THE STRUCTURE AND STRENGTH OF THE PROPENSITY INFERENCE: SINGULARITY, LINKAGE AND THE OTHER EVIDENCE

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This article brings some coherence to the law of similar fact evidence through a close focus on the logical structure of the propensity inference. For the inference to operate, the defendant must be linked with other misconduct which shares sufficient singularity with the charged offence. Any assessment of the inference must also have regard to the other evidence. The other evidence may play a contributing role, narrowing the issues and lessening the work demanded of the propensity inference. Alternatively, it may have the effect of rendering the propensity inference unnecessary. Where the propensity inference is supported by other independent incriminating evidence, it will not be necessary for the linkage and singularity components to satisfy the criminal standard of proof on their own. The analysis in this article has application to both the propensity and coincidence variants of the inference, and to both the admissibility and proof stages of the trial. The English Law Commission's draft Bill and Chapter 1 of Part 11 of the Criminal Justice Bill are criticised for failing to take account of the logical structure of the inference.

I INTRODUCTION

The principles governing propensity or 'similar fact evidence' were described almost half a century ago as being of 'apparently insoluble difficulty',[1] and despite numerous attempts at clarification by the House of Lords[2] and the High Court of Australia,[3] were recently found by the English Law Commission to be 'haphazard

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1 Zelman Cowen and Peter B Carter, 'The Admissibility of Evidence of Similar Facts: A Re-examination' in *Essays on the Law of Evidence* (1956) 106. Contrary to Lord Herschell's claim in *Makin v A-G (NSW)* [1894] AC 57 ('*Makin*'), 65, the problem is not merely one of application. The underlying principles are far from clear. Nor is there plausibility in Hoffman's view that the decisions are broadly consistent, 'a tribute to the power of commonsense over the forms of legal reasoning': L H Hoffman, 'Similar Facts After *Boardman*' (1975) 91 *Law Quarterly Review* 198, 204.

2 *Harris v DPP* [1952] AC 694 ('*Harris*'); *R v Kilbourne* [1973] AC 729 ('*Kilbourne*'); *DPP v Boardman* [1975] AC 421 ('*Boardman*'); *DPP v P* [1991] 2 AC 447; *R v H* [1995] 2 AC 596.

3 *Markby v The Queen* (1978) 140 CLR 108 ('*Markby*'); *Perry v The Queen* (1982) 150 CLR 580 ('*Perry*'); *Sutton v The Queen* (1984) 152 CLR 528 ('*Sutton*'); *Hoch v The Queen* (1988) 165 CLR 292 ('*Hoch*'); *Harriman v The Queen* (1989) 167 CLR 590 ('*Harriman*'); *Thompson v The Queen* (1989) 169 CLR 1 ('*Thompson*'); *B v The Queen* (1992) 175 CLR 599 ('*B*'); *Pfennig v The Queen* (1995) 182 CLR 461 ('*Pfennig*'); *BRS v The Queen* (1997) 191 CLR 275 ('*BRS*'); *Gipp v The Queen* (1998) 194 CLR 106 ('*Gipp*'); *KRM v The Queen* (2001) 178 ALR 385 ('*KRM*'); *Festa v The Queen* (2001) 185 ALR 394 ('*Festa*').

... inconsistent and unpredictable'.[4] Unfortunately, the Law Commission's recommendations for reform offer no apparent remedy for these ills, at least as far as the admissibility and operation of the propensity inference is concerned. This article seeks to bring clarity to this area of law by presenting a detailed picture of the inference at its centre. Drawing upon English and Australian authorities[5] and the logic of proof,[6] the article examines the structure of the propensity inference, and the factors that determine its strength.

The propensity inference has a number of variations, but in its archetypal form it amounts to the following: the defendant has committed this kind of misconduct on other occasions; the defendant's propensity for this type of misconduct led them to commit the charged offence. Due to the danger of prejudice, this form of reasoning is subject to a general exclusionary rule and must possess a sufficient level of probative value to gain admission. According to the House of Lords, for propensity evidence to be admissible its probative value must exceed its prejudicial effect.[7] The High Court of Australia, however, has held that for the evidence to gain admission it must be so strong that there is 'no rational view' of it consistent with innocence.[8] The House of Lords and the High Court have also diverged in their approaches to sexual assault cases where the prosecution relies on the evidence of other alleged victims. The High Court's view is that the reasonable possibility of joint concoction is an obstacle to admissibility,[9] whereas the House of Lords considers that this is a matter of credibility which lies squarely in the jury's domain.[10] These matters, forming the background to the analysis, are explored in the next section.

In the three succeeding sections, it is argued that the probative value of the propensity inference is dependent on three structural components. There must be sufficient *linkage* evidence, identifying the defendant as the individual that committed the other misconduct. The other misconduct and the charged allegation must share such a degree of *singularity* as to suggest that the perpetrator of the former also committed the latter. Finally, the strength of the propensity inference must be assessed in the context of the *other evidence* (see Figure 1).

4 English Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Law Com No 273, Cm 5257 (October 2001) ('*Cm 5257*'), [1.7]; English Law Commission, *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, Consultation Paper No 141 (1996) ('*Consultation Paper*'), [1.2].

5 And to a lesser extent, the authorities of Canada, New Zealand and the United States.

6 See, eg, John Wigmore, 'The Problem of Proof' (1913) 8 *Illinois Law Review* 77; Terrence Anderson and William Twining, *Analysis of Evidence: How to do things with facts* (1991); Stephen Odgers, 'Proof and Probability' (1989) 5-6 *Australian Bar Review* 137; David Hamer, 'The Continuing Saga of the Chamberlain Direction: Untangling the Cables and Chains of Criminal Proof' (1997) 23(1) *Monash University Law Review* 43.

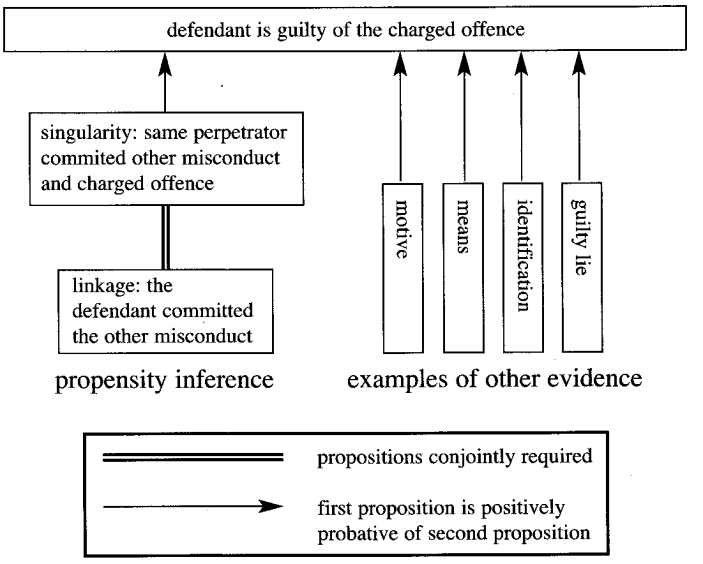
7 *DPP v P* [1991] 2 AC 447, 460.

8 *Pfennig* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ), 506 (Toohey J); cf 530 (McHugh J).

9 *Hoch* (1988) 165 CLR 292, 297 (Mason CJ, Wilson and Gaudron JJ); cf 299, 302, 304 (Brennan and Dawson JJ).

10 *R v H* [1995] 2 AC 596, 605 (Lord Mackay), 613 (Lord Griffiths), 620 (Lord Mustill), 624 (Lord Lloyd), 627 (Lord Nicholls).

Figure 1: The structure of the propensity inference



Over the remainder of this article, the tripartite structural analysis provides further insights into the operation of the inference. A finding of singularity - that the other misconduct and the charged offence were committed by the same person - may flow from the observation of 'striking similarities',[11] but this is just one of a number of factors, and is not essential. A focus on the linkage step suggests that 'coincidence reasoning' may be distinguished from the propensity inference, but it is questionable whether this distinction has practical importance. The analysis in this article has equal application to both variants.

It is submitted that the propensity inference possesses the same basic structure, regardless of the issue or issues on which it is adduced. However, the other evidence, in narrowing the outstanding issues, may lend the propensity inference considerable support. As a consequence it is generally inappropriate to impose strong singularity or linkage requirements at either the admissibility or proof stages.[12] Only where there is no other evidence on the outstanding issues should the propensity inference be required to bear the weight of the criminal standard on its own.[13] This is not to say that highly prejudicial propensity evidence of slight probative value could gain admission on the back of an otherwise strong

[11] *R v Sims* [1946] KB 531, 539, 544; *Boardman* [1975] AC 421, 439-41 (Lord Morris), 443-4 (Lord Wilberforce), 452, 454 (Lord Hailsham), 457-8, 460 (Lord Cross), 462-3 (Lord Salmon).

[12] See, eg, *R v McGranaghan* [1995] 1 Cr App R 559 ('*McGranaghan*'); *R v Salerno* [1973] VR 59.

[13] *R v Arp* [1998] 3 SCR 339, 376, 377; *R v White* [1998] 2 SCR 72, 104, 105-6; *Gipp* (1998) 194 CLR 106, 133 (McHugh and Hayne JJ), 155 (Kirby J); *Shepherd v R* (1990) 170 CLR 573, 579 (Dawson J); see also Hamer, above n 6.

prosecution case. Propensity evidence should not be admitted unnecessarily;[14] it must have a real bearing upon a genuine issue in the case.

II ADMISSIBILITY, PROBATIVE VALUE, CREDIBILITY AND CONCOCTION

It has recently been suggested that propensity reasoning is not significantly different from 'the more orthodox reasoning process'.[15] It operates 'simply by confining the suspect or accused to a small sub-set in the community who are willing to engage in the type of conduct which is alleged',[16] and is comparable, for example, to identification evidence that puts the defendant in 'the portion of the community who have red hair or are over six feet six in height'.[17] But to equate the defendant's propensity with their physical characteristics is to commit the mischief that the law is centrally concerned with: 'Characters, tendencies or dispositions towards particular conduct, are not permanent features and (unlike the proverbial cauliflower ear) may change.'[18] To suggest there is an exact correspondence is to suggest that the propensity has 'a continuing quality [and] that the accused has not mended his ways. The making of this assumption is the very thing found objectionable in propensity evidence.'[19]

The propensity inference carries well recognised dangers. There is the risk of 'reasoning prejudice'[20] - the jury may overestimate the extent to which the defendant's acts are governed by their character.[21] There is also the danger of 'moral prejudice'[22] - having regard to their other misconduct, the jury may not feel inclined to give the defendant the full benefit of a reasonable doubt.[23] The jury may even seek to punish the defendant for the other misconduct by convicting them of the charged offence regardless of whether it is proven.[24] There are also procedural and functional considerations: the proliferation of issues will call upon extra resources;[25] the jury might become confused and substitute an element from

14 *R v Bond* [1906] 2 KB 389, 417; Donald Piragoff, *Similar Fact Evidence: Probative Value and Prejudice* (1981), 146.

15 Mirko Bagaric and Kumar Amarasekara, 'The prejudice against similar fact evidence' (2001) 5 *International Journal of Evidence and Proof* 71, 90.

16 Ibid 87.

17 Ibid.

18 Andrew Ligertwood, *Australian Evidence* (3rd ed, 1998) 95. Cf John Dyson Heydon, *Cross on Evidence* (online.butterworths.com.au, 2002) [21185]: 'an "abnormal propensity" is unlike a wooden leg, in that the latter is permanent whereas the former may influence conduct at one moment and not the next'.

19 Cowen and Carter, above n 1, 143.

20 Andrew Palmer, 'The Scope of the Similar Fact Rule' (1994) 16 *Adelaide Law Review* 161, 169; I H Dennis, *The Law of Evidence* (1999) 582.

21 *Boardman* [1975] AC 421, 456 (Lord Cross); *Pfennig* (1995) 182 CLR 461, 478, 488 (Mason CJ, Deane and Dawson JJ); Cowen and Carter, above n 1, 120, 145.

22 Palmer, above n 20.

23 Richard Lempert, 'Modelling Relevance' (1977) 75 *Michigan Law Review* 1021, 1034; Richard Eggleston, *Evidence, Proof and Probability* (2nd ed, 1983) 97-8.

24 *S v R* (1989) 168 CLR 266, 276 (Dawson J), 278-9, 283 (Toohey J), 285 (Gaudron and McHugh JJ); *KBT v R* (1997) 191 CLR 417, 431-2 (Kirby J); Adrian S Zuckerman, *The Principles of Criminal Evidence* (1989) 195-6.

25 *Perry* (1982) 150 CLR 580 (Gibbs CJ); *Sutton* (1984) 152 CLR 528 (Brennan J); Cowen and Carter, above n 1, 145.

the other alleged misconduct for an unproven element in the present charges;[26] the defendant may be surprised by the raising of these other events at trial, and not in a position to respond to them;[27] it will be arduous for the defendant to be 'put to answer' not 'to one alleged event, but ... for a good part of her life'.[28] Finally, on a broader policy level, it appears inconsistent with the goal of rehabilitation to allow a defendant's prior offences to be used against them.[29] It would endorse a forensic strategy that could turn out to be self-fulfilling - the more the police focus on known offenders, the more difficult it is for them to rejoin mainstream society, leading to the creation of 'an underclass of "usual suspects"'.[30]

For many years, the Privy Council decision in *Makin v A-G (NSW)*[31] was thought to have excluded the propensity inference absolutely while allowing evidence of the defendant's other misconduct to be admitted for other purposes, for example, to determine whether the defendant's acts were 'designed or accidental, or to rebut a defence'.[32] The House of Lords in *Boardman*[33] provided some support for the notion that there was a 'forbidden type of reasoning',[34] but the case generally came to be understood as permitting the inference if it possessed sufficient probative value, for example, where there is a 'striking similarity' between the other misconduct and the charged offence.[35] In *DPP v P*,[36] the House of Lords drew upon another strand of *Boardman*[37] and held that, to be admissible, the probative value of the inference must exceed its prejudicial effect.[38] In October 2001, the English Law Commission recommended the codification and clarification of this admissibility test, laying down 'guidelines' on the assessment of probative value

26 Cowen and Carter, above n 1, 145; Colin Tapper, *Cross and Tapper on Evidence* (9th ed, 1999) 355-6; Heydon, above n 18, [21145].

27 *R v Makin* (1893) 14 NSWR (L) 1, 39-40 (Innes J); Cowen and Carter, above n 1, 145; *Evidence Act 1995* (Cth) ss 97(1)(a), 98(1)(a); *Evidence Act 1995* (NSW) ss 97(1)(a), 98(1)(a).

28 *Perry* (1982) 150 CLR 580, 595 (Murphy J).

29 Tapper, above n 26, 357; Zuckerman, above n 24, 232.

30 David T Wasserman, 'The morality of statistical proof and the risk of mistaken liability' (1991) 13 *Cardozo Law Review* 935, 953; Tapper, above n 26, 357; *R v Makin* (1893) 14 NSWR (L) 1, 39 (Innes J). This outcome could receive further impetus from a positive feedback effect. The more the prosecution is allowed to rely upon the defendant's prior convictions, the more likely it is that the usual suspects will be convicted, and the higher the apparent rate of recidivism. Apparently validated, propensity reasoning will become embedded more deeply: Tapper, above n 26, 355-6.

31 [1894] AC 57.

32 Ibid 65 (Lord Herschell).

33 [1975] AC 421.

34 Ibid 453 (Lord Hailsham); see also 438 (Lord Morris), 461 (Lord Salmon). Lords Cross and Wilberforce made no mention of *Makin*.

35 Ibid 427, 439-41 (Lord Morris), 443-4 (Lord Wilberforce), 452-4 (Lord Hailsham), 457-8, 460 (Lord Cross), 462-3 (Lord Salmon); *Consultation Paper*, above n 4, [2.26].

36 [1991] 2 AC 447.

37 [1975] AC 421, 438-9 (Lord Morris), 442 (Lord Wilberforce), 451 (Lord Hailsham), 456 (Lord Cross).

38 Ibid 460. In *Pfennig* (1995) 182 CLR 461, McHugh J at 528 suggested that the concepts probative value and prejudicial effect were 'incommensurable' and 'have no standard of comparison'. He indicated that evidence should be admitted where the 'interests of justice require its admission despite the risk, or in some cases the inevitability, that the fair trial of the charge will be prejudiced'. However, at 529 he quickly reverts back to a more familiar and concise formulation: 'The judge must *compare* the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted' (emphasis added).

which, as explored in Section X below, are confusing and incomplete.[39] The government did not accept this recommendation. On 21 November 2002, the government introduced the Criminal Justice Bill into Parliament, Part 11 Chapter 1 of which has the appearance of dramatically reforming the rules relating to bad character evidence.[40] The common law exclusionary rule would be abolished,[41] evidence of the defendant's convictions for offences of the same description and same category would be admissible,[42] and other evidence of the defendant's bad character would be admissible 'if relevant to an important matter in issue between the defendant and prosecution'[43] including 'whether the defendant has a propensity to commit offences of the kind with which he is charged'.[44] It is important to note, however, that the defendant may, under the Bill, apply to the court to exclude the evidence for the reason that it would have 'an adverse effect on the fairness of the proceedings'.[45] This is in almost identical terms to the court's general discretion to exclude evidence under *Police and Criminal Evidence Act 1984* (UK) ('PACE'),[46] where an important ground of exclusion is that the probative value of the evidence is outweighed by its potential prejudicial effect.[47] It is arguable, then, depending on how the new law is applied, that the reform may turn out to be quite slight. The requirements of admissibility remain the same - probative value must outweigh prejudicial risk. The only difference is that the onus has shifted from the prosecution to the defendant, a difference of uncertain significance.[48] And yet the government's stated intention is that 'this part of the Bill fundamentally changes the system'.[49] While the assessment of the

39 *Cm 5257*, above n 4, [4.2]-[4.6], [7.18]-[7.19], [11.40]-[11.46], Cll 2(1), 6, 8 and 5(2) of the draft Bill; *Consultation Paper*, above n 4, [10.72].

40 Secretary of State for the Home Department, the Lord Chancellor and the Attorney General, 'Justice for All', Cm 5563 (July 2002), [4.55]-[4.59]. See also Secretary of State for the Home Department, 'Criminal Justice: The Way Ahead', Cm 5074 (February 2001), [3.51]-[3.52]. This Chapter of the Bill extends beyond evidence of the defendant's propensity to bad character evidence generally.

41 Cl 83. Note that the clause numbers refer to the text as amended in Standing Committee B on 4 March 2003.

42 Cl 85(1)(d); see also cl 87.

43 Cl 85(1)(e); see also cl 88.

44 Cl 88(1)(a).

45 Cl 85(3).

46 PACE s 78. This in turn was based on the common law exclusionary discretion: *R v Christie* [1914] AC 545. '[S]ubsection (3) makes ample and appropriate provision to ensure that evidence with no or little probative value that is otherwise likely to be prejudicial to the defendant is excluded': Hilary Benn, Standing Committee B, House of Commons, Session 2002-03, Col 581, 23 January 2003. Note, however, that the discretion in cl 85(3) Criminal Justice Bill does not apply to all grounds of admissibility appearing in cl 85(1), including (c) 'important explanatory evidence'; see also cl 86. This appears to be a version of the principle relating to background or *res gestae* evidence.

47 *R v Quinn* [1990] Crim LR 581; Dennis, above n 20, 74.

48 '[T]he test proposed in the bill is identical to the one currently applied': Mr Marshall-Andrews, Debates, House of Commons, Part 28, Col 1006, 2 April 2003. The wording of cl 85(3) resembles s 78 of PACE, however, unlike the latter it expressly requires 'an application by the defendant'. It is not clear how significant this difference is. Dennis, above n 20, 77, suggests that under PACE, the defendant normally raises the issue of exclusion. He notes authority that the defendant bears the burden of persuasion (citing *R v Cooke* [1995] 1 Cr App R 318, 328 (Glidewell LJ)), but despite this, suggests that doubts should be resolved in the defendant's favour.

49 Hilary Benn, Standing Committee B, House of Commons, Session 2002-03, Col 453, 23 January 2003.

probative value of the evidence remains central to its admissibility, the Bill did not include the Law Commission's guidelines.[50]

The proposed reforms generated a great deal of opposition from all sides of politics,[51] the profession,[52] academics,[53] the judiciary[54] and civil liberties groups,[55] on the basis that they provided insufficient protection against the dangers of propensity evidence mentioned above. The government response to these objections is that greater 'trust' should be put in the jury 'to use their judgment and ... to weigh all the evidence in the balance'.[56] 'In the end, we should trust the jury to reach the right verdict.'[57] But the government apparently fails to appreciate that the English common law has already moved in this direction. In *R v H*,[58] Lord Griffiths suggested that a 'less restrictive form' of the admissibility test better suited today's 'better educated and more literate juries'.[59] In support of its reforms, the government provided this anecdote:

> In one recent case, a jury trying a doctor accused of raping a patient was not allowed to know that he had previously been convicted of indecently assaulting six patients and acquitted of raping another ... That typifies the sort of case ... where juries should not be kept in the dark.[60]

But if this brief description is accurate, it seems clear that the case was wrongly decided.[61] In the broadly similar New Zealand case, *R v Hsi En Feng*,[62] the Court of Appeal applied Boardman and held that the evidence should be admissible on the grounds that

> it would be needlessly artificial and contrary to the requirements of justice to deny the jury the advantage of the full picture. In a phrase used more than

50 Guidelines were retained for the assessment of the probative value of evidence of a non-defendant's character (cl 84(3)), presumably on the basis that the court's leave is required for admissibility (cl 84(4)), the grounds for which is that the evidence has 'substantial probative value' (cl 84(1)(b)(i)).

51 See, eg, the Select Committee on Home Affairs, in its Second Report (4 December 2002) considered this the 'most controversial part of the Bill' (at [108]) and recommended that the provisions relating to the defendant's bad character be deleted from the Bill (at [123]).

52 See, eg, Simon Hattenstone, 'All you do is hang a dog for its bad name', *Guardian (Features)* (30 December 2002), 5; D Barrett, 'Lawyers Fight Justice Reforms', *Daily Post* (Liverpool) (2 April 2003), 3; 'Crime Reform Delay', *Birmingham Post* (20 May 2003), 8.

53 Jaqueline Laing, 'Welcome to Big Brother BRITAIN; As Labour drives another nail in the coffin of individual freedom', *Daily Mail* (28 March 2003), 12.

54 Joshua Rozenberg, 'I am not soft on violent criminals, says Lord Woolf', *Daily Telegraph* (26 December 2002), 26; S Lister, 'Woolf concern at plan to reform jury trials', *The Times* (26 December 2002), 2.

55 See, eg, S Broadbridge noting the opposition of the groups Liberty and Justice in *House of Commons Research Paper* 02/75 (3 December 2002), 53-8.

