidence, the similar fact evidence, if accepted, bears no rational or reasonable explanation consistent with the innocence of the accused, or in other words, bears no rational explanation other than an inference that the accused is guilty of the crime charged. This is the test adopted and applied by the joint judgment in *Pfennig*[127], accepted in part by McHugh J[128] and adopted by Toohey J with the added "just" requirement[129].

Dawson J in *Sutton*[130] would appear to be the first judge to suggest that the correct test is the same standard that the jury must ultimately apply when dealing with circumstantial evidence.[131] His Honour said[132]:

> Prejudice may operate where neither logic nor experience necessarily require the answer that the evidence points to the guilt of the accused and that being so the probative force of the evidence will not outweigh or transcend its prejudicial effect.

It would seem that as a jury can only convict where satisfied beyond reasonable doubt of guilt, and in a circumstantial evidence case, that is expressed in the formula that there must be no reasonable hypothesis consistent with innocence, a court can only ensure a safe conviction, and one not improperly influenced by prejudice, by insisting that the potentially prejudicial evidence meet the same strict standard of proof before admission. If there is a reasonable explanation of the propensity evidence consistent with innocence, the admission of that evidence gives rise to prejudice to the accused as there is no guarantee that a guilty verdict will not be based on improper grounds.

This test is stricter than earlier formulations that the probative value must "clearly transcend" the prejudicial effect.[133] Inherent in the new formulation is the

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126 (1988) 165 CLR 292.
127 (1995) 127 ALR 99 at 114.
128 *Ibid* at 152.
129 *Ibid* at 131.
130 (1984) 152 CLR 528 at 563–4.
131 Murphy J in *Perry* (1982) 150 CLR 580 at 594–7 refers to the circumstantial evidence test without clearly stating that it was the appropriate test for similar fact evidence also.
132 *Ibid.*
133 *Perry* (1982) 150 CLR 580 at 590 per Brennan J; *Sutton* (1984) 152 CLR 528 at 547 per Brennan J, at 560 per Deane J; *Thompson* (1989) 129 CLR 1 at 16 per Mason CJ and Dawson J; *Harriman* (1989) 167 CLR 590 at 633 per McHugh J.

assumption of high or substantial prejudicial effect on the admission of similar fact evidence. The old formulation suggested a balancing exercise between the respective probative and prejudicial effect of the evidence. It is submitted that such an exercise was more imaginary than real. Although many of the High Court judges make reference to the nature of the potential prejudice, there does not seem to be any real attempt to identify the nature or extent of prejudice in the case at hand.[134] Also, throughout the various judgments reference is made to the "inevitable prejudice" of the admission of similar fact evidence.[135] It is also to be noted that in the classic statement of the modern theoretical approach to this area, Lord Wilberforce after stating that a trial judge must estimate the respective weights of the probative and prejudicial value, is prepared to assume prejudice.[136]

In practice, it would be a difficult if not entirely speculative task to estimate the likely prejudice of the admission of propensity and similar fact evidence. McHugh J asserts that the risk of prejudice differs with the reasoning process involved.[137] However after examining the various forms that prejudice may take identified by McHugh J and the joint judgment,[138] it seems this assertion is untenable. Although, as will appear, it is considered that McHugh J's conclusion that the "no rational explanation test" may not be the proper test in all cases does have merit but for other reasons.

Before moving to propensity evidence of a more general nature, it must be noted that it is clearly now the law that in similar fact cases, the disputed evidence may satisfy the test of admissibility notwithstanding that it does not disclose stiking similarities, unusual features or an underlying unity.[139] This development reflects developments in other jurisdictions[140] and an acceptance that the so-called similar fact evidence rule extends to other types of propensity evidence.

6.2 Other propensity evidence

In relation to other propensity evidence, two separate categories must be considered:— evidence which discloses criminal propensity where that propensity is relied on in the reasoning process; and evidence where the accused's propensity is disclosed but does not form the basis of any reasoning process. This categorisation is necessary due to the novel approach taken by McHugh J that the special rule of admissibility applies to evidence in the latter category.[141]

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134 An exception to this statement would appear to be the analysis by Murphy J in *Perry* (1982) 150 CLR 580.

135 For example *Perry* (1982) 150 CLR 580 at 604 per Wilson J; *Harriman* (1989) 167 CLR 590 at 598 per Dawson.

136 *DPP v Boardman* [1975] AC 421 at 442.

137 *Pfennig* (1995) 127 ALR 99 at 148,149.

138 *Ibid* at 135,136 and 118.

139 *Ibid* at 113 per Mason CJ, Deane and Dawson JJ.

140 *Director of Public Prosecutions v P* [1991] 2 AC 447.

141 *Pfennig* (1995) 127 ALR 99 at 136,148 and 150.