56 Hilary Benn, Standing Committee B, House of Commons, Session 2002-03, Col 548, 23 January 2003.

57 Ibid Col 580; cf ibid Cols 588, 590, 593.

58 [1995] 2 AC 596.

59 Ibid 613; see also below nn 102, 368.

60 Clare Dyer, 'It's a fair thing to do: The government wants jurors to be told about defendants' previous convictions', *Guardian (Features)* (18 March 2003), 16, paraphrasing Lord Falconer. See further anecdotes provided by Hilary Benn, Debates, House of Commons, Part 28, Col 1024, 2 April 2003.

61 Cf Mr Llwyd, Debates, House of Commons, Part 28, Col 1006, 2 April 2003; Mr Gummer, ibid Col 1025; Mr Marshall-Andrews, ibid Col 1026.

62 [1985] 1 NZLR 222.

once in the House of Lords, the similarities in the evidence here would make five separate trials 'an affront to common sense'.[63]

At best, the government's anecdote supports an argument for clarification and codification, not radical reform. The 'bad character' provisions were passed by the House of Commons on 2 April 2003 without amendment,[64] however, amendment by the House of Lords appears a real possibility.[65]

The High Court of Australia continues to give some support to the probative-value/prejudicial-effect test.[66] However, in *Pfennig*[67] it laid down a narrower and supposedly less discretionary[68] admissibility test for the common law and possibly the Uniform Evidence Act[69] - the evidence must be so strong that there is no rational view of it consistent with the defendant's innocence.[70] If the propensity evidence possesses such a high degree of probative value there should be no room for a conviction to be brought through prejudice.[71]

These changing formulations of the admissibility test - the shift from the notion of 'forbidden reasoning' to a requirement of sufficient probative value - may mark

63 Ibid 225.

64 The remainder of the Criminal Justice Bill passed the House of Commons on 19 and 20 May 2003 amid further controversy: Nicholas Watt, 'Rebels keep up fight on jury trials', *Guardian Weekly* (22 May 2003), 9.

65 Lord Falconer is scheduled to give the second-reading speech in the House of Lords on 16 June 2003.

66 *Sutton* (1984) 152 CLR 528, 534 (Gibbs CJ); *Harriman* (1989) 167 CLR 590, (Brennan J), 597-9 (Dawson J), 610 (Toohey J); B (1992) 175 CLR 599, 618-9 (Dawson and Gaudron JJ); *Pfennig* (1995) 182 CLR 461 (Mason CJ, Deane and Dawson JJ), 515, 528 (McHugh J); *BRS* (1997) 191 CLR 275 (McHugh J); *Gipp* (1998) 194 CLR 106, 157 (Kirby J).

67 (1995) 182 CLR 461.

68 Ibid 483 (Mason CJ, Deane and Dawson JJ), 506 (Toohey J). This test is fashioned out of the criminal standard, but this may not be a fixed standard. 'In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard': *Bater v Bater* [1951] P 35, 37 (Denning LJ); 'Jurymen themselves set the standard of what is reasonable in the circumstances': *Green v The Queen* (1971) 126 CLR 28, 33 (Barwick, McTiernan and Owen JJ).

69 *Evidence Act 1995* (Cth) ss 97, 98, 101; *Evidence Act 1995* (NSW) ss 97, 98, 101. The NSW Court of Appeal followed *Pfennig* in *R v AH* (1997) 42 NSWLR 702, 709; *R v Vinh Le* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Sullu Huline and Hidden JJ, 7 March 2000); *R v WRC* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, James and Kirby JJ, 7 June 2002), [25]; *R v Joiner* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, Simpson J and Smart AJA, 28 August 2002), [37]. T H Smith and O P Holdenson, 'Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions: Part II' (1999) 73 *Australian Law Journal* 494, 499, point out that the legislation is actually expressed in terms of the 'balancing test'. The Full Federal Court in *W* (2002) 124 A Crim R 545, 560-1 (Miles J), 572-5 (Madgwick J) was critical of the NSW approach, and drew more heavily upon McHugh J's balancing approach in *Pfennig*: see above n 38; *W*, [52]-[53] (Miles J), [102] (Madgwick J). The Victorian and Queensland legislatures clearly favour the probative-value/prejudicial-effect test over the 'no rational explanation' test. See below n 105.

70 (1995) 182 CLR 461 (Mason CJ, Deane and Dawson JJ), 506 (Toohey J); McHugh J favoured a version of the probative-value/prejudicial-effect test, above n 38. However, his Honour considered that on the facts of this case, the probative value required would reach the level suggested by the majority: 530. Justice McHugh described the majority approach in *Pfennig* as the 'prevailing view' in *KRM* (2001) 178 ALR 385, 390; see also *BRS* (1997) 191 CLR 275, 298-9 (Gaudron J), 292 (Toohey J); *Gipp* (1998) 194 CLR 106, 111 (Gaudron J); *Festa* (2001) 185 ALR 394, 455 [260] (Callinan J).

71 Hoffman, above n 1, 194; *Consultation Paper*, above n 4, [7.32], [10.49]; but see Rajir Nair, 'Weighing Similar Fact and Avoiding Prejudice' (1996) 112 *Law Quarterly Review* 262, 263.

advances in the courts' understanding of the law rather than developments in the law. Even under *Makin*, propensity reasoning was being employed, despite judicial protestations to the contrary.[72] Regrettably, the improved understanding has not been enjoyed universally. Some courts continue to admit evidence for a propensity purpose while seeking to maintain the fiction that such reasoning is forbidden. In the recent Victorian case, *R v Camilleri*,[73] the issue was whether the defendant had played a role in the rape and murder of two schoolgirls, or whether, as he claimed, it had all been the work of his accomplice. The prosecution called an alleged victim of a similar attack a few weeks later, who testified that the defendant had been the dominant one. At trial the defendant objected that the evidence 'was being put on the propensity basis',[74] to which the trial judge responded 'it is admissible evidence under our law these days'.[75] The Court of Appeal also rejected the defendant's argument, but on the doubly impercipient ground that that the trial judge's directions were sufficient to 'proscribe the notion of the accused man being regarded as the "sort of person" who would act in a similar fashion to that described'.[76] On the contrary, as the trial judge appreciated, this was precisely the reasoning by which the evidence acquired its relevance.[77]

On occasions an attempt has been made to accommodate both early and modern versions of the law in an uncomfortable halfway house. In *Harriman*,[78] Gaudron J first adopted the forbidden reasoning view:

> Evidence which shows no more than the propensity of an accused to engage in criminal conduct of a particular kind or that the accused is the sort of person likely to commit the offence charged is not admissible to prove that he committed the offence charged.[79]

Her Honour then adopted the modern view. Other-misconduct evidence would be admissible if it 'has a high probative value', even if that value is generated by showing 'the propensity of the accused to commit the offence'.[80] And then the resolution - the evidence in such a case would disclose 'unusual or unique features which render it improbable that anyone else had a like propensity. But in that

[72] *Boardman* [1975] AC 421, 456-7 (Lord Cross); *Pfennig* (1995) 182 CLR 461, 480-1 (Mason CJ, Deane and Dawson JJ), 527 (McHugh J); *Harriman* (1989) 167 CLR 590, 599-601 (Dawson J); *BRS* (1997) 191 CLR 275, 305 (McHugh J); Hoffman, above n 1, 198; Piragoff, above n 14, 14; Zuckerman, above n 24, 227; Palmer, above n 20, 162; Rosemary Pattenden, 'Similar Fact Evidence and Proof of Identity' (1996) 112 *Law Quarterly Review* 446, 451-2; Tapper, above n 26, 365; Dennis, above n 20, 587; Ligertwood, above n 18, 103.

[73] (2001) 119 A Crim R 106 ('*Camilleri*').

[74] Ibid 128.

[75] Ibid 129.

[76] Ibid 128.

[77] Similar criticisms can be made of *R v Best* [1998] 4 VR 603, 613-15; as in *Camilleri*, the trial judge displayed greater awareness than the Victorian Court of Appeal that the other-misconduct evidence was being admitted for a propensity purpose. See also the English Law Commission's discussion of the Supreme Court of Canada's recent relapses: *Consultation Paper*, above n 4, [B29]-[B44].

[78] (1989) 167 CLR 590.

[79] Ibid 613.

[80] Ibid.

situation, the evidence establishes much more than *mere propensity*.'[81] The difference between forbidden reasoning from a 'mere propensity' and permissible reasoning from a more particular propensity might be described as 'extremely fine'.[82] Far better, however, to drop the fictions of forbidden reasoning and mere propensity altogether, and recognise that admissibility turns on '*degrees* of relevance' rather than 'different *kinds* of relevance'.[83] The relationship between these two approaches to admissibility is explored further below in connection with the impact of other evidence on the probative value assessment.[84]

In requiring the trial judge to assess the inculpatory strength of the propensity inference, the admissibility test brings an unusual overlap in the functions of judge and jury.[85] This is particularly the case where the Australian 'no rational view' test is applied. The High Court fashioned the test out of the direction that is commonly given in cases where the prosecution relies heavily upon circumstantial evidence: 'the jury must be satisfied that there is no rational mode of accounting for the circumstances, other than the conclusion that the prisoner is guilty'.[86] This is no more than a reformulation or 'amplification'[87] of the criminal standard of proof. Basically, the 'no rational view' admissibility test requires the trial judge to form their own view on whether the prosecution evidence establishes the defendant's guilt beyond reasonable doubt. Clearly the probative-value/prejudicial-effect test has greater flexibility, and where the risk of prejudice appears less, the standard set for the evidence may decrease considerably.[88]

In assessing the admissibility of the propensity inference, the trial judge does not step exactly into the shoes of the jury. Generally, assessments of credibility remain the jury's exclusive domain. In *Pfennig*, the High Court indicated that, to be admitted, propensity evidence must possess 'a particular probative value or cogency such that, *if accepted*, it bears no reasonable explanation other than the

81 Ibid (emphasis added); see also *Pfennig* (1995) 182 CLR 461, 529 (McHugh J); B (1992) 175 CLR 599, 618-9 (Dawson and Gaudron JJ); *Thompson* (1989) 169 CLR 1, 15-16 (Mason CJ and Dawson J); *Hoch* (1988) 165 CLR 292, 302 (Brennan and Dawson JJ); *Festa* (2001) 185 ALR 394, 439 (Kirby J); Cowen and Carter, above n 1, 157.

82 *Hoch* (1988) 165 CLR 292, 302 (Brennan and Dawson JJ); *Consultation Paper*, above n 4, [2.54], citing P Murphy (ed) *Blackstone's Criminal Practice* (1996), [F12.8].

83 Hoffman, above n 1, 200; Julius Stone, 'The Rule of Exclusion of Similar Fact Evidence: England' (1932) 46 *Harvard Law Review* 954, 984; Zuckerman, above n 24, 226.

84 Sections V and IX.

85 *Pfennig* (1995) 182 CLR 461 516-7; *R v Arp* [1998] 3 SCR 339, 375-6 [65]; R Mahoney, 'Similar Fact Evidence and the Standard of Proof' [1993] *Criminal Law Review* 185, 185-7; J C Smith, *Criminal Evidence* (1995), 136. Compare the reliability and admissibility of confessions: *R v H* [1995] 2 AC 596, 620 (Lord Mustill); *R v Arp* [1998] 3 SCR 339, 379-380 [71]-[72].

86 *Wills on Circumstantial Evidence* (6th ed, 1912), 313-14, reporting on *Patch*, Surrey Spring Assizes, 1805 (C B Macdonald); see also *R v Hodge* (1838) 168 ER 1136; *Pfennig* (1995) 182 CLR 461, 483-4 (Mason CJ, Deane and Dawson JJ). In *R v Vinh Le* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Sully, Hulme and Hidden JJ, 7 March 2000), the trial judge appeared to apply *Pfennig* in directing the jury rather than at the admissibility stage, and the NSW Court of Criminal Appeal did not correct the error.

87 *Knight v The Queen* (1992) 175 CLR 495, 502 (Mason CJ, Dawson and Toohey JJ); see also *Grant v R* (1975) 11 ALR 503, 505.

88 *Pfennig* (1995) 182 CLR 461, 531-2 (McHugh J); *Consultation Paper*, above n 4, [10.52]-[10.54]. Clearly the scope for prejudice appears greater where the alleged other misconduct is the abduction and sexual assault of a child, as in *Pfennig*, than where it is the provision of public transportation without a licence, as in *Martin v Osborne* (1936) 55 CLR 367.

inculpation of the accused in the offence charged'.[89] However, the Court has identified one situation where the trial judge should consider issues of credibility - sexual assault cases where the prosecution tenders evidence of the defendant's other alleged victims.[90] A majority in *Hoch*[91] held that if 'in the light of common sense and experience [the other allegations are] capable of reasonable explanation on the basis of concoction'[92] they would not be admissible. In developing this test, the High Court drew upon Lord Wilberforce's suggestion in *Boardman* that 'mere possibility of collaboration is sufficient to exclude the evidence'.[93] However, more recently in *R v H*, the House of Lords adopted a very different approach, indicating that, except perhaps 'in a very exceptional case',[94] questions of collusion and infection should not be considered by the trial judge but are 'properly a matter for the jury'.[95]

It has been suggested that the *Hoch* approach makes sexual assault prosecutions too difficult.[96] Evidence of this kind of offence is often difficult enough to obtain anyway - there are often no eyewitnesses, and the allegations may not surface until some time later when the possibility of gathering forensic evidence has

89 *Pfennig* (1995) 182 CLR 461, 481 (Mason CJ, Deane and Dawson JJ), citing *Hoch* (1988) 165 CLR 292, 294 (Mason CJ, Wilson and Gaudron JJ) (emphasis added); *Sutton* (1984) 152 CLR 528, 564-5 (Dawson J); *Harriman* (1989) 167 CLR 590, 621 (Gaudron J); Andrew Palmer, 'Propensity, Coincidence and Context: the Use and Admissibility of Extraneous Misconduct Evidence in Child Sexual Abuse Cases' (1999) 4 *Newcastle Law Review* 46, 50.

90 Often such cases will raise issues of joinder as well as admissibility. The two issues fall to be decided by similar but not identical considerations: *R v Christou* [1996] 2 All ER 927; *R v TJB* [1998] 4 VR 621; *De Jesus v R* (1986) 68 ALR 1; *R v Arp* [1998] 3 SCR 339, 370 [52]. Joinder is beyond the scope of this article.

91 (1988) 165 CLR 292.

92 Ibid 297 (Mason CJ, Wilson and Gaudron JJ); Brennan and Dawson JJ delivered a strong minority judgment advocating a more permissive admissibility test. Admissibility should only be denied where there is a 'real chance' or 'real danger' of concoction: 299, 302, 304. See also *R v H* [1995] 2 AC 596, 609, 611, where Lord Mackay agreed with this if 'real risk' or 'real possibility' is interpreted to mean 'such a risk that no reasonable jury could be sure that the evidence was not contaminated'.

93 *Boardman* [1975] AC 421, 444. In *R v B*(CR) [1990] 1 SCR 717, [29], Sopinka J suggested this may set an even 'tougher standard' than that of the criminal standard. Lord Morris, however, notes that the trial judge in *Boardman* had left collusion for the jury to consider. And in Lord Cross' formulation of the admissibility test the trial judge is to assess the probative value of the evidence on the basis that it is 'accepted as true'.

94 *R v H*, [1995] 2 AC 596, 612 (Lord Mackay), compare 622 (Lord Mustill).

95 Ibid 605 (Lord Mackay), 613 (Lord Griffiths), 620 (Lord Mustill), 624 (Lord Lloyd), 627 (Lord Nicholls); see also *R v Best* [1998] 4 VR 603, 610-1. Lord Mackay argued that the High Court in *Hoch* misunderstood Lord Wilberforce in *Boardman* (607, 611), but Lord Mustill adverted to the 'impressive weight of contrary opinion': 614. Note that Lord Lloyd may not have supported as lenient an approach to admissibility, observing that 'where a risk of collusion or contamination is apparent on the face of the documents, it will always be an element, and exceptionally a decisive element, in deciding whether the probative force of the similar fact evidence is sufficiently strong to justify admitting the evidence, notwithstanding its prejudicial effect': 626. Lord Mustill in particular (617, 621-2) expressed an aversion to the holding of a *voir dire* to determine the concoction issue (a procedural matter that is beyond the scope of this article).

96 Odgers, above n 6, 140; Palmer, above n 89, 80; Geoff Flatman and Mirko Bagaric, 'Non-similar Fact Propensity Evidence: Admissibility, Dangers and Jury Directions' (2001) 75 *Australian Law Journal* 190, 193-4; *R v H* [1995] 2 AC 596, 617 (Lord Mustill), 625 (Lord Lloyd); Tapper, above n 26, 350; see also Jonathan Clough, *'Pfennig v The Queen*: A Rational View of Propensity Evidence?' (1998) 20 *Adelaide Law Review* 287, 302; W (2002) 124 A Crim R 545, [54]-[55] (Miles J); *Consultation Paper*, above n 4, [9.31]-[9.34].

passed.[97] At the same time, evidence of the alleged victims' opportunity and motive for concoction may be readily available - where the allegations come from the defendant's children following their parents' marital breakdown,[98] students at a tribalistic boarding school,[99] or alleged victims seeking media attention[100] or civil damages.[101] However, given the centrality of the alleged victims' credibility in such cases, the English approach may appear an abdication of the court's duty to protect against prejudicial wrongful convictions.[102]

The High Court continues to affirm the *Hoch* approach,[103] as have some courts applying the Uniform Evidence Act.[104] The Victorian and Queensland Parliaments, however, have passed legislation adopting the English approach.[105] It remains unclear which way Canada will go.[106] The English Law Commission found the issue difficult,[107] suggesting in its *Consultation Paper* that 'the judge's encroachment on the territory of the jury appears to be justified',[108] but ultimately recommending that questions of credibility and collusion be left to the jury.[109] The Criminal Justice Bill is silent on the matter. Of course, while in this event the risk of concoction does not block admissibility, it may still present a considerable obstacle to conviction, particularly if, as the Law Commission suggests, the trial judge has a duty to discharge the jury where it appears a conviction would be unsafe.[110]

97 As the Crown pointed out in *DPP v P* [1975] AC 421, 449. See also Zuckerman, above n 24, 160; Jeremy Gans, '"Whom do you believe?": Criminal Appeals, Conflicting Testimony and the Burden of Proof' (2000) 22 *Sydney Law Review* 220. There are exceptions. In *R v B(FF)* [1993] 1 SCR 697, the allegations were made some 25 years after the alleged abuse, however the Crown was able to support the complainant's evidence with eyewitness testimony, medical records and scars.

98 See discussion in Palmer, above n 89, 76-77.

99 See, eg, *Boardman* [1975] AC 421.

100 See, eg, *Burke* [1996] 1 SCR 474.

101 Ibid.

102 Tapper, above n 26, 363; compare D Birch, *R v Whitehouse* case commentary [1996] *Criminal Law Review* 50, 51; *Consultation Paper*, above n 4, [6.5].

103 *Harriman* (1989) 167 CLR 590, 614 (Gaudron J); *BRS* (1997) 191 CLR 275, 292 (Toohey J), 300 (Gaudron J), 327-8 (Kirby J).

104 *R v Colby* [1999] NSW CCA 261 (Unreported, Mason P, Grove and Durford JJ, 26 August 1999) [107]; *R v OGD (No 2)* (2000) 50 NSWLR 433, 447; *R v WRC* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, James and Kirby JJ, 7 June 2002), [38]. The Full Federal Court in *W* (2002) 124 A Crim R 545 recently declined to follow NSW's adoption of *Pfennig*. Justice Miles similarly indicated there was no reason for the *Hoch* approach to be considered implicit in the legislation: [54]. Justice Madgwick, however, considered *Hoch* should be adopted, following *R v OGD (No 2)*: [99].

105 *Evidence Act 1977* (Qld) s 132A; *Crimes Act 1958* (Vic) s 398A(3); *R v Best* [1998] 4 VR 603, 607; Palmer, above n 89, 79-80; Kenneth J Arenson, 'Propensity Evidence in Victoria: A Triumph for Justice or an Affront to Civil Liberties' (1999) 23 *Melbourne University Law Review* 263; Ligertwood, above n 18, 120-1; Clough, above n 96, 303; Jonathan Clough, 'Section 398A of the *Crimes Act 1958* (Vic): *Pfennig* Resurrected?' (2000) 24 *Criminal Law Journal* 8, 14-15.

106 In *R v B(CR)* [1990] 15 CR 717, 752 [29], Sopinka J (dissenting) suggested that the Crown should 'negative conspiracy or collaboration in accordance with the criminal standard' to obtain admissibility. In *R v Burke* [1996] 15 CR 474, 494, 495 [42], [45], delivering the Court's judgment, his Honour indicated that it was 'not necessary' and 'not appropriate' to resolve the issue, but commented that the English approach was 'more conventional'. Cf Tapper, above n 26, 363, fn 7; *B(L)* 102 OAC 104 (1998), [30].

107 *Consultation Paper*, above n 4, [10.98].

108 Ibid [6.5].

109 *Cm 5257*, above n 4, Part XV; cl 14 of the draft Bill.

110 The Commission considered the present law on this point unclear, ibid [15.33].

The inherent difficulties in prosecuting sexual assault cannot be denied. However, the obstacle posed by the defence claim of concoction is sometimes overstated. The Victorian Court of Criminal Appeal in *R v Best*,[111] following *R v H*, held:

> Where collusion, unconscious influence or the like is raised as an issue, the judge should direct the jury that they must be satisfied beyond reasonable doubt that no such factor was operating before they use similar fact evidence as part of their reasoning.[112]

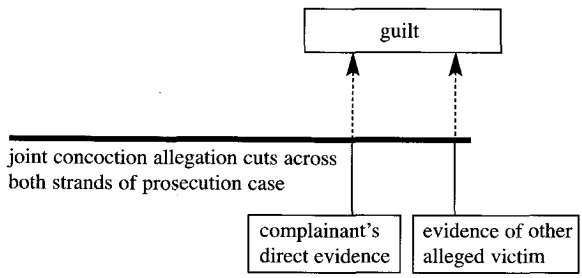
This statement may be warranted where the prosecution case consists of no more than the evidence of alleged victims, and the defence argues joint concoction (see Figure 2(a)). In other cases, however, it should be recognised that a reasonable doubt regarding concoction may be removed by other evidence (see Figure 2(b)). In *R v Whitehouse*,[113] for example, the two boys who claimed that the defendant, their karate instructor, had indecently assaulted them during supposed massage treatments certainly had the opportunity for collusion, and the trial judge directed the jury 'if there was collusion then the whole case collapsed'.[114] But the case should not have been resolved solely with regard to evidence of the alleged victims' motive and opportunity for collusion. The jury's doubts about collusion may have been overcome by their consideration of an alleged guilty lie.[115] The defendant claimed that it was a proper karate technique to massage from the knee to the groin, but two other practitioners testified that they had never heard of it.

A second danger apparent in the *R v Best* direction is the inappropriate conflation of many varieties of concoction.[116] As Smith points out in his commentary on *R v H*, the reasonable possibility of concoction will only render the evidence worthless where 'two or more accusations are alleged to be complete fabrications'.[117] Less destructive is joint refinement: 'where the two have consciously brought their stories into line in matters of detail, they may still be basically true'.[118] Also distinguishable is unilateral infection, for example, where the other witness copies the complainant's story from media reports. Unlike joint fabrication or joint refinement, this leaves the complainant's allegation unscathed[119] (see Figure 2(c)). The logic of proof does not apply to all situations alike.[120]

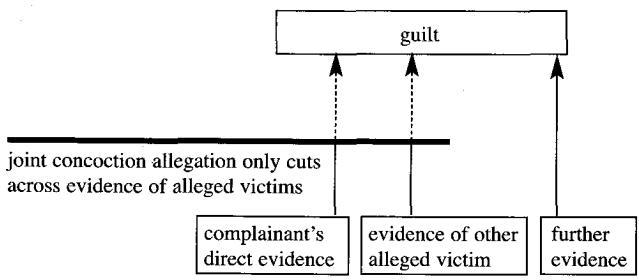
[111] [1998] 4 VR 603.
[112] Ibid 616; see also ibid 611 citing *R v H* [1995] 2 AC 596, 602; see also *R v H* [1995] 2 AC 596, 612 (Lord Mackay), 614 (Lord Griffiths), 627 (Lord Nicholls).
[113] [1996] *Criminal Law Review* 50.
[114] Ibid 51.
[115] See generally David Hamer, '"Hoist with his own Petard"? Guilty Lies and Ironic Inferences in Criminal Proof' (2001) 54 *Current Legal Problems* 377, 382-7.
[116] See also Cm 5257, above n 4, [15.3]-[15.7].
[117] [1995] *Criminal Law Review* 717, 718.
[118] Ibid.
[119] The situation would be very different if it appeared that the 'infection' passed from the other prosecution witness to the complainant rather than vice versa.
[120] *R v H* [1995] 2 AC 596, 616 (Lord Mustill).

The law reports are replete with such misunderstandings about the operation and probative value of the propensity inference. The remedy pursued in this article is to pay close attention to the inference's logical structure.

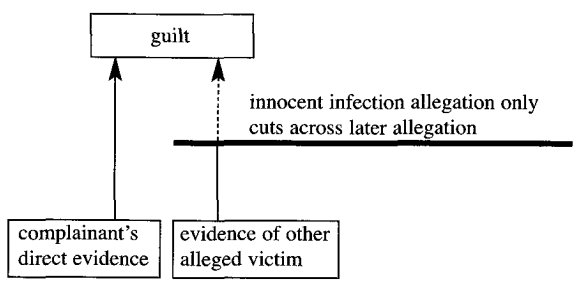
Figure 2: Distinguishing different 'concoction' cases



(a) Joint concoction, alleged victims' allegations only



(b) Joint concoction, further evidence



(c) Innocent infection

III MARKERS OF SINGULARITY

The propensity inference has two internal components. The defendant must be sufficiently *linked* with the other misconduct, and the other misconduct and the charged allegations must share such *singularity* as to indicate that the perpetrator of the former was guilty also of the latter. Clearly neither by itself is sufficient.

It is with regard to singularity that cases suggest the need for evidence of a 'system',[121] a 'striking similarity'[122] or 'underlying unity'[123] between the charged offence and the other misconduct. However, 'these and other similar expressions must only be used as guides to principle' rather than as statements of principle.[124] No single expression could do justice to the 'numerous and complex' factors involved in the singularity assessment, many of them 'a matter of degree'.[125] All should be taken into account, and 'it is the overall effect that counts'.[126]

A key factor in determining whether the other misconduct and the charged offence were the product of the same individual's propensity will be their degree of similarity.[127] But '[i]t is not enough to show a high degree of similarity between different incidents if their occurrence is too common.'[128] Some authorities suggest that the trial judge should look for something beyond the 'stock in trade'[129] of that kind of offender - a house-burglar entering by a ground-floor window,[130] a rapist plying their prospective victim with alcohol,[131] or picking them up and taking them to a remote location.[132] Does the charged offence and other misconduct bear the same distinctive 'hallmark'[133], 'signature'[134] or 'calling card'?[135] However, the absence of features that are individually peculiar may not be fatal. An

121 *R v Makin* (1893) 14 NSWR (L) 1, 5, 20, 22.
122 *R v Sims* [1946] KB 531, 539, 544.
123 *Moorov v HM Advocate* [1930] JC 68, 73. See generally *Boardman* [1975] AC 421, 427, 439-41, (Lord Morris), 443-4 (Lord Wilberforce), 452-4 (Lord Hailsham), 457-8, 60 (Lord Cross), 462-3 (Lord Salmon); *Hoch* (1988) 165 CLR 292, 294-5 (Mason CJ, Wilson and Gaudron JJ); *Thompson* (1989) 169 CLR 1, 39 (Gaudron J).
124 *Boardman* [1975] AC 421, 441 (Lord Morris), 453-4 (Lord Hailsham); *Perry* (1982) 150 CLR 580, 610 (Brennan J); *Sutton* (1984) 152 CLR 528, 535 (Gibbs CJ), 568 (Dawson J).
125 Cowen and Carter, above n 1, 146; see also *Boardman* [1975] AC 421, 441 (Lord Morris), 452 (Lord Hailsham), 457 (Lord Cross); *R v Scarrott* (1977) 65 Cr App R 125, 129 (Scarman LJ); *R v Rance* (1975) 62 Cr App R 116, 121 (Lord Widgery CJ); *Sutton* (1984) 152 CLR 528, 535 (Gibbs CJ); *Pfennig* (1995) 182 CLR 461, 482, 484 (Mason CJ, Deane and Dawson JJ); *KRM* (2001) 178 ALR 385, 403 [66] (Gummow and Callinan JJ); *R v Arp* [1998] 3 SCR 339, 364-5 [44], [45]; *B(L)* 102 OAC 104 (1998), [39].
126 Pattenden, above n 72, 449.
127 Cowen and Carter, above n 1, 143.
128 Colin Tapper, 'Similar Facts: Peculiarity and Credibility' (1975) 38 *Modern Law Review* 206, 208.
129 *Sutton* (1984) 152 CLR 528, 535 (Gibbs CJ); *R v Holloway* [1980] 1 NZLR 315, 319; Colin Tapper, 'The Probative Force of Similar Fact Evidence' (1992) 108 *Law Quarterly Review* 26.
130 *Boardman* [1975] AC 421, 454 (Lord Hailsham), 462 (Lord Salmon); see also *Familic v R* (1994) 75 A Crim R 229, 241.
131 *R v Holloway* [1980] 1 NZLR 315, 319.
132 Cf *R v Wilmot* (1988) 89 Cr App R 341, 348.
133 *Thompson v R* [1918] AC 221 ('*Thompson*'), 235; *DPP v P* [1991] 2 AC 447, 453; *R v Arp* [1998] 3 SCR 339, [50].
134 *Boardman* [1975] AC 421, 454 (Lord Hailsham).
135 *R v B(CR)* [1990] 15 CR 717, 748 [21] (Sopinka J).

'accumulation of common circumstances'[136] may together indicate singularity. Alternatively, this conclusion may be drawn from 'the very number of the alleged incidents'[137] in the series. In several cases it has been held that one or two other similar incidents would not be admissible, but with the addition of one or two more, the singularity threshold is achieved.[138] Mr Smith may have been unlucky enough to have had two brides drown in the bath in succession, but when the third bride drowns, and it is noted that Mr Smith benefited from life insurance policies in each case, the suggestion of coincidence gives way to the inference of design.[139]

Any similarities and uniformities between the charged offence and other misconduct should be balanced against any dissimilarities, differences and incongruities.[140] This again is a matter of degree. In *R v Wilmot*,[141] the Court of Appeal indicated that it was no obstacle to admissibility that the first victim in the series of alleged rapes, unlike the other five, was not a prostitute, and whereas they took place over two weeks, the first was three months earlier. There were sufficient other similarities and '[i]t is the pattern of behaviour and alleged acts which is all important'.[142] The Court in *Familic v R*[143] suggested:

> points of dissimilarity ... are of little relevance unless they are of such a nature as to suggest affirmatively that the offences were not committed by the same people - as would be the case where the physical characteristics of the robbers were clearly different.[144]

But in *Tomasetti*,[145] dissimilarities played a key role. The trial judge had joined eight charges of cab-robbery with cross-admissibility on the basis of their similar features, but the Manitoba Court of Appeal considered there to be 'as many differences ... as there are similarities'.[146] The trial judge noted that a weapon was exhibited in each incident, but in three cases it was a gun, while in the other five, a knife. The trial judge noted that in some cases the perpetrator had mentioned his accomplices to instil fear in the victim, but in one case the defendant said he

[136] *Sutton* (1984) 152 CLR 528, 567 (Dawson J) (emphasis added); *R v Arp* [1998] 3 SCR 339 [50]; Cowen and Carter above n 1, 143; Tapper, above n 128, 207. In *Camilleri* (2001) 119 A Crim R 106, 124, 'the judge was supplied with a written list of 37 similarities'.

[137] *R v His En Feng* [1985] 1 NZLR 222, 225; see also *Boardman* [1975] AC 421, 459 (Lord Cross); *Sutton* (1984) 152 CLR 528, 568 (Dawson J); *Perry* (1982) 150 CLR 580, 610 (Brennan J); *Pfennig* (1995) 182 CLR 461, 488 (Mason CJ, Deane and Dawson JJ); *R v Rodley* [1913] 3 KB 468, 473; Palmer, above n 89, 74.

[138] *R v Wilmot* (1988) 89 Cr App R 341, 346-7; *Perry* (1982) 150 CLR 580, 590 (Gibbs CJ), 613 (Brennan J); *R v Z* [2000] 3 All ER 385.

[139] *R v Smith* (1915) 11 Cr App R 229; Jenny McEwan, 'Law Commission dodges the Nettles in Consultation Paper No 141' [1997] *Criminal Law Review* 93, 94, cited in *R v Z* [2000] 3 All ER 385, 400 (Lord Hutton); Mike Redmayne, 'A Likely Story!' (1999) 19 *Oxford Journal of Legal Studies* 659, 663.

[140] See also Pattenden, above n 72, 449-450. Tapper, above n 26, 365 fn 18, suggests that where 'peculiarity relates to modus operandi it requires virtual identity and is thus easily destroyed by any dissimilarity'. However, he appears to have in mind a case where there is no other evidence on identity, and the propensity inference is indispensable: see Section VII.

[141] (1988) 89 Cr App R 341.

[142] Ibid 348.

[143] (1994) 75 A Crim R 229.

[144] Ibid 240-1.

[145] Unreported, Manitoba Court of Appeal, 8 December 2000.

[146] Ibid [34].

was part of a gang, while in three other cases there was mention of armed accomplices watching from nearby. The description of the perpetrator varied considerably, and whereas in three cases there were two robbers, in the other five there was a single robber. There may have been 'significant similarities'[147] among some of the episodes, but not among all eight. A retrial was ordered.

A positive finding on singularity from the presence of similarities and absence of dissimilarities in the modi operandi will gain further support if the other misconduct and the charged offence were close or repetitious in time or place.[148] Did the various misdeeds all occur within a geographical locality?[149] Were the misdeeds committed in the same kind of place, for example sexual assaults in a school ground?[150] Were they all committed within a short space of time, or at the same time of day or night, or the same day of the week? *R v Downey*,[151] for example, concerned two similar service station robberies within 15 minutes in the same area of London. In *R v Brown, Wilson, McMillan & McClean*,[152] the two robberies were in different parts of London six weeks apart, but were both of Cullens Grocery Stores at the end of a weekend with the prospect of richer pickings. With regard to the time factor, a number of recent authorities indicate 'in general (as a matter of common sense), the weight to be afforded to *subsequent* [misconduct] will be less than that to be afforded to *previous* [misconduct]'.[153] However, earlier authorities recognise that this distinction will often be 'wholly immaterial'.[154] 'A business must have a commencing point, and the performance of the earliest acts as well as of the latest acts may be inferred from the existence of the course of business.'[155] In some of the landmark cases including *Makin*[156] and *R v Smith*,[157] the other misconduct occurred after the charged offence. It is, perhaps, difficult to generalise about the operation of the temporal factor, with the assessment turning on the facts of the particular case. In *Pfennig*,[158] the other abduction and sexual assault was a year later than the charged offence, however, there was evidence that on being arrested for the later abduction the defendant told his wife 'that he had been thinking of "it" on and off for the past twelve

147 Ibid [33].
148 Cowen and Carter, above n 1, 145.
149 If the misdeeds took place in disparate locations, but the geographical pattern matches the movements of the defendant, then clearly this will not weaken the singularity argument. On the contrary. In *John W* [1998] 2 Cr App R 289, 305, it was noted that '[t]he appellant lived near both attacks, having moved from Aldershot to Farnham in the [intervening] period'.
150 *Sutton* (1984) 152 CLR 528, 535-6 (Gibbs CJ).
151 [1995] 1 Cr App R 547 (*'Downey'*).
152 [1997] Crim LR 502 (*'Brown'*).
153 *R v Loguancio* [2000] VSCA 33 (Unreported, Tadgell, Callaway and Buchauar JJA, 24 March 2000), [10]; *R v Fraser* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Mason P, Wood CJ and Sperling J, 10 August 1998), [25]; *R v Beserick* (1993) 30 NSWLR 510, 521-2. This objection may be motivated by a notion that inference should follow 'the direction of causality': R Friedman, 'Assessing evidence' (1996) 94 *Michigan Law Review* 1810, 1828.
154 *R v Geering* (1849) 18 LJMC 215 (Pollock CB); applied in *R v Makin* (1893) 14 NSWR (L) 1, 27 (Windeyer J).
155 *Martin v Osborne* (1936) 55 CLR 367, 401 (Evatt J).
156 [1894] AC 57.
157 (1915) 11 Cr App R 229.
158 (1995) 182 CLR 461.

months."[159] In *DPP v P*,[160] the charges arose from the defendant's sexually abusive relationship with his two daughters. Each complainant's testimony was admitted in support of the other, Lord Mackay commenting on how the two fitted together: 'The younger took on the role of the elder daughter when the elder daughter left home'.[161]

Another proposition regarding singularity is that some forms of misconduct are, of their very nature, likely to be repeated. Other misconduct involving planning and arrangement - some degree of sustained commitment on the part of the perpetrator - is less likely to be a one-off than opportunistic misconduct, which is more the product of the situation.[162] More speculatively and controversially, some forms of deviance are inherently stronger and more indelible than others.[163] It is this kind of reasoning that appears to lie behind the proposition accepted in *Thompson v R*[164] and *R v Sims*[165] that 'sodomy' and other 'unnatural offences' formed 'a special category in which the requirement of similarity was less stringent'.[166] In the earlier case Lord Sumner declared:

> Persons, however, who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity.[167]

The suggestion that offences of homosexuality were exempt from the exclusionary rule was overruled in *Boardman*,[168] Lord Cross suggesting that Lord Sumner's suggestion 'sounds nowadays like a voice from another world'.[169] Zuckerman cites *Thompson* and *Sims* as proof that 'judges too are prey to prejudice'.[170] Of course, the attitudes displayed in these cases towards homosexuality now appear fundamentally wrong, and homosexuality is far too prevalent to be described in terms of a hallmark, or as specialised, extraordinary or peculiar. However, the view that 'the act was of a sort which, if done at all, is done many times'[171] may be less open to criticism.

159 Ibid 470; in *Thompson* (1989) 169 CLR 1, the other murders took place three years after the charged murders.
160 [1991] 2 AC 447.
161 Ibid 461.
162 See *R v Young* [1998] 1 VR 402, 411; *Consultation Paper*, above n 4, [9.25] fn 36; *US v Bettencourt* 614 F2d 214 (1980).
163 Cowen and Carter, above n 1, 145-6.
164 [1918] AC 221, 235.
165 [1946] KB 531, 538-40.
166 J Forbes, *Similar Facts* (1987), 102; see also Dennis, above n 20, 588-9.
167 *Thompson* [1918] AC 221, 235.
168 [1975] AC 421.
169 Ibid 458 (Lord Cross), 440 (Lord Morris), 443 (Lord Wilberforce), 456 (Lord Hailsham), 461 (Lord Salmon). Although, as Forbes notes, above n 166, 103, the result in *R v Sims* and its treatment of the 'striking similarity' factor was approved in *Boardman* [1975] AC 421, 440 (Lord Morris), 444 (Lord Wilberforce), 446, 452 (Lord Hailsham), 457-8 (Lord Cross).
170 Zuckerman, above n 24, 242.
171 Cowen and Carter, above n 1, 146.

A similar rationale underlay the introduction of a number of provisions to the United States Federal Rules of Evidence in 1994. In sexual assault cases, Rule 413 removes the exclusionary rule with regard to evidence that the defendant has committed other sexual assaults, and Rule 414 does the same for child molestation cases.[172] Motivating these reforms was the view that these kinds of offences are driven by the perpetrators' character traits to a greater degree than other crimes, giving the other-misconduct evidence greater probative value.[173] It is questionable whether psychological findings bear this out and, due to the massive underreporting of such crimes, the recidivism statistics are also far from conclusive.[174] Nevertheless, if supported by research findings, the singularity dimension of probative value would be stronger. Yet it is difficult to imagine evidence more prejudicial than that of a defendant's prior convictions for child sexual assault.

In determining whether the charged offence and the other misconduct were the product of the same perpetrator, a further factor will be the extent to which each is proven to be the product of anyone's deliberate intervention rather than accidental or natural. As discussed in the previous section, the trial judge generally leaves issues of credibility for the jury, and so, as Dawson J observed in *Sutton*:[175]

> No difficulty will ordinarily arise where the evidence, if accepted, directly establishes that fact [of the other misconduct] but where the fact itself is a matter of inference then the inference must be capable of being clearly drawn from the evidence relied upon before that evidence is admissible.[176]

His Honour referred to *Perry*,[177] where, on charges that the defendant had attempted to poison her husband with arsenic, the prosecution presented evidence that two former spouses and a brother had also been poisoned with arsenic. But it was not clear that the charged offence or other poisonings were deliberate, and in one instance the alleged victim may have suffered from a natural illness rather than arsenic poisoning.[178] Evidence of the latter event

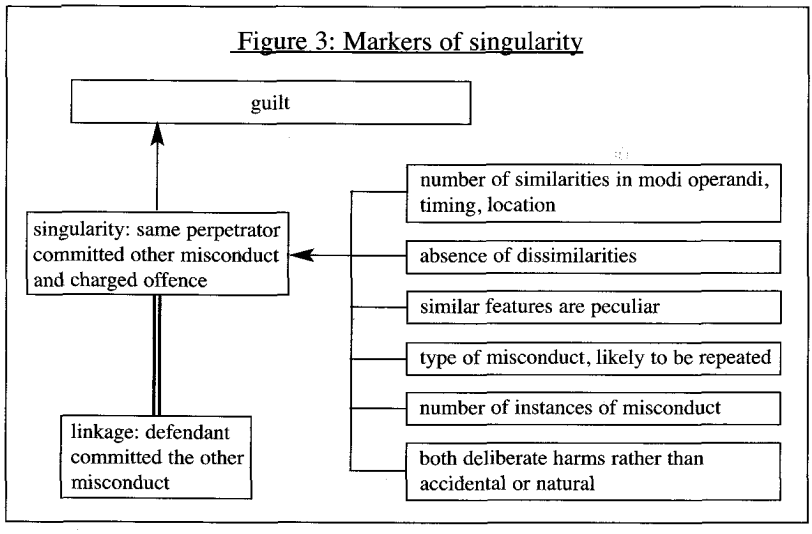
> was inadmissible, not because that instance if proved would not constitute a similar fact carrying the necessary clear inference that the accused was guilty of the offence with which she was charged, but because the available evidence, even if accepted, did not prove with sufficient strength the ingestion of arsenic

[172] See R Friedman, *Elements of Evidence* (2nd ed, 1998) 397. Rule 415 extends these reforms to civil cases; *US v Enjady* 134 F 3d 1427 (1998).
[173] *Consultation Paper*, above n 4, [9.25]-[9.27].
[174] Ibid.
[175] (1984) 152 CLR 528.
[176] Ibid 565. In *Pfennig* (1995) 182 CLR 461, 482, the majority commented that '[o]bviously, the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed'.
[177] (1982) 150 CLR 580.
[178] The defendant's de facto husband, Duncan, actually died from what appeared to be a self-administered overdose of barbiturates. The incident that the prosecution relied upon was an earlier bout of illness.

> in order to provide a factual basis - a similar fact - upon which to found the ultimate inference.[179]

In *Thompson*,[180] the prosecution's case was that the defendant shot two sisters, and then set it up to look as though they had died in a car accident and fire. The prosecution tendered evidence that the defendant had pleaded guilty to the later shooting of another sister and her family, unsuccessfully attempting to conceal the crimes by setting fire to their house. In admitting this evidence, the trial judge commented that in this incident, as in the charged murders, the victims had been shot, and an attempt was then made to destroy the evidence by fire.[181] However, accidental death remained in issue, and the trial judge's comparison 'was tantamount to assuming the truth of the fact in issue which the similar fact was tendered to prove'.[182] There was, however, 'evidence suggesting that'[183] the deaths in question had resulted from human intervention similar to that of the later murders, and while the shared singularity was not as strong as the trial judge suggested, it was sufficient for the evidence to be admissible.

Figure 3: Markers of singularity



The various singularity markers discussed in this section are pictured in Figure 3. Caution should be used with a number of the formulae considered in this section - 'striking similarity', 'hallmark', 'signature' - and not only because of the variety of singularity markers. There is also the risk that such expressions may be taken as establishing a standard of proof for the singularity factor in isolation, whereas there are further considerations. As explored in the following sections, the

[179] *Sutton* (1984) 152 CLR 528, 565 (Dawson J); see also *Perry* (1982) 150 CLR 580, 589-90 (Gibbs CJ), 594-7 (Murphy J), 606-7 (Wilson J), 611-12 (Brennan J).
[180] (1989) 169 CLR 1.
[181] Ibid 7-8.
[182] Ibid 17 (Mason CJ and Dawson J).
[183] Ibid.

propensity inference also requires linkage, and then its strength should be assessed in the context of the other evidence. The other evidence may supplement the probative value of the propensity inference, however, as discussed in the penultimate section, the other evidence may also diminish the value of the inference by rendering it unnecessary.