There have been numerous cases where evidence which incidentally discloses that the accused has committed a crime other than the crime charged has been admitted without objection or apparent application of special rules relating to propensity evidence.[142] An example of such a case, is *R v O'Meally*[143] where on a charge of murder, evidence that a car stolen from the murder scene contained proceeds from a robbery committed by the accused, was admitted to prove he was guilty of the murder. Quite clearly the evidence was not being lead as evidence of criminal propensity from which it could be inferred that the accused was guilty of the murder. That the impermissible line of reasoning was not involved is demonstrated by the fact that had innocent articles connected with the accused been found in the car, the evidence would have had the same relevance.[144]

It would seem that the only other occasion that a High Court judge has suggested that the propensity evidence rule extends to this type of evidence was Dawson J by way of obiter in *Harriman*[145] where His Honour said:

> Of course, evidence of previous criminal behaviour may exhibit a high level of cogency for reasons other than that it shows a criminal disposition on the part of the accused. For example, evidence that the accused was committing another offence at the scene of the crime with which he is charged may go to rebut a defence of alibi regardless of any criminal disposition on the part of the accused. And it is the circumstances of each case which will determine whether the propensity evidence, whether tendered as such or for some other reason, is of sufficient probative value to warrant its admission: see *Sutton v the Queen* (1984) 152 CLR 528 at 549 per Brennan J.

If His Honour was intending to assert that special rules of admissibility apply to all evidence revealing criminal propensity regardless of the purpose for which it is tendered, an examination of the quoted page of Brennan J's judgment does not reveal support for that proposition. In *Rogerson and Paltos v R*[146] the New South Wales Court of Criminal Appeal dealt with a submission based on this proposition. After an examination of all judgments in *Harriman*[147], Loveday J on behalf of the court on the issue of conviction said:

> *Harriman* is not an authority for the broad proposition that where evidence tends to disclose criminality other than that charged it must have a high degree of probative force to be admissible. Only if it is tendered merely as "propensity" or "similar fact" or "improbability" evidence must it pass some such initial test.[148]

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142 *R v Evans and Gardiner (No 2)* [1976] VR 523; *R v Sims and Anderson* [1967] Qd R 432; *R v O'Meally (No 2)* [1953] VLR 30.
143 [1953] VLR 30.
144 Byrne and Heydon, *supra* n.8, para. 21045 provides other examples.
145 (1989) 167 CLR 590 at 601.
146 (1992) 65 A Crim R 530.
147 (1989) 167 CLR 590.
148 (1992) 65 A Crim R 530 at 543. Note that McHugh J considered that this conclusion was incorrect: *Pfennig* (1995) 127 ALR 99 at 136 fn 99.

Furthermore, in *Pfennig*[149], where a detailed analysis is made in the joint judgment of this whole area, no support or even reference is made to this proposition. Toohey J also does not contemplate that the term propensity in terms of the special rules for admissibility extends to all evidence which discloses criminal conduct. Instead, he focuses on the use of the evidence stating that "propensity necessarily involves the use of character against the accused".[150]

Thus it is submitted that the special test of admissibility for propensity and similar fact evidence, the "no rationale explanation" test, has no application to cases where the accused's propensity is disclosed but is not the basis of any reasoning process. This approach reflects the context in which the rule was first formulated in *Makin*[151]; is in accordance with the practice of the courts; and is not contrary to any authoritative statements of the High Court.[152] The test for admissibility of this evidence would be merely that it is probative of guilt. It would no doubt be appropriate for the judge to give a warning to the jury as to the permitted use of the evidence. Furthermore the residual discretion to exclude the evidence would remain. Interestingly, this is the same test of admissibility proposed by McHugh J in relation to this type of evidence.[153]

Where propensity evidence does form a part of the reasoning process, it would seem that the joint judgment and Toohey J would apply the same test as that for similar fact cases. The relationship cases typically fall within this category. The difficulty is in reconciling the "no rational explanation" test with the practice of the courts. It has been noted[154] that in sexual offence cases, evidence is commonly given of sexual conduct between the accused and complainant other than relating to the specific offence charged. However there is commonly no objection to the admission of this evidence or any judicial analysis as to the basis of its admission. These other acts are admitted on the basis that they are relevant as similar facts, as evidencing a guilty or abnormal passion, or as providing a background within which to evaluate the evidence.[155]

It was made clear in *Harriman*[156] that evidence of a non-innocent relationship or association was subject to the similar fact test of admissibility. In that case, evidence of a previous relationship with another person involving dealing in drugs was evidence of a disposition to engage in dealings of that kind with each other.[157]

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149 (1995) 127 ALR 99.
150 *Ibid* at 127.
151 [1894] AC 57
152 For a similar conclusion see Byrne and Heydon, *supra* n.8, para. 21040 and Palmer, *supra* n.1 which is devoted to this issue.
153 *Pfennig* (1995) 127 ALR 99 at 149 and 150.
154 *Ibid* at 144 per McHugh J.
155 *B v R* (1992) 172 CLR 599 at 602 per Mason CJ, at 605 per Brennan J, at 610 per Deane J, at 618 per Dawson and Gaudron JJ; *S v R* (1989) 168 CLR 266 at 275 per Dawson J.
156 (1989) 167 CLR 590.
157 *Ibid* at 597 per Dawson J.