IV LINKAGE, PROPENSITY AND COINCIDENCE REASONING

Evidence of singularity 'go[es] to show that the same man committed both offences not that the defendant was that man'.[184] Evidence of other similar misconduct will not advance the prosecution case unless 'there is some evidentiary link, direct or circumstantial, with the accused'.[185] Where the linkage evidence is direct and, following the English approach in *R v H*, the trial judge takes the evidence at its highest, this will not be an admissibility issue. But on the Australian approach in *Hoch*, and where the evidence is circumstantial, doubts about linkage will reduce the probative value of the propensity evidence and may pose a threat to admissibility. Of course, on either approach the strength of linkage will be a factor for the jury in its use of the propensity inference to determine whether guilt is proven.

In principle, as broad a range of evidentiary materials may be drawn upon to prove the defendant's commission of the other misconduct as are utilised to prove that the defendant committed the charged offence[186] (see Figure 4). However, the trial judge will be concerned about opening a multiplicity of issues, and will not admit linkage evidence that is only of slight probative value.[187] As uncertainty about singularity increases, evidence of other-misconduct linkage becomes more remote from the ultimate question of the defendant's guilt of the charged offence.

A focus on linkage distinguishes 'propensity reasoning' from its close relation, 'coincidence reasoning'. In *Perry*,[188] Gibbs CJ outlines how coincidence reasoning may operate:

> [W]here a number of poisonings have occurred, and the victims have all been associated with the accused person, the evidence of other poisonings may be admissible to support the inference that the accused was responsible for the death in issue, because it would be contrary to ordinary experience that a series

[184] *McGranaghan* [1995] 1 Cr App R 559, 573; see also *Perry* (1982) 150 CLR 580, 590 (Gibbs CJ), 611 (Brennan J); *Harris* [1952] AC 694, 708, 711; Dennis, above n 20, 602.

[185] *R v Sweitzer* [1982] 1 SCR 949, 949.

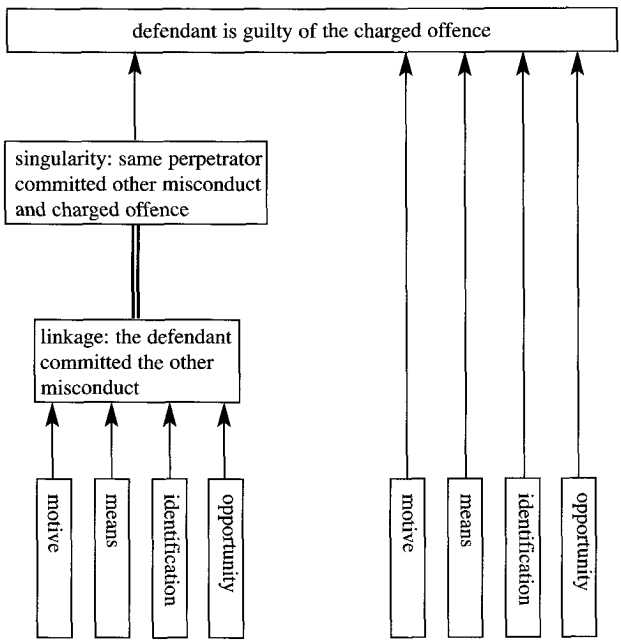
[186] One limitation, however, is that the prosecution could not employ a propensity inference from the defendant's commission of the charged offence to establish the defendant's linkage with the other misconduct. If the other misconduct were then relied upon to support a propensity inference back to the charged offence, circular reasoning would result: *Perry* (1982) 150 CLR 580, 589-590 (Gibbs CJ), 594-5 (Murphy J), 607 (Wilson J), 612 (Brennan J); *Sutton* (1984) 152 CLR 528, 532-3 (Gibbs CJ), 550-2 (Brennan J), 560-1 (Deane J); 567-8 (Dawson J).

[187] See above n 14.

[188] (1982) 150 CLR 580.

of poisonings, caused by accident or suicide, would occur by coincidence in the circle of persons with whom the accused was associated.[189]

Figure 4: Indicators of linkage



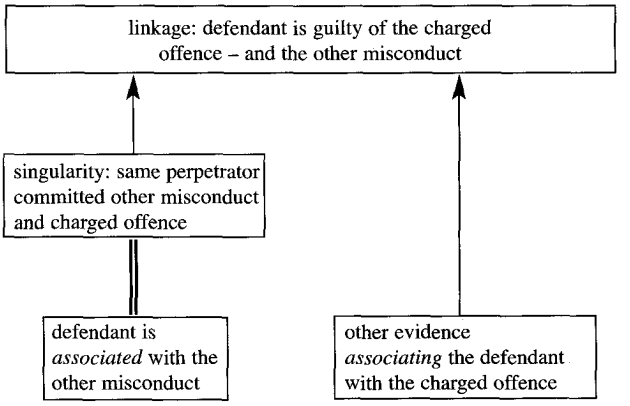
In *Perry*, a poisoning case, and *Smith* ('Brides-in-the-bath case'), coincidence reasoning was directed to the issue of commission. However, coincidence reasoning may also be applied to other issues. For example, in *R v Armstrong*,[190] the issue was identity. The defendant could be put in the location of each of a series of housebreakings and thefts. The prosecution suggested this was not mere coincidence; the defendant was the thief.[191]

Where propensity reasoning is employed, the defendant is clearly identified as the perpetrator of one or more of the misdeeds from the outset (see Figure 1). For example, in *Pfennig*[192] and *Thompson*,[193] the defendant had pleaded guilty to the other alleged misconduct before the instant charges were laid - the evidence was of the defendant as a convicted paedophile or murderer. The linkage step is taken

[189] Ibid 587, 593 (Murphy J); *R v H* [1995] 2 AC 596, 619 (Lord Mustill); *Martin v Osborne* (1936) 55 CLR 367, 384-5 (Evatt J).
[190] (1990) 54 SASR 207.
[191] Cf *Harris* [1952] AC 694, below nn 458-463.
[192] (1995) 182 CLR 461.
[193] (1989) 169 CLR 1.

en route to the guilt finding. With coincidence reasoning, on the other hand, the evidence is not of the defendant as a proven criminal. There is evidence associating the defendant with the other misdeeds, and on the basis of shared singularity this may be added to the evidence implicating the defendant in the charged offence - the 'other evidence'. Only then, as a result of this accumulation, is linkage established. It is a 'by-product' of the finding of the defendant's guilt.[194] It is only 'after the argument has been made, and because it succeeds, that [the defendant's] bad disposition is established'[195] (see Figure 5).

Figure 5: The structure of the coincidence inference



It has been suggested that coincidence reasoning carries a lower risk of prejudice than propensity reasoning, since the defendant's propensity for misconduct is not recognised prior to the finding of guilt, and may be exempt from the exclusionary rule.[196] Such a view may be warranted by the contrast between propensity reasoning and coincidence reasoning in their purest forms. In practice, however, a sharp line between the two forms of reasoning is difficult to draw. In essence, the distinction is one between the stronger notion of 'linkage' and the weaker notion of 'association'; it is one of degree (compare Figures 1 and 5). Classification is rarely straightforward, and most cases will present the possibility of either or both forms of reasoning.[197] Even where cases appear susceptible to clear classification the significance of the distinction is questionable; coincidence reasoning involves the recognition of the defendant's propensity, and the operation of propensity reasoning can be described in terms of the rejection of a coincidence.

[194] Hoffman, above n 1, 199; Piragoff, above n 14, 33; Redmayne, above n 139, 665.
[195] Tapper, above n 26, 344.
[196] *Pfennig* (1995) 182 CLR 461, 519-522, 530-2 (McHugh J); *W* (2002) 124 A Crim R 545, 560-1, [49] (Miles J), [102] (Madgwick J); Cowen and Carter, above n 1, 111, 133; see also Eggleston, above n 23, 92, 101-02; Ligertwood, above n 18, 97.
[197] Redmayne, above n 139, 668.

I have suggested that *Pfennig* is an example of propensity reasoning since the defendant's commission of the other abduction and sexual assault could be taken as a definite starting point in the inference of guilt. However, Tapper cites it as an illustration of coincidence reasoning.[198] For the defendant to have been innocent of the charged offence, given the evidence of the other crime,

> it would have to be premised that on that occasion there were present in the same small bathing place in rural South Australia two different men, both with white vans, *both determined and violent homosexual abductors of children*, both of whom spoke to the victim, both of whom left at about the same time, and both of whom were cunning enough to seek to lay a false trail.[199]

If this appears too much of a coincidence, the jury may infer the defendant's guilt. However, this reasoning is clearly based on the proposition that the defendant has a violent propensity to abduct and sexually assault boys. The same overlap between propensity and coincidence concepts is discernible in Deane J's reference in *Sutton* to

> the similarities between *offences which the accused undoubtedly committed* and the offence with which he is charged [being] such as to warrant, in the context of all the evidence, the conclusion that, *in the absence of extraordinary coincidence*, the same person committed all the offences ...[200]

These are not isolated instances of a blurring of the distinction between propensity reasoning and coincidence reasoning. Consider the multiple-victim sexual assault cases such as *Boardman*,[201] *Hoch*,[202] *R v Best*[203] and *R v H*[204] discussed in previous sections. Given the complainant's direct evidence of commission and identity, these can be classified as credibility cases.[205] The reasoning employed is often described in terms of coincidence reasoning. The other similar allegations support the complainant's evidence due to the 'improbability of similar lies'.[206] Given the similarity of the allegations, 'they must ... either all be true or have arisen from a cause common to the witnesses or from pure coincidence'.[207] And yet the other alleged victims provide direct evidence linking the defendant to the other misconduct. To the extent that any of these accounts is judged credible, the fact-finder will consider the defendant

198 Tapper, above n 26, 344 fn 4.

199 Colin Tapper, 'Dissimilar Views of Similar Facts' (1995) 111 *Law Quarterly Review*, 381, 383 (emphasis added).

200 (1984) 152 CLR 528, 557 (emphasis added); cf Dennis, above n 20, 583, with reference to *R v West* [1996] 2 Cr App R 374: 'Given Rosemary West's *propensity*, it would be an extraordinary *coincidence* if all these killings had occurred without her participation' (emphasis added); see also Stephen Odgers, *Uniform Evidence Law* (5th ed, 2002) 275, 283.

201 [1975] AC 421.

202 (1988) 165 CLR 292.

203 [1988] 4 VR 603.

204 [1995] 2 AC 596.

205 *B (CR)* [1990] 1 SCR 717, [73]; see also *DPP v P* [1991] 2 AC 447, 462; *Pfennig* (1995) 182 CLR 461, 532 (McHugh J).

206 Piragoff, above n 14, 38; Cowen and Carter, above n 1, 116.

207 *Boardman* [1975] AC 421, 444 (Lord Wilberforce).

> to have displayed a propensity for sexual assault.[208]

Despite its status as the *locus classicus*, commentators still disagree as to whether *Makin* involved coincidence reasoning or propensity reasoning.[209] The defendants were charged with the murder of an infant that had been placed in their care and whose body had been found buried in their yard. From the state of the body the cause of death was unclear and could have been illness, accident or deliberate human action. The prosecution adduced other incriminating evidence, including the discovery of the bodies of twelve other infants in premises occupied by the defendants, and alleged that the defendants were employed in a murderous system of 'baby-farming'. For small sums of money, the defendants took unwanted babies ostensibly for adoption. However, according to the prosecution their plan was, not to care for the babies, but to kill them, dispose of the bodies, and make a profit out of the payments.

Did the evidence of the other deaths invoke propensity reasoning or coincidence reasoning? Because the defendants' responsibility for the other killings had not been clearly proven prior to the trial, most jurists view the case as one of coincidence reasoning.[210]

> A family might be unfortunate enough to take a house in the back yard of which babies had been buried by a former tenant; but no one could believe that it was by mere coincidence that a person took three houses in the back yards of which former tenants had secretly buried babies.[211]

On the other hand the jury might first have applied coincidence reasoning to the other deaths, holding the defendants responsible for these, and only then have moved on to the charged murder via propensity reasoning.[212] Tapper supports this view, suggesting that the prosecution case was 'that Makin took in a large number of children, that his disposition was murderous, and that this supported their case that he murdered the child in respect of which he was charged'.[213]

Yet it seems doubtful that the case is susceptible to exclusive categorisation.[214] The evidence may have been admitted for both purposes, or more plausibly, the purpose may not have been clearly specified. In line with Tapper's view, Windeyer J indicated that '[t]he evidence went to shew a system pursued by the prisoners of receiving children in this way, and the evidence of such a system

208 See Cowen and Carter, above n 1, 140, 152-3, discussing *R v Sims* [1946] KB 531; Palmer, above n 89, 82-3. Indeed, as Smith points out, the approach taken in *R v H* precludes the trial judge from questioning the credibility of the other alleged victim and 'seems to presuppose the forbidden reasoning process': above n 117, 719. On the other hand, if the trial judge takes the complainant's direct evidence at its highest then there is no issue; the defendant is guilty.

209 The English Law Commission reviews some of the history of this debate: *Consultation Paper*, above n 4, [10.11] fn 16.

210 *Pfennig* (1995) 182 CLR 461, 532 (McHugh J); Hoffman, above n 1, 199; Eggleston, above n 23, 89; Dennis, above n 20, 586; Ligertwood, above n 18, 100, 116.

211 *R v Makin* (1893) 14 NSWR (L) 1, 22 (Windeyer J).

212 *Harriman* (1989) 167 CLR 590, 600 (Dawson J); Heydon, above n 18, [21060]; Tapper, above n 26, 345.

213 Tapper, above n 26, 345.

214 Piragoff, above n 14, 33-4 entertains both possibilities.

made it probable that they took Murray's child, as stated, in pursuance of it'.[215] However, his Honour added that 'the finding of the other babies ... was not only admissible to shew system, but to shew that it was not by a mere accident or coincidence that the prisoners happened to live in a house in the back yard of which babies happened to be buried'.[216] It seems that even in the purest coincidence case the jury may give pre-emptive consideration to the defendant's criminal propensity, and it is doubtful whether any trial judge direction to the contrary would be effective.[217]

This is not to say that all uses of other-misconduct evidence tend to merge with the propensity reasoning with its potential for prejudice. Distinguishable from propensity and coincidence reasoning are genuinely incidental uses of evidence revealing the defendant's other misconduct. In *R v OGD (No 2)*,[218] for example, the defendant had been charged in connection with the homosexual abuse of his adolescent nephew. The prosecution tendered evidence of a confession that the defendant had allegedly made to JS, another young nephew, during further sexual misconduct with him: 'JS said that while this was happening the appellant told him that it was all right to do "these things", that he used to do them with the complainant and that the complainant said that it felt good'.[219] The purpose of JS's evidence was to prove that the defendant had confessed, and the revelation of the defendant's misconduct with JS was incidental. The use of the evidence did not rely upon the defendant's propensity for misconduct. Had the alleged confession been made to an adult colleague over a work lunch it would have been used in the same way.[220]

Incidental uses of the defendant's other misconduct fall into a distinct category, and may not be subject to the exclusionary rule - this is a point of uncertainty that

215 (1983) 14 NSWR 1, 20.

216 Ibid 22.

217 See, eg, *W* (2002) 124 A Crim R 545 [50] (Miles J): 'If the evidence negating coincidence is also capable of showing tendency, then the jury must be warned that they must not treat it as evidence of tendency and must not indulge in reasoning based on tendency.' This appears particularly futile since the Uniform Evidence Act treats 'tendency' and 'coincidence' evidence in almost identical terms: *Evidence Act 1995* (Cth) ss 97, 98, 101; *Evidence Act 1995* (NSW) ss 97, 98, 101. Justice Madgwick more pragmatically suggested that the 'evidence was either or both strong tendency evidence within the contemplation of s 97 or powerful coincidence evidence within the contemplation of s 98': [98]. It is difficult to understand the basis for the finding in *R v WRC* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, James and Kirby JJ, 7 June 2002), 97, 100, 102, that certain evidence might be admissible as coincidence evidence but not as tendency evidence. See also Redmayne, above n 139, 659.

218 (2000) 50 NSWLR 433.

219 Ibid 437.

220 Ibid. Unfortunately the confession 'could not be extricated' from the evidence of the other misconduct. Odgers questions this conclusion, above n 200, 287. However, given the wording of the admission, the other misconduct does appear inextricable. In *R v Flicker* [1995] Crim LR 493, an alleged confession to a robbery with violence took place in the course of a conversation concerning a planned future robbery with an undercover police officer. Eg, the defendant allegedly said at one point, 'Well that would be handy ... Only thing is, we'd have to bash the geezer like last time'. The difficulty was that 'potentially inadmissible evidence was inextricably bound up with clearly admissible evidence'. Cf *Driscoll v R* (1977) 137 CLR 517, 533 (Gibbs J).

is beyond the scope of this article.[221] However, the distinction between coincidence and propensity reasoning, although clear in theory, is dubious in practice. It is doubtful whether the distinction provides a sound basis for determining the scope of the exclusionary rule. Throughout this article, unless the contrary is clearly implied, the terms 'propensity reasoning', 'propensity evidence' and 'propensity inference' are used to also cover their coincidence equivalents.

V THE OTHER EVIDENCE: ADMISSIBILITY BY CATEGORIES AND DEGREES

In assessing the strength of the propensity inference so as to determine its admissibility, regard should be had to the defendant's linkage with the other misconduct, and whether there is sufficient singularity to suggest that the perpetrator of that misconduct also committed the charged offence. While not uniform and not without qualification, numerous authorities suggest that the

[221] In *R v OGD (No 2)* (2000) 50 NSWLR 433, 445, the Court indicated that the incidental evidence was not excluded under the propensity provisions of the *Evidence Act 1995* (NSW), ss 97, 101; see Odgers, above n 200, 281, 283. With regard to the common law, McHugh J in *KRM* (2001) 178 ALR 385, 392, suggested that 'an important question still to be resolved by this court is whether the "no rational view" test of admissibility applies to all evidence revealing criminal or discreditable conduct or only to evidence tendered to prove propensity and to evidence proving similar facts'. Justice Kirby 'resist[ed] the temptation to respond to McHugh J's discussion': 412-3. See also Heydon, above n 18, [21010].
A broader exclusionary rule may suit the more flexible English probative-value/prejudicial-effect admissibility test. The English Law Commission recommends that the scope of the exclusionary rule should be determined by 'risk of prejudice, rather than the purpose for which the prosecution claims to be adducing the evidence': *Consultation Paper*, above n 4, [2.43]; see also *Cm 5257*, above n 4, [8.1]. However, evidence on the 'central' facts is exempt from the rule (ibid 113-4 [8.20]-[8.28], cl 2(1) of the Draft Criminal Evidence Bill (UK)) and there is also an 'explanatory exception', albeit one requiring the court's leave which hinges, more or less, on probative value and prejudicial effect: 113-37 Part 10, *Cm 5257* and Part 10, cl 7 of the Draft Criminal Evidence Bill. The growing body of literature on the scope of the exclusionary rule, *res gestae*, relationship and background evidence and incidental reasoning includes: Forbes, above n 166, Ch 2: 'Res Gestae: Facts Not Similar But the Same'; Palmer above n 20, 174-7; Peter Mirfield, '"Similar Facts" in the High Court of Australia' (1990) 106 *Law Quarterly Review* 199, 202; T H Smith and O P Holdenson, 'Comparative Evidence: Admission of Evidence of Relationship and Sexual Offence Prosecutions: Part I' (1999) 73 *Australian Law Journal* 432, 437; Dennis, above n 20, 595, 598-9; Tapper, above n 26, 341-4; D Birch, *Stevens* case commentary (1995) *Criminal Law Review* 651; *Underwood* (1999) Crim LR 227.

probative value assessment should be made in the context of the other evidence.[222]

The 'other evidence' is perhaps most easily identified by considering what would be left if the propensity inference were disallowed. Without any evidence of the defendant's other similar misconduct, there may still be prosecution evidence relating specifically to the charged offence: evidence of motive, means or opportunity,[223] forensic or eye-witness identification evidence, an alleged confession, or consciousness-of-guilt evidence of post-offence conduct. The term 'other evidence' should also be extended to cover any strategic admissions by the defendant. The defendant, for example, may concede that an offence was committed by someone, and defend the charges solely on the issue of identity, or concede the *actus reus* but deny the *mens rea*, and so on.

As discussed in the previous section, the other prosecution evidence is integral to coincidence reasoning. The defendant's association with the various other misdeeds *and* the charged offence is considered, and it is asked whether the *combination* could plausibly be considered a coincidence, or whether the defendant must be guilty of the lot (see Figure 5). A clearer separation between propensity evidence and other evidence is maintained in propensity reasoning. The focus is on the defendant's commission of the other misconduct in isolation and it is asked whether this demonstrates a propensity consistent with the commission of the charged offence (see Figure 1). While the propensity inference can be viewed as operating independently, in assessing its probative

222 Hoffman notes that in *Boardman*, only Lord Cross explicitly suggested that the probative value assessment should be of the propensity evidence '*taken together with the other evidence*': Hoffman, above n 1, 202; *Boardman* [1975] AC 421, 457. But Lord Hailsham noted that propensity evidence may appear irrelevant '[w]hen there is nothing to connect the accused with a particular crime', but '[w]hen there is some evidence connecting the accused with the crime, in the eyes of most people, guilt of similar offences in the past might well be considered to have probative value': 451.
In *Sutton* (1984) 152 CLR 528, 532-3, Gibbs CJ held: '[I]t would be impossible to consider the probative force of any similar fact evidence without taking into account the rest of the case which the evidence tendered was intended to support'; see also 539 (Murphy J), 549-550 (Brennan J), 557 (Deane J); *Thompson* (1989) 169 CLR 1, 17 (Mason CJ and Dawson J); *Pfennig* (1995) 182 CLR 461, 483, 489 (Mason CJ, Deane and Dawson JJ), 529, 536, 542 (McHugh J); *Harriman* (1989) 167 CLR 590, 595 (Brennan J), 602 (Dawson J), 614 (Gaudron J), 633 (McHugh J); *Festa* (2001) 185 ALR 394, 454 (Callinan J).
The argument that the *Pfennig* 'no rational explanation' should operate contextually is particularly strong, first, because this sets a particularly high standard, and secondly, because this standard is derived directly from the criminal standard of proof which clearly applies to the evidence as a whole.
It is interesting to note that in the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW), the general coincidence and tendency rules ss 97(1)(b) and 98(1)(b), refer to the strength of the disputed evidence 'either by itself or having regard to the other evidence', whereas the tighter provision applying to criminal trials, s 101(2), refers only to the strength of 'the evidence'. The significance of this difference is unclear.
On conflicting authorities and the need for qualification, see discussion of strong singularity and linkage requirements in Sections 2, 5 and 7, and the balancing need principle in Section 8.

223 Some forms of motive evidence may rely upon the propensity inference: *R v Ball* [1911] AC 47, 68 (Lord Atkinson); *Boardman* [1975] AC 421, 462-3 (Lord Salmon); *Sutton* (1984) 152 CLR 528, 545 (Brennan J). Means evidence may identify the defendant, but it may also display their criminal propensity: see McHugh J's comments in *Pfennig* (1995) 182 CLR 461, 525; *KRM* (2001) 178 ALR 385, 391; *Festa* (2001) 185 ALR 394, 414; see also 438 (Kirby J) and 455 (Callinan J). In both cases, it may be that the exclusionary rule is by-passed via a *res gestae* or completeness principle.

value it should still be 'combined with the other evidence'.[224] This will reduce the work required of it, and can be a considerable aid to gaining admission.[225] While certain propensity evidence may be excluded if required to 'bear the whole weight' of the prosecution case, the same evidence may be found admissible in order to 'dispel a mere doubt'.[226]

An appreciation of the role of the other evidence in assessing the probative value of propensity evidence has led some to propose a reconciliation between the older approach - admissibility by *category* of relevance - and the modern approach - admissibility by *degree* of relevance.[227] On this view it is not the actual classification of the issue that is necessarily of importance. But the fact that the other evidence has made it possible to narrow the defence to a specific issue means there will be less work required of the propensity evidence.[228] In *Makin*,[229] Lord Herschell suggested that, despite the general exclusionary principle, propensity evidence was admissible to determine 'whether the acts alleged in the indictment were designed or accidental'.[230] In such a case, the issues have been narrowed considerably; identity and the *actus reus* have been established or conceded, and the only outstanding question concerns the *mens rea*. Eggleston suggests that, in such a case, 'slighter similarities will suffice to let in evidence of prior offences than if the attempt is to use the evidence to prove that the act was in fact committed'.[231]

Dennis suggests that the probative impact of the defendant conceding the *actus reus* may justify the Court of Appeal's unusual decision in *Lewis*.[232] In this particular instance, however, the explanation is strained. At trial defendant was convicted on a number of indecent assault charges with regard to the twin 10 year-old daughters of the woman with whom he was living. The challenged propensity evidence was quite dissimilar to the charged offences. It consisted of the defendant's statements to the police and his possession of literature revealing a sympathy for paedophilia. The Court of Appeal did not find *Boardman*[233] 'of

224 *Pfennig* (1995) 182 CLR 461, 536 (McHugh J).

225 Tapper, above n 129, 28; Dennis, above n 20, 581; *Consultation Paper*, above n 4, [2.47].

226 Hoffman, above n 1, 202. This provides a rebuttal to Palmer's suggestion, above n 89, 82-3, that an item of evidence may have less probative value solely by reason of being admitted for propensity reasoning rather than for coincidence reasoning.

227 Cowen and Carter, above n 1, 150; Hoffman, above n 1, 201-4; Piragoff, above n 14, 135-6; Dennis, above n 20, 581. Note that admissibility in the United States is still ostensibly categorial: see eg Rule 404(b) of the Federal Rules of Evidence.

228 To suggest that the admissibility of propensity evidence is in this sense gauged against the background of other prosecution evidence and defence concessions clearly raises procedural issues. These, however, are beyond the scope of the present article. See, eg, Cowen and Carter, above n 1, 147-8; Tapper, above n 26, 351-2.

229 [1894] AC 57.

230 Ibid 65. See also *R v Francis* (1874) 12 Cox CC 612, 615 (Lord Coleridge); *R v Makin* (1893) 14 NSWR (L) 1, 29-30 (Windeyer J).

231 Eggleston, above n 23, 101. See also *Hoch* (1988) 165 CLR 292, 295 (Mason CJ, Wilson and Gaudron JJ).

232 (1983) 76 Cr App R 33; Dennis, above n 20, 581.

233 [1975] AC 421.

assistance',[234] and applied Lord Herschell's statement of principle in *Makin*. The Court upheld the trial judge's decision to admit the propensity evidence on those charges where the *actus reus* was conceded, 'to rebut the defence of accident or innocent association'.[235] For example, one of the complainants alleged that the defendant persistently rubbed between her legs with a towel after a bath. The defendant admitted to having dried her, and conceded that it was possible that the 'towel touched between her legs'.[236] The Court, however, considered that the propensity evidence was not admissible to support the prosecution case on the 'masturbation incident'. It was alleged that the defendant had stood naked in the presence of the twin daughters and masturbated despite the evident distress it caused them. The defendant responded to this charge with a 'complete denial'.[237]

On this brief outline it appears that *Lewis* might illustrate Dennis' point: 'Evidence which suggests that a particular admitted act was not accidental, or was done with an indecent motive, may not be sufficient to prove the commission of another act which the accused denies'.[238] On closer examination, however, it appears that *Lewis* was a rather technical categorial decision after all. Despite the defendant's denial of the masturbation incident there was significant other evidence. The complainants' account was fully corroborated by their 14 year-old brother.[239] Furthermore, the defence of accident or innocent explanation on the towelling charge was presented hypothetically; 'there was some denial of the basic facts'.[240] The trial judge dealt with this ambiguity by admitting the evidence conditionally. The jury was directed not to use the propensity evidence 'to prove these charges of itself'.[241] Only if it considered that the defendant had touched the complainants as alleged could the propensity evidence be used to determine 'whether matters which you are satisfied did occur were accidental or innocent'.[242]

The same categorial approach to admissibility was taken by the Court of Appeal in *R v Wright*[243] and most recently in *R v Burrage*.[244] Birch in her commentary is justified in criticising *R v Burrage* as a 'retrograde step'.[245] Having regard to modern authorities, such as *Boardman* and *DPP v P*, '[t]he right way to tackle these issues ... is without reliance on categorisation to arrive at an assessment of

234 (1983) 76 Cr App R 33, 35. Begging the question, the Court indicated that *Boardman* was 'not directly relevant since it concerned "similar fact" evidence'.
235 Ibid 36.
236 Ibid 34. Similarly, the other complainant alleged that defendant had fondled her chest while ostensibly 'cuddling' her in bed. The defendant 'said that his hand may have strayed there but that it was without significance': 35.
237 Ibid 36.
238 Dennis, above n 20, 581.
239 (1983) 76 Cr App R 33, 34. The general denial on this charge may have been because 'there was, on the facts of that incident, no possibility of a defence of accident or ... innocent explanation': 36.
240 Ibid 37. The defence of innocent explanation was raised more squarely with regard to the 'urination incident'. He admitted that he had 'shook his penis at the twins, but said that his gesture "was only in fun"': 34.
241 Ibid 37.
242 Ibid.
243 (1990) 90 Cr App R 325.
244 [1997] 2 Cr App R 88.
245 D J Birch, 'Case and Comment' (1997) *Criminal Law Review* 440, 441.

the probative value'.[246] Again, one could draw a connection between categorisation and the probative contribution of the other evidence. The Court held that evidence of previous similar acts is inadmissible to prove indecent assault where there is a 'denial that the acts in question ever happened at all',[247] but will be admissible in several situations where the issues are narrowed: (1) where the defendant 'admits the contact but asserts that it was accidental';[248] (2) where the defendant concedes the association but argues that it 'bears an innocent explanation';[249] and (3) where 'there is no doubt that an offence was committed by someone, but where the defendant denies that he was that person'.[250] In the first category, identity and the *actus reus* are established, and only *mens rea* is in issue. In the second category, identity is established, there is evidence of opportunity going to the *actus reus* and *mens rea* is in issue. In the third category, the *actus reus* and *mens rea* are established and identity is in issue. In each category, the issues have been confined considerably, either by other prosecution evidence or the strategic concessions of the defendant, and far less is demanded of the propensity evidence. However, as *Lewis* demonstrates, the narrowness of the issue does not necessarily correlate with the strength of the other evidence.

An interesting illustration of the lingering effects of the categorial approach into the modern age is *Pfennig*,[251] Australia's leading common law authority.[252] The lengthy discussions of principle, though mentioning *Makin* in passing,[253] suggest that admissibility turns on the degree of relevance rather than the kind of relevance. However, the majority left open the possibility that admissibility requires some narrowing of the issues. As noted by Heydon and Tapper, the current authors of *Cross on Evidence* in Australia and England respectively, '[t]he greatest difficulty is experienced in cases where it is necessary to show by the evidence ... both that a criminal act occurred, and that, if it did, it was the accused who committed it'.[254] *Pfennig* was such a case. The defendant was charged with a boy's murder, but there were no eyewitnesses and no body; at trial it was an open question whether the victim had in fact drowned in the river by which his bicycle and fishing gear were found. Even if drowning was ruled out, leaving abduction/murder as the only viable theory, the identity of the perpetrator remained a real issue. The prosecution was put to proof of all elements of the crime.

The prosecution tendered evidence that the defendant had pleaded guilty to the abduction and sexual assault of another boy, 11 months later. Given that everything was in issue, the prosecution may not have been permitted to present the evidence under a strict categorial approach. The trial judge admitted the

246 Ibid 442.
247 Ibid 441.
248 Ibid.
249 Ibid.
250 Ibid.
251 (1995) 182 CLR 461.
252 See, above n 68.
253 (1995) 182 CLR 461, 475-6 (Mason CJ, Deane and Dawson JJ), 501-3 (Toohey J), 512, 517 (McHugh J).
254 Tapper, above n 26, 350; Heydon, above n 18, [21105].

evidence conditionally, adopting a similar approach to that in *Lewis*, above. The jury were directed that the issues had to be narrowed before the propensity evidence could be employed: '[T]he evidence was relevant, at the most, to the question of the abductor's identity and ... it could not be used to resolve any doubts on the question whether there was an abduction at all'.[255] Justice Toohey clearly considered this limitation appropriate,[256] and while the majority reserved their decision on the matter,[257] they emphasised that the jury was entitled to settle upon the abduction and murder theory without recourse to the propensity evidence.[258] Only McHugh J clearly rejected the categorial constraints, indicating that the propensity evidence 'was admissible to prove the abduction, the purpose of the abduction and the murder as well as the fact that the appellant was the killer'.[259]

Lord Herschell's judgment in *Makin* has been taken as the leading authority for the discredited though persistent categorial approach to admissibility,[260] but this may be less the fault of the decision itself than of subsequent courts paying 'excessive respect to judicial pronouncements, torn out of their context and elevated to the dignity and authority of dogma'.[261] In *Makin*, given that the 12 infant bodies were all found buried on properties owned by the defendants, it might have been thought that identity was established, and the defence was one of accident. However, 'it does not appear this was ever raised in terms',[262] and it is interesting to note that the Full Court of the Supreme Court of New South Wales expressly resisted treating it on this basis. Justice Windeyer indicated that admissibility turned upon the strength of the 'nexus' between the other misconduct and the charged offence 'irrespective of the existence of any abstract question of accident or design'.[263] The probative value of the propensity evidence was explicitly assessed against the background of the other evidence. Indeed, the Court considered whether any particular standard of proof should be imposed on 'prior evidence' of the charged offence, before 'evidence of other killings can be admitted'.[264] Justice Innes suggested that there should be 'sufficient evidence

255 (1995) 182 CLR 461, 485 (Mason CJ, Deane and Dawson JJ), 498-9 (Toohey J).

256 Ibid 499-500, 507; see also Clough, above n 96, 299-300.

257 (1995) 182 CLR 461, 490.

258 Ibid 466, 471, 486-7, 490 (Mason CJ, Deane and Dawson JJ), 492, 507 (Toohey J).

259 Ibid 536. This sequential approach to proof of commission and identity may have origins beyond the categorial approach to admissibility of propensity evidence. *Starkie on Evidence* (3rd ed, 1842), 574, suggested that 'the coincidence of circumstances tending to indicate guilt, however strong and numerous they may be, avails nothing unless the *corpus delicti*, the fact that the crime has been actually perpetrated, be first established ... hence upon a charge of homicide it is an established rule that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body'. This appears to have been accepted as correct in *Peacock v R* (1911) 13 CLR 619, 628, 633 (Griffith CJ), 650 (Barton J); see also *R v Makin* (1893) 14 NSWR (L) 1, 17 (Windeyer J). However, in *Plomp v R* (1963) 110 CLR 234, 248, Menzies J held that 'proof of a case cannot be so fragmented'; see also 242 (Dixon CJ).

260 Tapper, above n 26, 337; *Consultation Paper*, above n 4, [2.17].

261 Cowen and Carter, above n 1, 156; see also Tapper, above n 26, 337.

262 Dennis, above n 20, 584.

263 (1893) 14 NSWR (L) 1, 24. Justice Windeyer's analysis led Evatt J in *Martin v Osborne* (1936) 55 CLR 367, 387, to observe: '"to rebut accident" is often a euphemism for "to prove wilful murder by the accused"'.

264 Ibid 18 (Windeyer J).

adduced aliunde ... to justify the case being sent to the jury',[265] however, Windeyer and Foster JJ resisted the adoption of any fixed formula.[266]

The last three sections have examined the three factors that determine the probative value of the propensity inference: singularity; linkage; and the other evidence. Within this framework a number of issues have been considered: singularity factors beyond just similarity; the difference and the overlap between coincidence and propensity reasoning; the scope of the exclusionary rule; and the modern significance of the specific issue requirement. Over the rest of the article, the tripartite structure will be used to explore a number of further questions regarding the probative value, admissibility and application of the propensity inference. Authorities laying down strong linkage and singularity requirements at both admissibility and proof stages will be criticised for their failure to take account of the contribution of the other evidence. The limited circumstances in which the inference alone bears the weight of the criminal standard will be outlined. The penultimate section assesses the concern that the supportive role of the other evidence may allow the admission of propensity evidence that is only slightly probative but highly prejudicial. The antidote is a need requirement - the propensity evidence must make a significant contribution to a real issue in the case. The final section considers the extent to which the English Law Commission's proposed guidelines on the probative-value assessment of propensity evidence adequately address these considerations.

VI STRONG LINKAGE: SEQUENTIAL AND CUMULATIVE REASONING

Having regard to the probative contribution of the other evidence it will generally be inappropriate to direct the jury that the propensity inference need itself satisfy any particular standard of proof. Inconsistent with this observation, however, is a body of authority holding that a 'sequential' or 'anchoring' approach should be taken to the propensity inference; the defendant's linkage with the other misconduct should be strictly proven before that misconduct is used against the defendant on the charged offence.

The chief English authority on the sequential approach is *McGranaghan*.[267] The defendant was convicted of three burglaries aggravated by indecent assault or rape, committed over two years in the south-west of London. The description of the perpetrator's appearance, manner and accent, and the nature of the assault was similar in each case, and the trial 'proceeded on the basis that all three groups of offences were most probably committed by one man'.[268] The defendant had been identified in connection with each incident, however, the identifications were all of questionable quality. The trial judge had directed the jury that they could take

[265] Ibid 37-8.
[266] Ibid 18 (Windeyer J), 43-4 (Foster J); see also *Martin v Osborne* (1962) 55 CLR 367, 387 (Evatt J).
[267] [1995] 1 Cr App R 559.
[268] Ibid 571.

the view that each identification 'serves as some supportive evidence [and] confirms [or] bolsters up'[269] the others. The Court of Appeal held this direction was wrong. Evidence that the defendant has committed another offence other than that charged 'may only be admitted if the jury are *sure* on evidence other than the similar fact evidence that the defendant is guilty of the other offence'.[270] The convictions were quashed.

There were other quite good grounds for overturning the convictions. The Court of Appeal heard the matter in 1991, 10 years after the original convictions, following a Home Office reference. In the intervening period, forensic evidence had been freshly examined. Analysis of the perpetrator's semen on the bed clothes of the third assault victim strongly suggested that the defendant was innocent in relation to this incident. The Court could have then drawn a negative propensity inference with regard to the other charges. If the same person had committed all three offences, and the defendant was innocent of one, then the defendant must have been innocent of all three. However, the Court only quashed the convictions in relation to the third incident on this ground, and quashed the other convictions owing to the trial judge's failure to apply the propensity inference in strict sequence.

The Court of Appeal declined to follow *McGranaghan* in this respect in *Downey*.[271] The defendant was convicted of two service-station robberies, committed 15 minutes apart in the Wembley district of London. Security video footage of the robberies was not sufficient to provide a positive identification, however, it revealed a number of shared singularities. In both cases the robber was white, wore a black stocking mask, had 'the same look about him',[272] and obtained the money by threatening the cashier with a hand-gun, grabbing handfuls from the till, then leaning over to check there was none left. There was also linkage evidence. Two days later, the defendant was arrested in possession of a shirt and gun that were described as 'similar' to those in each robbery. The cashier from the first robbery made a '75 per cent' identification, and the prosecution presented the jury with a still of the robber from an external camera allegedly resembling the defendant.[273] A witness at the second robbery made a note of the registration of the getaway car which was close to that of the defendant's rental car.

The trial judge had directed that, if the jury was 'sure that the same man committed both robberies', it could 'take the evidence on [the first robbery] into account when considering [the second] and vice versa'.[274] The defendant argued that this was inconsistent with *McGranaghan*, but the Court held that the trial judge was entitled to adopt a 'different approach':

> If there is evidence which entitles the jury to reach the conclusion that it was

[269] Ibid 564.
[270] Ibid 574.
[271] [1995] 1 Cr App R 547.
[272] Ibid 549.
[273] Ibid 552.
[274] Ibid 550.

> the same man, even though the evidence in either case does not enable them to be sure who the man was, then it follows that they can take account of evidence relating to both offences in deciding whether that man was the defendant.[275]

This is known as the 'cumulative' or 'pooling' approach.

A comparison of *McGranaghan* with *Downey* suggests that there may be a justification for the sequential approach in the earlier case.[276] The items of evidence in *McGranaghan* linking the defendant with each incident were all eyewitness accounts which may have all suffered the same weaknesses.[277] The sum may have been no greater than its individual parts; the victims may all have mistaken the defendant for the similar-looking perpetrator. In the circumstances of that case it may have been appropriate to observe that '[a]n identification about which the jury are not sure cannot support another identification of which they are also not sure however similar the facts of the two offences may be'.[278] In *Downey*, however, there were various types of linkage evidence - clothes, weapon, photographic identification, eyewitness identification, and getaway car registration - each confirming the other, and in combination providing an increasingly solid foundation for conviction.

Soon after *Downey*, the Court of Appeal was presented with the issue again in *R v Barnes*.[279] The defendant was charged in connection with a series of evening knifepoint indecent and sexual assaults on young women in the Tufnell Park area of London over a period of two weeks. The linkage evidence consisted largely, though not exclusively, of descriptions and identifications by the victims, in this respect resembling *McGranaghan* more closely than *Downey*.[280] However, the Court elected to follow *Downey*:

> If the jury are satisfied by other evidence that one man committed all the offences then the victims at the identification parades are, *ex hypothesi*, all seeking to identify the same man and we can see no reason why their identifications should not be regarded as mutually supportive.[281]

It is tempting to view *McGranaghan* as *sui generis*. Perhaps in that case, the fresh evidence which decisively *negated* the defendant's linkage to one of the singular offences led the Court to overstate the need for *positive* linkage. The Court's heightened caution may have been warranted since the various items of identification evidence may have all been equally fragile. However, sequential

275 Ibid 552.
276 Pattenden, above n 72, 461-2.
277 On the dangers of identification evidence see *R v Turnbull* [1977] QB 224; *Alexander* (1982) 145 CLR 395; Elizabeth Loftus, *Eyewitness Testimony* (rev ed, 1996).
278 [1995] 1 Cr App R 559, 573; quoted in *Downey* [1995] 1 Cr App R 547, 551.
279 [1995] 2 Cr App R 491 (*'Barnes'*).
280 In addition, the defendant was arrested in the area following the final attack, he was in possession of a knife, about which he lied, and had purportedly made an admission in regard to an earlier aborted attack. However, heavy reliance was placed on the identifications and descriptions. See also Pattenden, above n 72, 462.
281 [1995] 2 Cr App R 491, 497-8.

approaches have also developed in Australian cases without the features of *McGranaghan*.[282]

In *R v Salerno*,[283] the defendant was convicted of eight counts of larceny of portable television sets from electrical stores. While the actual thefts were not witnessed, the defendant was identified in each case as the individual who had entered the store with a large blue overnight bag prior to the theft, and following the final theft was found in possession of the bag which contained a television power cord and an ear plug. The defendant's appeal was upheld on the ground that the trial judge had not correctly directed the jury as to the use of the evidence. The Full Court of the Supreme Court of Victoria considered it 'obvious that the evidence given in relation to other counts cannot assist to identify the accused with the particular count under consideration unless the jury is first satisfied that the acts disclosed by such other evidence were done by the accused'.[284] Perhaps this direction was warranted to some degree on the basis that, as in *McGranaghan*, other than possession of the bag and accessories, all the linkage evidence had the same nature and may have carried the same risk of error. However, in *Vaitos v R*,[285] on charges relating to a sequence of sexual assaults and burglaries, there were various types of linkage evidence - 'physical identification of the applicant by some witnesses, identification of certain property stolen from victims which was later found in the applicant's possession, and forensic evidence'[286] - and yet the Court still advocated a sequential approach. The jury should have been instructed to 'start their considerations with those counts in respect of which the Crown case was strongest'[287] and work through to the Crown's weakest charge.

The decisions so far discussed in this section have all concerned the issue of identity. Australian state appeal courts have recently applied the sequential approach more broadly. In *R v Peake*,[288] the defendant was convicted of the unlawful wounding of his former de facto wife and the attempted murder of her parents with a samurai sword at the parents' house. His defence was that he was merely seeking the return of his sword, following his wife's decision to leave him, and that the injuries all occurred accidentally when they tried to stop him.[289] The prosecution countered with evidence of the defendant's previous violence to the injured persons and their property. Justice Olsson indicated that the defence counsel 'is correct when he asserts that it was essential that it be made clear to the jury that, before it could rely on disputed evidence of prior conduct going to

[282] See also the discussion in *R v Arp* [1998] 3 SCR 339, 373 [58] of Canadian authorities both cumulative and sequential, and the discussion in Mahoney, above n 85, 188-9, 194-5 of New Zealand and United States authorities.

[283] [1973] VR 59.

[284] Ibid 63.

[285] (1981) 4 A Crim R 238.

[286] Ibid.

[287] Ibid 253 (Young CJ); see also 265-6, 272 (Murphy J), 298-9 (O'Bryan J).

[288] (1996) 67 SASR 297.

[289] This was of a piece with his explanation for driving his van into their house on his arrival - 'he lost control of the van, aquaplaned across the lawn and "kangaroo-jumped" into and from the house on a total of three occasions' - described by Olsson J as 'scarcely plausible' (ibid 303) and Millhouse J as 'quite laughable' (ibid 299).

relationships, it had, first, to be satisfied of its accuracy beyond reasonable doubt',[290] and, dissenting, would have allowed the defendant's appeal. The majority, while agreeing that 'it would have been appropriate to remind the jurors that evidence of these particular facts could not be used unless they were proved to the required degree of satisfaction',[291] considered the summing up as a whole satisfactory.