Together with other evidence concerning an overseas trip with that other person, it was relevant to whether the accused was knowingly concerned in the importation of heroin with which the other person had been charged. Dawson, Gaudron and Toohey JJ each dealt with the case by evaluating the propensity evidence with the other evidence in terms of the "no rational explanation" test[158].

Brennan J admitted the evidence on the basis that it was highly probative of the offences as it tended to make more likely that the accused's acts were for a "guilty rather than an innocent purpose[159]. Toohey J appears to deny that evidence of the character of the association between the accused and the other person is evidence of propensity.[160] He reaffirms this view in *Pfennig*[161] were he asserts that that evidence was directly relevant to the issue of "knowingly concerned". However, surely its only relevance can be by way of inference that the guilty association continued and was in existence for the later transaction. Thus the criminal nature of the association and hence the criminal disposition of the accused was an important part of the reasoning process.

In *S v R*[162], the issue of the admissibility of relationship evidence in sexual offences arose. In that case the evidence was not admitted, however it was not due to the nature of the evidence but to the fact that the Crown could not identify the specific offences to which it related. Dawson J stated that the basis for admission "is said to rely in establishing the relationship between the two persons involved in the commission of the offence, or the guilty passion existing between them, but it is in truth nothing more than evidence of a propensity on the part of the accused of a sufficiently high degree of relevance to justify its admission."[163] Importantly, Gaudron and McHugh JJ in a joint judgment, stated the test for admissibility of this type of evidence in terms of the "no rational explanation" test, that is "has probative value such that it raises the objective improbability of some event having occurred other than as alleged by the prosecution."[164]

Consequently it seems beyond dispute that the same strict test of admissibility applies to circumstantial evidence of relationship where that relationship discloses criminal propensity. However it is apparent that in the past, scrutiny has not been given to such evidence by the prosecution, the defence and judges. It would also be interesting to speculate on the number of occasions when this evidence may not have met the test of admissibility. Having regard to the fact that relationship evidence is often more in the nature of corroborative evidence or background evidence to an offence of which there is direct evidence, one must query whether the same strict test should apply as where the circumstantial evidence goes to

158 *Ibid* at 602–603, 615 and 635.
159 *Ibid* at 596.
160 *Ibid* at 608.
161 (1995) 127 ALR 99 at 131.
162 (1989) 168 CLR 266.
163 *Ibid* at 275.
164 *Ibid* at 287.

proof of identity or even the commission of a crime. McHugh J in *Pfennig*[165] considered that in relationship cases, "it would be contrary to both the practice of the criminal courts and the interests of justice to use the no rational explanation test." However until the High Court resile for their present position, the "no rational explanation" test is the test of admissibility of both propensity evidence, in the sense discussed above and similar fact evidence.

8. Conclusion

In relation to the various theoretical and practical issues raised in this vexed area of propensity evidence, it is considered that the following conclusions may be drawn:—

- Misdescriptions and subjective terminology should be abandoned. All evidence disclosing prior misconduct or bad character should be termed "propensity evidence" and the special rule of admissibility should accordingly be termed the "propensity evidence rule". "Mere propensity" evidence should be used to describe propensity evidence which does not meet the special test of admissibility.
- The propensity evidence rule is a special rule of admissibility which has to meet both policy considerations in favour of the accused and the interests of the community.
- Propensity evidence which does not satisfy the test of admissibility will be excluded as a matter of law.
- The rule does not apply to evidence which discloses propensity but does not form the basis of any reasoning process. This evidence would remain subject to the usual discretionary exclusions.
- The rule does not require that the propensity evidence be relevant to some issue other than propensity.
- At common law the test for admissibility for similar fact evidence is the "no rational explanation" test. Strikingly similar facts are not a pre-requisite for admissibility but may assist in satisfying the "no rational explanation" test.
- At common law the test for admissibility of other propensity evidence is the same as for similar fact evidence — the "no rational explanation" test.
- Admissible propensity evidence would still be subject to discretionary exclusion, in theory at least.

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165 (1995) 127 ALR 99 at 148,150.

Finally it must be considered whether the test of admissibility adopted by the High Court adequately meets the theoretical foundation of the rule. In a wide sense the basis of the rule, as with many rules of evidence, is the interests of justice. The strict test of "no rational explanation" satisfies the interests of justice as it guarantees fairness to the accused without disregard for the interests of the Crown and the community. It is conceded that in some cases this high threshold may not be warranted, and in this respect the balance tilts in favour of the interests of the accused. However surely it is better to err on the side of caution and it must be remembered that the origin of the rule lies foremost in the protection of the accused.