The main difficulty with the sequential approach - its failure to take account of the supportive role of the other evidence - is discussed in the next section. However, the sequential approach is problematic in another way. In demanding that the defendant's linkage to other misconduct be established as a separate first step, it will often preclude coincidence reasoning. As Hodgson JA recently observed in *R v WRC*:[292]

> The whole force of coincidence evidence is the co-existence of two or more pieces of evidence, so that satisfaction beyond reasonable doubt might come from this co-existence, whereas it could not come from any single piece of evidence considered on its own.[293]

The Supreme Court of South Australia in *Banco* was clearly unaware of the inconsistency between the sequential approach and coincidence reasoning in *R v Armstrong*.[294] The defendant appealed against a series of housebreaking and theft convictions on the grounds that the evidence on each count was inadmissible on others, and the jury had been incorrectly instructed on the use of the evidence. The appeal was dismissed. The Court indicated that the evidence acquired its force via coincidence reasoning:

> [T]he disputed evidence in this case was of positive probative value because, if accepted, it could lead the jury to conclude that the accused's presence at relevant times and places indicated his involvement in the series of offences and could not be explained as mere coincidence.[295]

However, at the same time, the Court invoked *R v Salerno* and expressed approval for the trial judge's sequential direction:

> Where propensity evidence is relied upon the jury should be told that, when considering any count in the information and drawing a conclusion with respect to it ... they must be satisfied, before using that evidence in relation to any other count or counts, that the accused had in fact committed the offence or done the relevant act disclosed by that evidence.[296]

These two statements are contradictory. The description of coincidence

[290] Ibid 309 (Olsson J).
[291] Ibid 301 (Millhouse J), applying *Brusnahan* (Unreported, Full Court South Australia Supreme Court, Bollen, Duggan, Mullighan JJA, 5 November 1993).
[292] (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, James and Kirby JJ, 7 June 2002), [58].
[293] Ibid [83] Greg James J, [124] Kirby J agreeing.
[294] (1990) 54 SASR 207.
[295] Ibid 229 (Duggan J), 214 (King CJ, Cox and Duggan JJ agreeing).
[296] Ibid 220 (King CJ, Cox and Duggan JJ agreeing).

reasoning assumes that the evidence merely associating the defendant with the various similar crimes should be considered together, while the sequential direction would prohibit this.

VII INDISPENSABLE INFERENCES AND THE CRIMINAL STANDARD

The main difficulty with the sequential approach is that it applies the criminal standard to the propensity inference in isolation, regardless of the support provided by the other strands of the prosecution case. The Supreme Court of Canada in *R v Arp*[297] held:

> Though the similar fact evidence, standing alone, may fall short of proof beyond a reasonable doubt, it can be relied upon to assist in proving another allegation beyond a reasonable doubt. Two separate allegations can support each other to the point of constituting proof beyond a reasonable doubt, even where a reasonable doubt may have existed in relation to each in isolation.[298]

On this basis, the Court rejected the sequential approach to proof, indicating that only a 'low standard' of proof applied to the linkage step.[299] The prosecution should demonstrate 'more than the possibility that the similar act is that of the accused', more than 'mere opportunity',[300] but, as a rule, the criminal standard is inappropriate.

Yet the courts often fail to appreciate this elementary aspect of the logic of proof. Consider, for example, the recent case of *Camilleri*[301] discussed above. In issue were the roles played by defendant and his accomplice in the rape and murder of two schoolgirls. The defendant claimed he was in a deep drug-induced sleep while his accomplice carried out the attacks. The prosecution relied upon the evidence of another victim of a similar attack a few weeks later in which both men were involved with the defendant playing the dominant role. The trial judge had given a sequential jury direction 'that before they could rely on the evidence of [the later victim] it was necessary that they be satisfied about the truth and reliability of her version beyond reasonable doubt'.[302] The Court of Criminal Appeal merely commented that 'it was not suggested that the above directions were anything other than proper'.[303]

297 [1998] 3 SCR 339.
298 Ibid 376.
299 Ibid 372, interpreting *R v Sweitzer* [1982] 1 SCR 949.
300 Ibid. Yet one could imagine a case where the prosecution should be permitted to prove other misconduct with only weak linkage. Suppose that the defendant previously pleaded guilty to offence A, and had mere opportunity for offences B and C. On charges for offence D, the prosecution should be allowed to bring evidence of offences A, B and C to show how offence D is part of the same series.
301 (2001) 119 A Crim R 106.
302 Ibid 128 (Phillips CJ and Brooking JA).
303 Ibid.

The application of the criminal standard was clearly inappropriate; the propensity evidence was supported by a wealth of other incriminating evidence.[304] The defendant's accomplice was the prosecution's main witness, and there was, in addition, evidence that the defendant was not asleep but was driving the car at about that time, forensic evidence of the defendant's semen on a shirt of one of the girls, the improbability that the companion by himself managed to drag both girls into the thick bush where they were killed, and consciousness of guilt evidence including the defendant's destruction of evidence and the presentation of a false alibi. Interestingly, the Court appeared to understand the logic of proof as it applied to the guilty-lie inference, indicating that the trial judge's application of the criminal standard to this inference was inappropriate and 'too favourable to the accused'[305] since the 'supposed lie is no more than part of a body of evidence'.[306] In two very recent decisions, Hodgson JA of the New South Wales Court of Criminal Appeal has recognised that the same reasoning obviates the need for a sequential direction with regard propensity reasoning.[307]

The Supreme Court of Canada and the High Court of Australia have separately recognised that the criminal standard should only be applied to strands of the prosecution case where these are 'individually crucial'[308] or 'indispensable'.[309] The English Court of Appeal in *John W*[310] considered a hypothetical case 'where *the only evidence* [of identity] on count A is striking similarity of the circumstances of that offence with the circumstances of another alleged offence with which the defendant is charged in count B'.[311] It indicated that '[i]f the jury is sure in relation to count B, then the jury would be entitled to convict the defendant on count A simply on the basis of the striking similarity.[312] Both the defendant's linkage with count B and the shared singularity of counts A and B would need to satisfy the criminal standard.

To state that the criminal standard has application to 'indispensable' or 'crucial' propensity evidence may be ambiguous. Consider the case of *R v Ball*.[313] The

304 Ibid 136-8. Some appreciation of this point was earlier displayed by the Court in *R v Loguancio* [2000] VSCA 33 (Unreported, Tadgell, Callaway and Buchanan JJA, 24 March 2000) [9] and *R v Best* [1998] 4 VR 603, 618.

305 (2001) 119 A Crim R 106, 118.

306 Ibid 117, following *Edwards v R* (1993) 178 CLR 193, 210 (Deane, Dawson and Gaudron JJ); Odgers above n 200, 293-4, 476-7.

307 *R v WRC* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, James and Kirby JJ, 7 June 2002); *R v Joiner* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, Simpson J and Smart AJA, 28 August 2002), [47]-[49].

308 *R v White* [1998] 2 SCR 72, 104.

309 *Shepherd v R (No 5)* (1990) 170 CLR 573, 579 (Dawson J, Mason CJ, Toohey and Gaudron JJ agreeing).

310 [1998] 2 Cr App R 289.

311 Ibid 300 (emphasis added). Ligertwood, above n 18, 115, appears to consider that the propensity inference is always 'essential'. But this is clearly not correct. Eggleston, above n 23, 96, on the other hand makes the point that 'evidence of similar facts can never by itself make a case against the accused. There must at least be evidence as to the offence charged with which the similar facts can be compared'; cf *R v Best* [1998] 4 VR 603, 618. However, the other-misconduct evidence may still be the only evidence on the issue of identity.

312 Ibid. See also *R v Arp* [1998] 3 SCR 339 [73]; Pattenden, above n 72, 456-7; D Birch, 'Case and Comment - *R v Downey*' (1995) *Criminal Law Review* 414, 416.

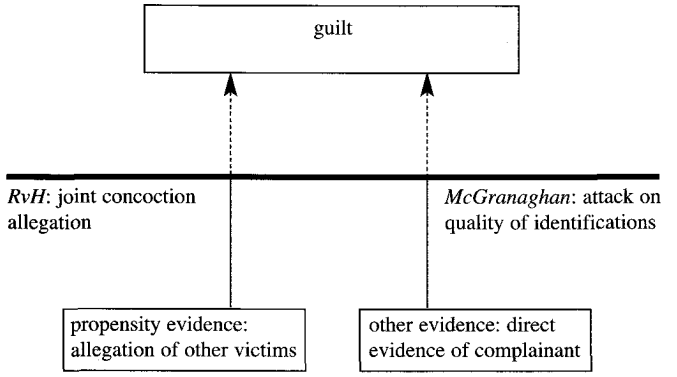
313 [1911] AC 47.

defendants, a brother and sister, were charged with incest. The prosecution presented evidence of their previous cohabitation as husband and wife, and the sister having named the brother as the father of her child.[314] In *Gipp*,[315] McHugh and Hayne JJ suggested this evidence was 'indispensable' and subject to the criminal standard since the prosecution 'must have failed' without it.[316] But the evidence was not 'indispensable' in the current stronger sense - 'the only evidence or substantially all of the evidence of the Crown' on a particular element.[317] While McHugh J has suggested that, in *Ball*, 'the prosecution case depends entirely on propensity reasoning',[318] this is not the case. As Piragoff notes, it 'tended to support the inference, derived from evidence of the discovery of the bed, that sexual relations occurred' - the defendants were living together and evidently shared a bed.[319] It might be argued that this other evidence made only a negligible contribution, leaving the vast bulk of the work to the propensity inference. Lord Alverstone CJ observed, 'it would be wrong to assume in some cases that there must have been incestuous intercourse because persons of different sexes were in the same bed', referring to 'poor people in crowded dwellings'.[320] But the difficulty with McHugh J's view - and the positive contribution of the other evidence - can be demonstrated by asking whether the incest charges could have been proven by the propensity evidence alone. The answer, it is submitted, is clearly no.

Generally, the propensity inference will be subject to the criminal standard only where there is no other incriminating evidence on one or more elements of the crime. However, there is an important exception to this proposition. Where there are other evidential strands to the prosecution case, but these are of the same nature and share the same potential weakness as the propensity inference, then the criminal standard should have application to all the strands. Two examples of this principle have already been mentioned. In *McGranaghan*[321] and *R v H*,[322] the evidence of the complainants was supported by the evidence of other alleged victims of the same perpetrator. However, in *McGranaghan* the various descriptions and identifications provided by the victims may all have been equally flawed, and in *R v H* the various accounts may have been jointly fabricated. In each case the prosecution's various inferential strands were open to a single attack, and therefore were arguably subject to the criminal standard, individually and severally (see Figure 6).

314 This previous conduct had occurred prior to the *Punishment of Incest Act 1908* (UK) and was not a crime.
315 (1998) 194 CLR 106.
316 Ibid 133-4.
317 *R v White* [1998] 2 SCR 72 [55].
318 *Pfennig* (1995) 182 CLR 461, 530.
319 Piragoff, above n 14, 138; *R v Ball* [1911] AC 47, 71 (Lord Loreburn).
320 [1911] AC 47, 66.
321 [1995] 1 Cr App R 559.
322 [1995] 2 AC 596.

Figure 6: Other evidence suffers same weakness as propensity evidence



Gipp may provide another illustration of this principle. The defendant was charged with the sexual assault of his step-daughter. The complainant had testified that the defendant had been carrying out such assaults for a number of years before the events that were the subject of the charges. The Court considered whether this evidence was admissible for a propensity purpose - to prove the defendant's 'guilty passion'[323] for his step-daughter. Justices McHugh and Hayne recognised that '[i]t is the charge, not the surrounding facts, that must be proved beyond reasonable doubt'.[324] However, with Kirby J, they appeared to consider that the other assaults would form 'an indispensable link in a chain of reasoning leading to an inference of guilt'.[325] '[I]t would have been necessary to direct the jury that these incidents as well as the charges had to be proved beyond reasonable doubt.'[326] They did not explain their reasoning, but a rationale can be provided.[327] The propensity inference from the complainant's other assault

[323] '... or, in less inflammatory terms, the sexual desire or feeling of the accused for the complainant': *R v AH* (1997) 42 NSWLR 702, 708. 'Guilty passion' may be open to the same criticism as 'consciousness of guilt': it 'labels the conduct in question in a preconceived manner': Dianne L Martin, '*White and Côté*: A Case Comment' (1997) 42 *McGill Law Journal* 459, 463; see also Hamer, above n 115, 382. Suggestions have been made that use of the word 'propensity', in directing a jury at least, is similarly 'undesirable ... because of its pejorative connotation': *R v Best* [1998] 4 VR 603, 614; *R v Vonarx* [1999] 3 VR 618, 624-5; *KRM* (2001) 178 ALR 385, 414 [113] (Kirby J); *Festa* (2001) 185 ALR 394, 439 (Kirby J); *Pfennig* (1995) 182 CLR 461, 509 (Toohey J); Bagaric and Amarasekara, above n 15, 88. But it is difficult to discern the pejorative aspect, other than the inculpatory connotation that is the essence of the inference and which would be inherent also in any accurate simile - tendency, disposition, bad character, 'preparedness to kill young children': Bagaric and Amarasekara, above n 15, 90. This concern may be an echo of the fiction that propensity reasoning is forbidden.

[324] (1998) 194 CLR 106, 133.

[325] Ibid 133 (McHugh and Hayne JJ), 155 (Kirby J), quoting from *Shepherd v R* (1990) 170 CLR 573, 579 (Dawson J).

[326] Ibid 132 (McHugh and Hayne JJ), 155, 157-8 (Kirby J). The other members of the Court were less explicit on this point: 115 (Gaudron J), 165 (Callinan J).

[327] Palmer, above n 89, 62, considers this aspect of *Gipp* to be inconsistent with *Shepherd v R* and suggests: 'If such a direction is required it would seem instead to be a response to the well-recognised dangers associated with propensity evidence'. The argument in the text interprets *Gipp* more narrowly, and reconciles it with *Shepherd v R*.

allegations did not stand alone; it supported her direct evidence of the charged assault. But that was all the prosecution was able to present.[328] It is arguable that the credibility of the complainant's allegations of sexual abuse then became an indispensable link in proof of the defendant's guilt.[329] Any doubts about the charged allegations would tend to apply equally to the uncharged allegations 'since it is little more difficult to concoct accounts of many incidents than to concoct an account of one'.[330] Their Honours might have suggested, in similar terms to the Court of Appeal in *McGranaghan*,[331] that an allegation by the complainant of sexual abuse about which the jury is not sure cannot support another of the complainant's allegations of sexual abuse about which they are also not sure, no matter how similar the two allegations are. Of course if the jury was satisfied to the criminal standard of the complainant's other allegations then they would probably believe the complainant's charged allegations to the same degree, in which case the support provided by the other allegations would not be required.[332]

328 'The evidence on trial was all heard in two and three quarter hours ... The trial was conducted as a contest of credit between the complainant and the appellant': *Gipp* (1998) 194 CLR 106, 160 (Callinan J).

329 Ibid 137. The trial judge recognised this, instructing the jury, 'you must be entirely satisfied of the honesty and reliability of the complainant before you act on that evidence alone'. Compare *Liberato v R* (1985) 159 CLR 507, a battle of credit case of which Brennan J indicated, '[i]t was fundamental to the prosecution case that the jury should believe beyond reasonable doubt the truth of [the complainant's] evidence': 517. See generally Gans, above n 97. Where the other allegations are backed up by independent evidence, the argument in the text does not apply, eg *B(FF)* [1993] 1 SCR 697.

330 Tapper, above n 26, 364; see also *R v Wackerow* [1998] 1 Qd R 197, 201-2 (Macrossan J); *R v Kemp* [1997] 1 Qd R 383, 398; Tapper, above n 128, 209; Flatman and Bagaric, above n 96, 202; *The People v Stanley* 67 Cal 2d 812 (1967); *The People v Ewoldt* 7 Cal 4th 380 (1994) 407-8. Although, in *Gipp* (1998) 194 CLR 106, 169 [183], Callinan J considered that the complainant's other allegation could be 'admissible as propensity evidence' even though that was a battle of credit case.

331 [1995] 1 Cr App R 559.

332 This is not to say that all of the complainant's allegations will necessarily be of equal credibility. Where a number of the complainant's allegations have led to joined charges, an appeal court will not automatically consider convictions inconsistent with acquittals. In *Jones v R* (1997) 191 CLR 439, the defendant, a gym instructor, had been convicted on two counts, but acquitted on the third count, of sexually assaulting the complainant, then aged 11 and 12, following gym lessons. The majority found that evidence relating to the separate counts was so similar that the acquittal threw doubt on the convictions, which were then set aside as unsafe and unsatisfactory: 446 (Brennan CJ), 453, 455 (Gaudron, McHugh and Gummow JJ). But this was not purely 'oath against oath'. The complainant's evidence was 'entirely uncorroborated' (448, Gaudron, McHugh and Gummow JJ), but the defendant called witnesses negativing opportunity which was stronger for the acquittal than it was for the convictions. There was not, therefore, a total resemblance between the evidence on different counts, and Kirby J dissented on this basis: 465, 469-70.
In *Maher* (CA, *The Times*, February 17, 1995; [1995] *Criminal Law Review* 720-2) the defendant argued that the convictions were inconsistent with the acquittals as '[t]he sexual offences were not corroborated, and the jury could not consistently regard her as a truthful witness on some counts, but not on others'. But the Court held that 'a detailed look at all the evidence [showed] that the jury had an excellent grasp of detail, and their apparently conflicting decisions could be explained'. The parties had a major falling out in November 1992, and so the complaints made after that date, which contained 'lurid details' absent from the earlier complaints, were considered less credible. However, the jury convicted on the specimen charges, while acquitting of particular offences - they 'might have done what the judge directed them to guard against - falling back on general allegations'. The appeal was upheld. See also *KBT v R* (1997) 191 CLR 417, 424 (Brennan CJ, Toohey, Gaudron and Gummow JJ); *MacKenzie v R* (1996) 190 CLR 348, 365; *W* (2001) 124 A Crim R 545 (Miles J); *R v G* [1998] Crim LR 483; *R v Kemp* [1997] 1 Qd R 383, 392.

It should be noted that, even where the complainant's other allegations add little through propensity reasoning, they may assist the prosecution via another argument. In *Gipp*, McHugh and Hayne JJ considered the evidence admissible for the 'limited purpose of making the circumstances of the specific offences more intelligible',[333] more specifically, 'to explain the complainant's apparent lack of surprise at being called into the bathroom to gratify the appellant's sexual desires and her matter of fact recounting of the incident'.[334] While not providing *independent* support for the charged allegations via propensity reasoning, the complainant's other allegations may nevertheless give their account greater *internal* coherence and strength. As previously suggested, where other misconduct evidence serves an incidental purpose, the exclusionary rule may not apply.

This section has argued against the application of the criminal standard of proof to the components of the propensity inference. The standard should only be applied where the inference is substantially the whole of the prosecution case, or where it shares a common weakness with the other strands of the prosecution case. In opposition to this view, Mahoney favours a broad application of the criminal standard to the propensity inference and other factual claims underlying the prosecution case. He believes that certainty in the defendant's guilt should be expected to 'rebound' on the prosecution's underlying evidential claims, removing doubt about them as well: 'By virtue of ... "the rebound effect" it is an error to suggest that guilt can be proven by evidence upon which there is a doubt which continues *after* the conclusion is reached that the accused committed the offence charged'.[335] Justice Murphy expressed a similar view in *Perry* and *Sutton*, suggesting that '[e]vidence of any circumstance ... should be discarded when it appears on consideration of the whole of the evidence that there is reasonable doubt about ... that circumstance.'[336]

This approach is more holistic than the strict sequential approach discussed in the previous section. It would permit the jury to pool evidence relating to the other misconduct and the charged misconduct and consider whether the combination could be explained as a mere coincidence. But while more permissive in this respect, the 'rebound' approach invites excessively complex reasoning. At the outset, the jury may combine all the prosecution evidence, however, the jury would then have to ask, not only whether the charged offence has been proven beyond reasonable doubt, but whether all the other alleged incidents have been proven to this high standard. If one or more of them has not, then the finding of guilt would not count. The evidence relating specifically to the unproven incidents would have to be discarded, and the jury would then have to ask whether, on this narrower evidential base, the defendant's guilt and the other remaining incidents have been proven. Again, if one or more of the incidents is

[333] (1998) 194 CLR 106, 132.
[334] Ibid 131, 113 (Gaudron J), 164 (Callinan J).
[335] Mahoney, above n 85, 187, 198.
[336] *Perry* (1982) 150 CLR 580, 595; see also *Sutton* (1984) 152 CLR 528, 539. In *Perry*, only Deane J provided clear support for a cumulative approach: 560. The rest of the Court appeared to approve the trial judge's sequential direction: 537 (Gibbs CJ), 552-3 (Brennan J), 566 (Dawson J).

not proven, a finding of guilt would not count, and the process would start again on a still narrower evidential base. Where numerous other misdeeds have been alleged, this process might have to be iterated many times.

Quite apart from the complexity concern, the rebound approach is based upon dubious logic. Why should a proposition of fact that remains uncertain be discarded? This approach appears to reflect an 'all or nothing' notion of proof: 'As with truth so with proof, it cannot be split: what is not full truth is full falsehood, not half truth; so what is not full proof is clearly not proof at all'.[337] It is not clear, however, why the analogy between truth and proof should be accepted.[338] For the sake of argument, we may accept that a statement about the past is, in some objective sense, either true or false - the defendant either stabbed the victim or the defendant did not stab the victim.[339] But the level of proof attained by the prosecution's case is a different matter. It is often supposed that empirical matters are capable 'only at best of being rendered highly probable'.[340] Even the criminal standard does not require 'absolute, metaphysical and demonstrative certainty',[341] and the civil standard requires far less.[342] Yet conclusions proved to these levels are not discarded, they are given full legal effect.

Mahoney suggests that the 'rebound effect' extends beyond the propensity inference to other items of circumstantial evidence.[343] However, at best, it is

[337] A maxim of Papinian: T C Brennan 'Circumstantial Evidence' (1930) 4 *Australian Law Journal* 106 109; Wills, above n 86, 420. On the next page, however, Wills appeared to acknowledge that there are degrees of proof: 'In proportion to the number of cogent circumstances, each separately bearing a strict relation to the same inference, the stronger their united force becomes, and the more secure becomes our conviction of the moral certainty of the fact they are alleged to prove'.

[338] Cf B Koopman, 'The Bases of Probability', in Henry Kyburg and Howard Smokler, *Studies in Subjective Probability* (1964) 167-9. Koopman suggests that a confusion may arise between {P(A or not-A) = 1} and {P(A) = 1 or P(not-A) = 1}. The first is correct. It is certain - there is a probability of one - that event A either will or will not occur. The second is false. We cannot necessarily be certain whether event A will occur or will not occur.

[339] Of course, the meaning of truth is controversial: see, eg, John Jackson, 'Theories of Truth Finding in Criminal Procedure: An Evolutionary Approach' (1988) 10 *Cardozo Law Review* 475; Donald Nicolson, 'Truth, Reason and Justice: Epistemology and Politics in Evidence Discourse' (1994) 57 *Michigan Law Review* 726.

[340] Alfred Ayer, *Language, Truth and Logic* (2nd ed, 1952), 135-136.

[341] Starkie, above n 259, 577; quoted in *Peacock v R* (1911) 13 CLR 619, 661 (O'Connor J).

[342] On occasions it has been asked whether the distinction between the two standards is 'more a matter of words than of substance': *Edmunds v Edmunds and Ayscough* (1935) VLR 177, 183, quoted with apparent approval *Briginshaw v Briginshaw* (1938) 60 CLR 336, 353 (Starke J), 368 (Dixon J); *R v Hepworth & Fearnley* [1955] 2 QB 600, 603 (Lord Goddard); *Khawaja v Secretary of State* [1984] AC 74, 112 (Lord Scarman). However, the prevailing view is now that '[t]he difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance': *Rejfek v McElroy* (1965) 112 CLR 517, 521; see also *Briginshaw v Briginshaw* (1938) 60 CLR 336, 344 (Latham CJ)); *Bater v Bater* [1951] P 35, 36 (Denning LJ); *Evidence Act 1995* (Cth) ss 140, 141; *Evidence Act 1995* (NSW) ss140, 141.

[343] Mahoney, above n 85, 198. Mahoney indicates the rebound effect applies to 'any item of circumstantial evidence which is an *essential component* of the inference of guilt', giving 'motive' as an example of inessential evidence. This suggests that he may be limiting the rebound effect and the application of the criminal standard to 'indispensable' and 'crucial' items of other-misconduct evidence, which is consistent with the analysis in the text. However, he implies that the effect invariably applies to propensity evidence, and gives an example in which it applies to both forensic identification and post-offence guilty conduct, even though these strands coexist independently of one another. The rebound effect is clearly broader than the principle of *Shepherd v R* (1990) 170 CLR 573 and *R v White* [1998] 2 SCR 72.

justified only in connection with direct evidence. Suppose that the defendant is charged with murder, and the prosecution relies upon eyewitness evidence of the murder, a blood stain on the defendant's clothes said to match the victim's blood, and prior acts of violence by the defendant against the victim. Suppose each prosecution witness is challenged by defence counsel with some success. The eyewitness, although honest and of sound mind, has imperfect eyesight and may be mistaken; the prosecution's forensic expert was shaky in cross-examination; and the propensity witness may be biased. But while the jury has doubts about each witness individually, in combination the evidence is considered to prove guilt beyond reasonable doubt; '[t]he cogency of the inference of guilt is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance'.[344] In these circumstances there may be some kind of 'rebound effect' on the eyewitness evidence. It would be contradictory for a juror to hold both that 'I am sure the defendant killed the victim', and that 'the eyewitness may have seen someone other than the defendant kill the victim'. However, it would not contradict a guilty finding for a juror to suggest that 'the stain on the defendant's clothes may not be the victim's blood', or that 'the defendant may not have been violent towards the victim on those other occasions'. To the extent that the jury considers these subsidiary facts probable, the prosecution case is strengthened, even though they may not themselves satisfy any particular standard of proof.

VIII STRONG SINGULARITY: STRIKING SIMILARITY

The previous sections examined a sequential principle requiring that the defendant's linkage to the other misconduct be firmly established before it can be used against the defendant on the charged offence. It was argued that such strong linkage requirements are not justified where there is other incriminating evidence. As noted above, the Court of Appeal in *Downey*[345] and *Barnes*[346] declined to apply the sequential linkage approach of *McGranaghan*.[347] However, both appear to have fallen into a corresponding error in holding that before the other-misconduct evidence could be used, the jury must be 'sure on the evidence of the incidents themselves that only one man was involved'.[348] Where there is other evidence capable of providing an independent probative contribution, there is no call for strong linkage or strong singularity.[349]

These principles were given a confused application by the New South Wales

[344] *R v Shepherd* (1990) 170 CLR 573, 592-3 (McHugh J); see also 579 (Dawson J, Mason CJ, Toohey and Gaudron JJ agreeing); Hamer, above n 6; Odgers, above n 6.
[345] [1995] 1 Cr App R 547.
[346] [1995] 2 Cr App R 491.
[347] [1995] 1 Cr App R 559.
[348] *Barnes* [1995] 2 Cr App R 491, 499; see also *Downey* [1995] 1 Cr App R 547, 550, 552.
[349] The Canadian Supreme Court in *R v Arp* [1998] 3 SCR 339, 377, stated: '[i]t is not inherently unfair that an accused may be convicted even though the jury entertains a doubt as to whether similarity between the acts, *on its own*, establishes that the same person committed both acts' (emphasis added). However, this may still be too strong. The propensity inference may add to the prosecution's other evidence and warrant a conviction without the jury ever being sure that the same person committed both acts.

Court of Criminal Appeal in *Familic v R*.[350] The defendant was charged in connection with the robbery of a home in Denham Court. The prosecution obtained a conviction, relying in part on the fact that the defendant had already pleaded guilty to a similar robbery that took place a few days after the Denham Court robbery. This was not, however, a straightforward application of the propensity inference. The defendant's guilty plea provided linkage with the other robbery, and the two robberies shared certain singularities; both involved three armed men with European accents wearing balaclavas and gloves; there were similarities in the houses targeted, the robbers' mode of entry and their treatment of the occupants; the robberies took place at the same time of day and only a few days apart; and the same model car was identified in connection with both robberies. But all this tends to show that the two robberies had been committed by the same gang, not necessarily by the same individuals. It still remains to be asked whether there is evidence of the charged robbery relating specifically to the defendant.[351] It appears that the added inferential step led the Court inappropriately to label 'the fact that the two groups of crimes were committed by the same person ... an intermediate fact proof of which was an essential element in the reasoning', a matter that 'would have to be proved to the satisfaction of the jury beyond reasonable doubt'.[352] The Court recognised that this would only be warranted '[i]f there were no other evidence of guilt',[353] but the Court then imposed the strong singularity requirement in the face of other incriminating evidence. The defendant was arrested driving his car which matched one seen at Denham Court at the time of the robbery.[354] In the car, the police found clothes and a gun similar to that used by the robbers[355] and a road map with Denham Court marked.[356] There was arguably also an admission,[357] and presumably the defendant also fitted one of the robbers' descriptions.[358] This was not merely evidence of the defendant's association with the gang; it linked him directly to the Denham Court robbery. Each item, taken individually, may have been open to challenge,[359] but in combination they were clearly capable of providing a degree of support to the propensity inference. That inference should not have been made to bear the weight of the criminal standard by itself.

350 (1994) 75 A Crim R 229.

351 Ibid 240. See also *Hart* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Badgery-Parker J, 25 August, 1993); *R v Lee* [1996] Crim LR 825; *Brown* [1997] Crim LR 502.

352 (1994) 75 A Crim R 229, 240, citing *Shepherd v R* (1990) 170 CLR 573, 278. Despite the reference to the jury, the context of this statement was admissibility rather than jury direction.

353 Ibid. The Court's references to 'other evidence' are puzzling. At another point the Court referred to 'other evidence' as 'evidence going to establish that both groups of offences were committed by the same offenders, not evidence tending in some other way to prove that the accused was guilty of the Denham Court offences': 241.

354 Ibid 241.

355 Ibid 233.

356 Ibid.

357 Ibid 233, 235. Or 'capable of being understood, if not as admissions, as manifestations of an awareness of his part of his guilt in respect of the Denham Court robberies' (242).

358 Ibid 240.

359 The defendant's car was a different colour from that described by the witness (ibid 241); the police testimony as to the alleged admission and the discovery of the map and other incriminating material was uncorroborated and was challenged (242, 244-5); the alleged admission was open to different interpretations: 235.

A dramatic illustration of the strength of the other evidence alleviating the singularity requirement is *DPP v P*.[360] The defendant, convicted of the incestuous rape of his two daughters, appealed on the ground that each complainant's testimony was not admissible on the charges relating to the other. Lord Mackay held that the other misconduct need not display the same 'hallmark' as the charged offence. 'Striking similarity' was not required. The common features may be only the 'stock in trade' of the paederast, but still have sufficient probative value in the context of the other evidence.[361] In this case, as in many such cases, there was little evidence other than the testimony of the alleged victims.[362] However, it appears that the direct evidence of the complainant reduces the work demanded of the other allegations significantly, and 'less stringent standards apply'.[363] The propensity evidence is not required to prove any element of the crime by itself - it merely has to support the complainant's credibility[364] - and an allegation of 'even vaguely similar conduct'[365] may be admissible. And yet, these evidential features were equally present in the House of Lords' earlier decision in *Boardman*[366] in which it was said the admission of propensity evidence 'requires exceptional circumstances'.[367] It seems *DPP v P* marked a 'liberalisation' in admissibility.[368]

In *Pfennig*,[369] McHugh J indicated that 'striking similarity is not the exclusive test. The circumstantial force of the other evidence together with the propensity evidence may prove the inference.'[370] However, it has been questioned whether this weakening of singularity requirements is general. In *DPP v P*, commission was in issue, and Lord Mackay suggested that his comments did not extend to cases where the propensity evidence is tendered on identity. Here, 'obviously

360 [1991] 2 AC 447.

361 Ibid 461. Lord Mackay suggested that there was a hallmark if one was needed, in that that 'father has allegedly shown himself to be prepared to abuse sexually girls who are no more than children, in this case under the age of 13, girls who moreover are his own children, and to use his position of power over them in their own home to achieve those ends': 453.

362 Ibid 449, as counsel for the prosecution commented, emphasising the difficulty of obtaining a conviction in this kind of case in the absence of the other-misconduct evidence. There was also evidence that the defendant had paid for abortions for each daughter, but this could be considered equivocal: 461.

363 Tapper, above n 129, 28. See, eg, *R v Simpson* (1994) 99 Cr App R 48.

364 *DPP v P* [1991] 2 AC 447; *B(CR)* [1990] 1 SCR 717; *Pfennig* (1995) 182 CLR 461, 532 (McHugh J).

365 Tapper, above n 26, 361-2; *Sutton* (1984) 152 CLR 528, 552 (Brennan J); *Hoch* (1988) 165 CLR 292, 295 (Mason CJ, Deane and Dawson JJ). This leads Palmer, above n 89, 74, to suggest, with reference to the admissibility of other allegations in child sexual abuse cases, that the 'insistence' of Australian State criminal appeal courts on '"striking similarity" is probably too extreme'.

366 [1975] AC 421.

367 Ibid 443 (Lord Wilberforce). Similar sentiments were expressed at 439 (Lord Morris), 451 (Lord Hailsham).

368 Smith, above n 85, 49. It is not clear that the Law Commission sees an inconsistency between *Boardman* and *DPP v P*: *Consultation Paper*, above n 4, [10.4]. However, *DPP v P* led Tapper, above n 129, 29 to declare 'it is not satisfactory that so important a principle of English criminal evidence should be diluted in this way'. Nevertheless, the liberalisation appears to have been entrenched by the House of Lords in *R v H* [1995] 2 AC 596, where Lord Griffiths optimistically suggested that a 'less restrictive form' of the admissibility test better suited today's 'better educated and more literate juries' (613); see also Tapper, above n 26, 363.

369 (1995) 182 CLR 461.

370 Ibid 529, 484 (Mason CJ, Deane and Dawson JJ); Hoffman, above n 1, 202-3; Piragoff, above n 14, 139; Zuckerman, above n 24, 230; Birch, above n 312, 415-16.

something in the nature of ... a signature or other special feature will be necessary'.[371] Pattenden suggests that it was 'right to single out proof on identity as deserving of separate treatment',[372] concluding that 'the only appropriate standard of proof for the jurors to apply when considering whether they are satisfied that the same person did all the offences is the criminal standard'.[373] As McEwan notes, while the Law Commission's *Consultation Paper* recognises 'that the more work the evidence is required to do, the greater the level of similarity which is necessary, it goes on to treat identification cases as a uniform genus for which "striking similarity" is required'.[374] But it is unclear why identity cases should deserve special treatment. One wonders whether there has been a conflation of two different senses of identity: 'the quality or condition of being a specified person or thing', viz the perpetrator, and 'absolute sameness'.[375]

In its final report, the Law Commission changed its position. It supported the Court of Appeal's view in *John W*[376] that 'there is no special rule for identification cases',[377] and no necessary requirement that the evidence be '"strikingly similar" or of the nature of a "signature" to be admissible'.[378] The Court suggested that Lord Mackay's comments to the contrary in *DPP v P* were directed to cases where the defendant's alleged commission of the other misconduct was the only evidence on identity and therefore indispensable.[379] *John W* was not such a case. There was other evidence identifying the defendant as the perpetrator of each of the charged attacks on the two women - the first complainant was able to identify the defendant in a parade, and on his arrest following the second attack, the defendant was found to have a grazed knee consistent with evidence that the perpetrator had fallen as he was running away. The admissibility test was therefore satisfied without great reliance by the Court on evidence of shared singularities,[380] the Court indicating that 'the circumstances of both offences are such as to provide sufficient probative support for the conclusion that the defendant committed both offences'.[381]

Jurists have speculated as to how low the similarity requirement may drop in a case where only a handful of persons had opportunity. In *O'Leary v R*,[382] Williams J commented that 'the fact that the number of possible culprits is limited makes

371 [1991] 2 AC 447, 462; see also 460; *R v Arp* [1998] 3 SCR 339; *Sutton* (1984) 152 CLR 528, 539 (Murphy J), 549 (Brennan J); *R v Lee* [1996] Crim LR 826.
372 Pattenden, above n 72, 447.
373 Ibid 471. In the United States it is also accepted that '[t]he greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity': *The People v Ewoldt* 7 Cal 4th 380 (1994), 403.
374 See above n 139, 93, referring to *Consultation Paper*, above n 4, [2.45]-[2.48].
375 *Concise Oxford Dictionary* (9th ed, 1995).
376 [1998] 2 Cr App R 289.
377 Ibid 301; *Cm 5257*, above n 4, [2.23], [4.6]; see also Roderick Munday, 'Similar Fact Evidence: Identity Cases and Striking Similarity' [1999] *Criminal Law Journal* 45, 46.
378 [1998] 2 Cr App R 289, 301.
379 Ibid 300.
380 Ibid 305: 'the attacks took place within a short time of each other and had certain similarities, including the fact that the attacker appears to have been predominantly left handed'.
381 Ibid 303-4; see also Munday, above n 377, 47.
382 (1946) 73 CLR 566.

the disposition evidence acceptable'.[383] Tapper suggests 'the circumstances may themselves so limit the range of perpetrators of an undoubtedly committed crime as to reduce the extent of required deviation'.[384] And Dennis proposes that this feature may have justified the admission of propensity evidence in *Fulcher v R*.[385] Only three persons had the opportunity to kill the infant; the defendant, his wife and his mother-in-law. In these circumstances, evidence of the defendant's extreme irritability at the child's crying and his previous infliction of injuries acquired considerable probative value.[386]

The last three sections have outlined the significant contribution that may be made by the other incriminating evidence, and how this can lessen the demand placed on the singularity and linkage steps of the propensity inference, at both admissibility and proof stages. It need not be certain that the defendant committed the other misconduct, and there need not be striking similarity between the other misconduct and the charged offence for the propensity inference to assist the prosecution case. This is not to say that other-misconduct evidence may be admitted with the slightest linkage to the defendant and the almost no shared singularity with the charged offence on the back of an otherwise strong prosecution case. As discussed in the next section, there is a component of the probative value admissibility test that does focus on the propensity inference in isolation.

IX THE NEED FOR THE INFERENCE

The authorities discussed above indicate that the probative value of propensity evidence is to be assessed in the context of the other evidence. The stronger the other incriminating evidence, the less that is required of the propensity evidence for the probative-value admissibility test to be satisfied. This may provide some reassurance for those who fear that the Australian 'no rational view' admissibility test may be so strict as to 'almost certainly always lead to ... exclusion'.[387] In fact, in some cases at least, the opposite danger might be perceived. Assessing probative value in context may be too permissive - 'a point will come at which

[383] Ibid 582. This statement prompted Heydon, above n 18 [21175] fn 4, to consider a variation on *Straffen* [1952] 2 QB 911. 'If only five or six people could have committed a homicide, and one of them had just escaped from Broadmoor, the relevance of that fact can scarcely be exaggerated.' Nevertheless, he submits 'its admissibility would be doubtful'.

[384] Tapper, above n 128, 208.

[385] [1995] 2 Cr App R 251; [1995] *Criminal Law Review* 883.

[386] Dennis, above n 20, 596. This was not the court's approach, however. The court considered the evidence lay beyond the scope of the exclusionary rule on the basis that it was motive evidence and 'went to the *actus reus* and the *mens rea*' (above n 354, 257). Dennis describes this reasoning as 'dubious' (above n 20, 596) and the English Law Commission cites the case as an illustration of how 'highly prejudicial evidence can be admitted as "background" without any adequate assessment of its prejudicial effect': *Cm 5257*, above n 4 [10.2]. Yet in its earlier *Consultation Paper* the English Law Commission was not critical of the case: above n 4 [2.77]-[2.79].

[387] *R v W* [1998] 2 Qd R 531, 537 (de Jersey J), 533-4 (Pincus JA and Muir J); *R v Vinh Le* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Sully, Hulme and Hidden JJ, 7 March 2000) (Hulme J); Smith and Holdenson, above n 221, 439; Flatman and Bagaric, above n 96, 196.

the rest of the evidence is so strong that any evidence of past crime can add only little weight but much prejudice'.[388]

Such a concern may explain McHugh J's recent retractions with regard to the role of the other evidence in assessing the probative value of propensity evidence.[389] The support that his Honour previously provided to a contextual assessment has been noted above.[390] However, in *Melbourne v R*,[391] McHugh J suggested that the *Pfennig*[392] admissibility test requires that 'there is no reasonable explanation for the *disputed evidence* other than the accused's guilt',[393] contrasting this with the ultimate assessment of guilt on 'the *whole of the evidence*'.[394] In *Festa*,[395] McHugh J indicated that propensity evidence is only admissible 'in those rare cases where that propensity has a *specific* connection with the crime'.[396] His Honour observed that in *Festa* there was a 'great deal of ... *other evidence* ... that implicated' the appellant, but suggested that 'the admissibility of the [propensity] evidence ... has to depend on the inferences that could be drawn from that evidence standing alone'.[397]

Other jurists have also recognised that the probative value test should, at some stage, focus on the propensity inference in isolation from the other evidence. Piragoff identifies 'need' as a contributing factor and/or a determinant of the degree of probative value'.[398] The Law Commission quotes from Elliott - propensity evidence 'being a sledgehammer ... should not be used to crack

388 Zuckerman, above n 24, 229.

389 Odgers above n 200, 290, draws attention to this aspect of McHugh J's approach.

390 See above n 194, 196, 339. Note, however, that in *Pfennig* (1995) 182 CLR 461, where McHugh J made reference to 'the circumstantial force of the other evidence together with the propensity inference: 529. His Honour added: 'For propensity evidence to be admissible, however, it will need to have "specific probative value *in relation to the crime charged*"' (quoting from T R S Allan, 'Similar Fact Evidence and Disposition; Law Discretion and Admissibility' (1985) 48 *Michigan Law Review* 253, 255).

391 (1999) 198 CLR 1.

392 (1995) 182 CLR 461.

393 (1999) 198 CLR 1, 17 (emphasis added).

394 Ibid (emphasis added).

395 (2001) 185 ALR 394.

396 Ibid 416, 446 (Hayne J agreeing).

397 Ibid 417. The evidence in question was of the appellant's co-accused's *after-acquired* guns, which, rather than identifying him with the bank robberies, tended to show that he had a propensity for bank robbery. The quotation at the preceding note concerned the admissibility of the evidence against the co-accused. A propensity inference also operated against the appellant. The prosecution submitted that her knowledge of his possession of these articles demonstrated her preparedness to associate with a person with criminal tendencies. From this the prosecution invited the inference that she was an active participant in his crimes. Justice McHugh considered that the evidence was admissible against neither party, Hayne J agreeing (446). Justice Kirby also appeared to test the probative value of the evidence in isolation, however, he reached the opposite conclusion, Gleeson CJ agreeing (395). His Honour commented on the 'striking similarities' between the after-acquired weapons and those used in the robberies (439) and the 'unusual modus operandi' they pointed to (438). Justice Callinan, on the other hand, appeared to make a contextual assessment. His Honour indicated that 'the evidence with respect to the firearms, taken with *all of the other evidence* upon which the prosecution relied, was important and logically probative of the appellant's guilt' (454), and satisfied the *Pfennig* test (455).

398 Piragoff, above n 14, 146; see also Cowen and Carter, above n 1, 146; Zuckerman, above n 24, 229; Tapper, above n 26, 351.

peanuts'.[399] It might be objected that no matter how strong the other evidence, 'the issue is still open, and there is no predicting what view the jury might take of any particular piece or pieces of evidence'.[400] But, as Heydon and Tapper note, managing limited resources is a regular part of the trial judge's job, and they are familiar with issues of cumulation and redundancy.[401]

Piragoff notes an apparent tension between the need principle and the contributive role of the other evidence:

> [O]n the one hand it is stated that the presence of *other* incriminating evidence *increases* the probative value of the similar fact evidence, thereby making it sufficiently relevant, while on the other hand and in apparent contradiction it is stated that the presence of *other* incriminating evidence may *decrease* the probative value of the similar fact evidence (ie, the need concept).[402]

With regard to the need principle, Heydon and Tapper suggest that it is not 'manifestly just that the weaker the case for the prosecution, the worse off the accused should become so far as the admission of evidence of discreditable extrinsic matters is concerned'.[403] However, the opposite objection could be made against the contributive principle - it appears no more just that the greater the prosecution's need for other-misconduct evidence, the less likely the evidence is to be admitted. Perhaps the two principles are complementary rather than antagonistic, balancing one another, in combination deflecting such concerns of injustice. In determining admissibility, the trial judge should assess both the strength of the prosecution case overall, and the contribution of the propensity evidence.

A good example of the joint operation of the contributive and need principles is provided by the very recent decision in *R v Joiner*.[404] Hodgson JA, with Simpson J and Smart AJ agreeing, suggested it would be an incorrect approach to the admissibility issue to 'look at the propensity evidence in isolation'.[405] However, it would also be inappropriate to:

> look at all the evidence in the case, including the propensity evidence, and admit the propensity evidence if and only if there is no reasonable view of all the evidence that is consistent with the innocence of the accused: that approach would disregard altogether the need for some special probative value of the propensity evidence.[406]

[399] *Consultation Paper*, above n 4, [10.77], quoting from D Elliott, 'The Young Person's Guide to Similar Fact Evidence - 1' [1983] *Criminal Law Review* 284, 292.
[400] Tapper, above n 26, 353; Heydon, above n 18, [21130].
[401] Ibid.
[402] Piragoff, above n 14, 149.
[403] Tapper, above n 26, 353; Heydon, above n 18, [21130].
[404] (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, Simpson J and Smart AJA, 28 August 2002), Hodgson JA drawing upon the approach he had previously taken in *R v WRC*, above n 43, [25]-[29].
[405] Ibid, quoting from *R v WRC* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, James and Kirby JJ, 7 June 2002) [25], [27].
[406] Ibid, quoting from *R v WRC* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, James and Kirby JJ, 7 June 2002) [25], [28].

The correct approach is to consider whether the other evidence leaves reasonable doubt, and then, to be admissible, 'the propensity evidence must be such that ... it would eliminate [that] reasonable doubt'.[407]

The defendant in *R v Joiner* had been convicted of the murder of his girlfriend, and appealed on the ground that his violence towards three former partners should not have been admitted. From two and a half weeks after the victim's death, the defendant had conceded that there had been an altercation, and that he had struck the victim, causing her to fall. He claimed that the severity of her injuries and her death were caused by the fall and that he did not intend to kill her. Hodgson JA considered the defendant's concessions, together with the forensic evidence of the victim's injuries and the defendant's initial attempts to conceal what had occurred,[408] strongly incriminating. He indicated that 'if there was a reasonable doubt about the appellant's intention, it must be to the effect that ... the appellant did not have an intention to cause really serious bodily injury'.[409] This possibility 'although very remote, was not excluded beyond reasonable doubt, because highly improbable things can sometimes happen'.[410] The evidence of the defendant's assaults on his previous girlfriends was sufficient to remove this doubt:

> [I]f one adds that the appellant had a tendency to respond to minor irritations with violence against women with whom he was having a relationship, it is in my opinion no longer reasonable to regard such a highly improbable scenario as a reasonable possibility ...[411]

Hodgson JA's approach to the admissibility issue raises two related concerns. First, he appears to have allowed in the prejudicial evidence when he considered it scarcely necessary; on the other evidence the defendant's innocence was already considered 'highly improbable'. Secondly, having regard to 'the issues to be decided'[412] it is questionable whether the evidence was capable of making a significant contribution to the prosecution case. Propensity evidence should not be admitted 'unless it is plainly necessary to prove something which is really in issue'.[413] The defendant's admission that he had deliberately struck the victim deprived the propensity evidence of its force.[414] Whether or not the defendant was the kind of person to 'respond to minor irritations with violence against women with whom he was having a relationship' was not in issue - violence against the present victim was conceded. It is questionable whether the other attacks demonstrated that the defendant, on such occasions, developed an intention to

[407] Ibid, quoting from *R v WRC* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, James and Kirby JJ, 7 June 2002) [25], [29].

[408] It is questionable whether the consciousness-of-guilt evidence adds much. It appears just as consistent with an accidental killing as with an intentional killing. See *Richens* [1993] 4 All ER 877, 885.

[409] Ibid [37], [39].

[410] Ibid.

[411] Ibid [40].

[412] *Harris v DPP* [1952] AC 694, 710.

[413] *R v Bond* [1906] 2 KB 389, 417 (Bray J); see also *B(CR)* [1990] 1 SCR 717, [70] (McLachlin J).

[414] *R v Joiner* (Unreported, Supreme Court of NSW - Court of Criminal Appeal, Hodgson JA, Simpson J and Smart AJA, 28 August 2002) [37], [31].

inflict serious bodily harm.[415] Nor was this a case where the other attacks displayed a distinctive modus operandi consistent with the injuries to the present victim. The likely cause of death was head injuries, but only two of the ten other attacks detailed by the prosecution witnesses involved blows to the head. A far more common feature, appearing in half the attacks, was choking or strangulation. However, there was no evidence that the present victim had sustained strangulation.

R v Joiner illustrates Dawson J's proposition in *Harriman*,[416] that there are 'cases in which admissibility will be dependent upon the nature of the defence'.[417] A further example, cited by Dawson J, is *R v Rodley*.[418] The defendant in *R v Rodley* was convicted of housebreaking with intent to rape. The prosecution case was that his plans were frustrated by the appearance of the intended victim's father. The trial judge had allowed the prosecution to tender evidence that an hour later the defendant climbed down the chimney of a house three miles away and had consensual sex with the woman occupant. On appeal it was held this evidence was not only liable to be excluded, it was irrelevant.[419] At trial, the defendant admitted that he had broken into the first house, but argued that he intended to 'court the girl',[420] not to rape her. The issue, therefore, was not *identity* - whether the defendant was the sort of person to break into houses with the prospect of sexual intercourse - but *mens rea* - whether he was the sort of person who would force himself on a woman without her consent. The evidence might have had relevance to identity,[421] but as was commented in the similar New Zealand decision, *R v Horry*,[422] on the issue of intent to rape, the evidence 'was not wholly unfavourable to the accused';[423] in the second house the defendant did employ persuasion rather than force. In this respect, the argument for the defence may have been stronger still in the English case, *R v Tweed*.[424] In the second house, when it became clear to the defendant that his intended sexual partner was not interested, he left, saying 'I'll go, I'm not bloody wanted'. The Court of Appeal rejected the proposition 'that a propensity to have intercourse by consent could indicate an intent or inclination to commit the crime of rape'.[425]

The reasoning in *R v Rodley*, *R v Horry* and *R v Tweed* is sound. However, it has been inappropriately extended in the New Zealand decision, *R v Holloway*,[426] and

415 Ibid [33].
416 (1989) 167 CLR 590.
417 Ibid 602, 608 (Toohey J).
418 [1913] 3 KB 468.
419 Ibid 474.
420 Ibid 470.
421 *Harriman* (1989) 167 CLR 590, 602 (Dawson J).
422 [1949] NZLR 791.
423 Ibid 799.
424 [1992] NI 269 (CA, 29 June 1992).
425 Contrast *R v Barrington* (1981) 72 Cr App R 280. While the other misconduct with the other children was not as extreme as the charged indecent assaults on the complainants, it went far beyond 'a paternal or avuncular interest' (287) and was held to be relevant and admissible. *R v Horry* [1949] NZLR 791 was distinguished, as was *Doughty* [1965] 1 All ER 560, from which this phrase was quoted: 562.
426 [1980] 1 NZLR 315, 320.

the Victorian decision, *R v Movis*.[427] The defendant in each case, charged with rape, conceded having met the complainant through subterfuge and admitted intercourse, but argued that the complainant had consented. In the former case the complainant responded to the defendant's bogus advertisement for a housekeeper, while in the latter the defendant responded with a false name to the complainant's advertisement for a boarder or companion. The prosecution sought to present evidence of the defendant's other alleged rapes in similar circumstances, but this evidence was held to be irrelevant:[428] 'the issue is primarily one of whether ... intercourse was consensual or otherwise. The attitude of other women to his advances is not ... relevant to the present case. Whether they consented or not is immaterial.'[429] But while one woman's response to the defendant's sexual advance may not provide any *immediate* insight into how another woman might respond, the relevance enquiry should not be posed so narrowly. The evidence of other alleged rape victims has considerable indirect relevance. As the trial judge in *R v Movis* recognised, the evidence is relevant 'on the basis of the improbability of different witnesses telling similar lies where there was no room for conspiratorial concoction'.[430] To reject this coincidence is to accept that the defendant is the kind of person who would force sexual intercourse on a woman without her consent, which supports the prosecution case that he did so on the occasion charged.[431]

In both *R v Holloway* and *R v Movis*, the courts relied upon *R v Horry* and considered what would have been the case if the prosecution witnesses 'gave evidence of consensual intercourse. Would evidence of the latter fact be relevant upon the question whether the other four women in fact consented? We think not'.[432] But this is a crucial point in which *R v Horry* differs from the present cases. As indicated above, evidence of other incidents of consensual intercourse arguably has no relevance to the question whether the intercourse giving rise to the charges was non-consensual. But in *R v Holloway* and *R v Movis*, unlike *R v Horry*, the other allegations were of non-consensual intercourse.

Two English decisions have dealt with these issues more sensibly. In *R v Wilmot*,[433] the defendant was convicted of a series of similar rapes and robberies of six women, his defence of consent having been rejected. The Court of Appeal noted that '[i]t has been suggested sometimes that [evidence of other alleged rapes] can never be admissible in relation to the defence of consent'.[434] However,

[427] (1994) 75 A Crim R 416, 424; Heydon and Tapper appear to approve of the decision: Tapper, above n 26, 352; Heydon, above n 18, [21115].

[428] In *R v Movis*, the other allegations were also the subject of charges, and the issue of admissibility was tied up with the issue of severance. The trial judge joined the charges with cross-admissibility, and the reported decision was the defendant's successful appeal. In *R v Holloway*, the other allegations were not charged and the issue was just one of admissibility. The reported decision was a ruling in the course of the trial.

[429] *R v Movis* (1994) 75 A Crim R 416, 425; *R v Holloway* [1980] 1 NZLR 315, 320-1.

[430] (1994) 75 A Crim R 416, 417-18, citing *Hoch* (1988) 165 CLR 292.

[431] This may be viewed as either coincidence or propensity reasoning. See Section IV.

[432] *R v Movis* (1994) 75 A Crim R 416, 424; *R v Holloway* [1980] 1 NZLR 315, 320.

[433] (1989) 89 Cr App R 341.

[434] Ibid 345.

it was held that, in a case such as this, '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 resemblance'.[435] The Court considered that the circumstances of the various incidents were sufficiently similar for the evidence to be admissible.

The recent case of *R v Z*[436] also involved a series of similar alleged rapes in which the defendant conceded identity and intercourse but claimed the women had consented. In the trial of the most recent in the series, the prosecution sought to bring evidence of the earlier four. The trial judge cited *R v Wilmot* and held that the similarities were such that evidence relating to these incidents was sufficiently probative to be admitted.[437] The obstacle for the prosecution was the double jeopardy principle. The defendant had been tried on each occasion, obtaining three acquittals. Clearly the effect of the prosecution argument was to call into question the correctness of these verdicts. The prosecution appealed to the Court of Appeal,[438] and then to the House of Lords, in which it was held that the double jeopardy principle did not prevent the propensity evidence from being adduced.[439] In neither forum did the defendant challenge the probative value of the propensity evidence; the judgments proceeded on the basis that *R v Wilmot* was correctly decided. On the resumption of the trial, the evidence was admitted, and the defendant was convicted.[440]

X THE LAW COMMISSION'S RECOMMENDATIONS ON ADMISSIBILITY

In October 2001, the Law Commission published a draft Bill dealing with propensity evidence and evidence of bad character more broadly.[441]

As discussed above in Section II, the government pursued more radical reforms in its Criminal Justice Bill introduced into Parliament in November 2002, and incorporated few of the Law Commission's recommendations. However, given that the government's Bill has yet to pass through the House of Lords, and having regard to the widespread opposition that it has generated, the Law Commission's draft Bill retains more than historical relevance.

435 Ibid.
436 [2002] 3 All ER 385.
437 Ibid 387.
438 164 JP 240.
439 [2002] 3 All ER 385; Paul Roberts, 'Acquitted Misconduct Evidence and Double Jeopardy Principles from Sambasivam to Z' [2000] *Criminal Law Review* 952. See also *Oliphant v Koehler* 594 F 2d 547 (1979).
440 C Urquhart, 'Rapist Gets Life After Past Victims Give Evidence', *The Times*, 22 September 2000, cited by Roberts, above n 439, 962 fn 44.
441 The Law Commission construed its reference to cover bad character evidence in general: *Cm 5257*, above n 4, [1.1]-[1.3]. However, the present comments are confined to the draft provisions governing the prosecution's use of propensity evidence against the defendant. The admissibility of such evidence is covered by cl 8, which is entitled 'Evidence going to a matter in issue'.

The Draft Bill provides that, for propensity evidence to be admitted, the trial judge must grant leave,[442] for which two conditions must be satisfied:

> 8 (2) The first condition is that the evidence has substantial probative value in relation to a matter which-
> (a) is a matter in issue in the proceedings, and
> (b) is of substantial importance in the context of the case as a whole.
> (3) The second condition is that the court is satisfied-
> (a) that, in all the circumstances of the case, the evidence carries no risk of prejudice to the defendant, or
> (b) that, taking account of the risk of prejudice, the interests of justice nevertheless require the evidence to be admissible in view of-
> (i) how much probative value it has in relation to the matter in issue,
> (ii) what other evidence has been, or can be, given on that matter, and
> (iii) how important that matter is in the context of the case as a whole.[443]

There is an obvious overlap between the two conditions. The main difference appears to be that the first requires an absolute assessment of the probative contribution of the propensity evidence, while the latter calls for its probative value to be balanced against the risk of prejudice.

These provisions give prominent place to the need principle, discussed in the previous section. In requiring that the evidence have 'substantive probative value' to a 'matter in issue', and that the 'importance' of that matter should be gauged 'in the context of the case as a whole' having regard to 'what other evidence has been, or can be, given on that matter' the unnecessary admission of propensity evidence should be precluded.

It is less clear whether these provisions create space for the complementary contributive principle. As well as the other evidence presenting an obstacle to admissibility of propensity evidence by rendering it redundant and unnecessary, the other evidence may also enhance the admissibility of propensity evidence, by reducing the demands placed on it. The Commission showed some appreciation of this in its earlier *Consultation Paper*, commenting that 'the more work the bad character evidence has to do, the more probative value it must have'.[444] Perhaps the references to the importance of the evidence 'in the context of the case as a whole' can be construed as importing the contributive principle.

While the structure and expression of cl 8 could have been clearer in this respect, it does resolve a problem lurking in the Commission's earlier *Consultation Paper*. It was proposed there that, to be admissible, propensity evidence must be

[442] Cll 2, 6.
[443] *Cm 5257*, above n 4; see also [9.38]-[9.39].
[444] *Consultation Paper*, above n 4, [2.47].

'relevant to a *specific issue*',[445] such as identity or *mens rea*.[446] While the Law Commission rejected the notion that there existed a 'closed list' of admissible categories,[447] this requirement still appears unduly restrictive, and was inconsistent with the Commission's recognition that propensity evidence may be admitted against a defendant's general denial.[448] In its final report, the Law Commission displays a greater understanding of the contributive role of the other evidence. No mention is made of the 'specific issue' requirement,[449] the Commission criticises the Court of Appeal's categorial approach in *R v Burrage*[450] for its inconsistency with *DPP v P*,[451] and makes the observation that 'where the defence is a general denial it may often be the case that the similar fact evidence will not be sufficiently probative'.[452]

More serious criticisms can be made of the Commission's 'structured guidelines'[453] on the assessment of probative value of propensity evidence. The Commission considered a plain requirement that the evidence possess sufficient probative value 'too vague'[454] but its guidelines are far from 'conducive to comprehensible and consistent application of the requisite test'.[455] In determining whether the conditions in cll 8(2) and 8(3) are satisfied, cl 8(4) directs the trial judge to cl 5(2), which provides:[456]

> 5(2) In assessing the probative value of evidence for the purposes of this section the court must have regard to the following factors (and to any others it considers relevant):
>
> (a) the nature and number of the events, or other things, to which the evidence relates;
> (b) when those events or things are alleged to have happened or existed;
> (c) where:
>
> (i) the evidence is evidence of a person's misconduct, and
> (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,
>
> the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;

445 Ibid [10.73] (emphasis added).
446 Ibid [10.76].
447 Ibid [2.57].
448 Ibid; see also *Cm 5257*, above n 4, [2.14], [2.15].
449 Although the Commission continues to approve Blackstone's requirement that the evidence 'sufficiently specifically prove guilt': *Consultation Paper*, above n 4, [2.54]; *Cm 5257*, above n 4, [4.7], citing Blackstone, above n 82, [F12.8].
450 [1997] 2 Cr App R 88.
451 [1991] 2 AC 694; *Cm 5257*, above n 4, [4.9].
452 *Cm 5257*, above n 4, [2.15].
453 Ibid [11.42], [11.45].
454 Ibid [4.3], [11.42].
455 Ibid [11.45].
456 Ibid headings of cll 3, 5. This provision is directed more immediately to evidence of a 'non-defendant's bad character ... going to a matter in issue'.

(d) where:

(i) the evidence is evidence of a person's misconduct,
(ii) it is suggested that that person is also responsible for the misconduct charged, and
(iii) the identity of the person responsible for the misconduct charged is disputed,
the extent to which the evidence shows or tends to show that the same person was responsible each time.

This provision does mention a number of factors which determine the strength of the propensity inference. Consider, for example, a prosecution argument that identifies (cl 5(2)(d)) the defendant as the perpetrator on the basis that there were a number (cl 5(2)(a)) of other instances of the defendant's misconduct possessing several similarities and no dissimilarities (cl 5(2)(c)) with the charged offence, and which occurred at about the same time as the charged offence (cl 5(2)(b)). But the puzzling structure of the clause makes it unclear whether the various factors can be combined in this fashion. What role is played by the preconditions in cll 5(2)(c) and 5(2)(d)? Do cll 5(2)(a) and 5(2)(b) also have application to 'other misconduct'? Does only cl 5(2)(c) have application to cases where 'similarity' between the various instances of misconduct has probative significance? Does only cl 5(2)(d) have application to 'identity' cases, and cases where it is alleged the same person is responsible for the other misconduct and the charged misconduct? These clauses also verge on the circular. Clause 5(2)(c) indicates that where other-misconduct evidence 'has probative value *by reason of similarity* between that misconduct and other alleged misconduct', the court should consider 'the *nature and extent of the similarities and dissimilarities*'. Clause 5(2)(d) indicates that where other-misconduct is adduced on the basis that the person committing it 'is *also responsible* for the misconduct charged', the court should consider 'the extent to which the evidence shows or tends to show that the *same person was responsible* each time'.

Another problem with cl 5(2) is its incompleteness. The guidelines do not, for example, draw attention to the need to consider the extent to which the similarities between the other misconduct and the charged offence are peculiar rather than commonplace. They do not invite the trial judge to consider whether the defendant's other misconduct and the charged offence was in the same or similar locations. Nor do they raise the question whether the defendant's other misconduct is, of its very nature, likely to be repeated, rather than opportunistic or isolated (see generally Figure 3). While these considerations are covered by the catch-all 'and to any others it considers relevant',[457] they have considerable importance and should have received separate mention.

A more serious omission is that cl 5(2) appears to deal exclusively with the singularity step of the propensity inference, and makes no express mention of the linkage step. Clause 5(2) fails entirely to address Lord Simon's point in *Harris*[458]

[457] Cll 5(2), 8(3) - it is unclear why this expression should have been repeated in the latter clause.

that 'evidence of similar facts cannot in any case be admissible to support an accusation against the accused unless they are connected in some relevant way with the accused'.[459] The Commission recognised in its *Consultation Paper* that '[t]he inference that D killed V2 can be drawn more confidently, and more safely, from the *certainty* that D killed V1 than from the *possibility* that D did so'.[460] However, the Commission then made the assumption that the other-misconduct evidence will be direct, and that the linkage issue is solely one of credibility - 'the truth of previous misconduct evidence'.[461] The draft Bill adopts this view - with cl 14(1) directing the court to assess the probative value of evidence 'on the assumption that it is true' the issue disappears. But, of course, linkage evidence may be only circumstantial. On seven of the eight charges in *Harris*, the linkage evidence was merely to the effect that the defendant, a police officer, was on duty at the markets when the breakings and thefts occurred, at a time when they were closed to the general public.[462] Even assuming this evidence to be true - and it was not seriously challenged - the question remains whether it sufficiently links the defendant with the first seven thefts. A majority of the House of Lords held that linkage was insufficient, and the evidence on the first seven charges should not have been admitted on the eighth charge.[463]

It is a puzzle how the Law Commission got it so badly wrong. The explanation may be, in part, that the Commission was overly ambitious in synthesizing the law governing bad character evidence in general. The Commission describes the present law as 'a haphazard mixture of statute and common law rules'.[464] Its aim was to place all rules in one statute, and it adopted as a 'key principle' that, '[i]nsofar as the context permits, defendants and non-defendants should be equally protected from having their previous misconduct revealed for no good reason'.[465] This may be well and good. However, it does not follow that the inferences arising from evidence of bad character of defendants and non-defendants will have a similar structure, and be subject to similar probative-value assessments. Yet this is what the Commission appeared to assume. The guidelines on assessing the probative value of evidence of the defendant's propensity are contained within a clause that deals with evidence of a non-defendant's bad character.[466]

[458] [1952] AC 694.
[459] Ibid 708.
[460] *Consultation Paper*, above n 4, [6.4].
[461] Ibid [6.5].
[462] The linkage evidence on the eighth charge was much stronger - a trap was set, and the defendant was found in closer proximity to the thieved premises with the proceeds hidden nearby.
[463] It is questionable, however, whether *Harris* should be interpreted more strongly as imposing a sequential approach to proof, as suggested by Dennis, above n 20, 605, and Mahoney, above n 85, 193; see also Section VI. Contrast the suggestion of Cowen and Carter, above n 1, 124-5, that *Harris* merely establishes 'that irrelevant or insufficiently relevant evidence is excluded'; see also Tapper n 26, 340.
[464] *Cm 5257*, above n 4, [1.7].
[465] Ibid [1.8].
[466] Cl 5(2). Contrast cl 3 and cl 6, and see also cl 8(4). Note that cl 84(3) of the Criminal Justice Bill does incorporate these guidelines for evidence of the bad character of a non-defendant.

XI CONCLUSION

This article has provided a structural analysis of the propensity inference - and its close relation, the coincidence inference - with a view to understanding the factors governing its probative value. For the inference to be probative, there must be evidence, first linking the defendant to the other misconduct, and secondly, indicating that the other misconduct shares a sufficient degree of singularity with the charged offence. This article has examined the circumstances indicative of linkage and singularity, and the interaction between the inference and other evidence. Where the inference operates in the presence of independent incriminating evidence, it will not be appropriate to require the singularity and linkage steps to satisfy the criminal standard. The analysis has application both to the admissibility of propensity evidence, and its use by the jury.

While this article has drawn upon many precedents and authorities, the analysis has been driven by the logical structure of the inference. Whatever form the English reforms ultimately take, an assessment of the probative value of the propensity inference is likely to remain central. Statutory guidelines may well lead to greater consistency in the admission and use of propensity evidence. Such guidelines should be based upon the logical principles of proof detailed in this article.