Propensity, Coincidence and Context: the Use and Admissibility of Extraneous Misconduct Evidence in Child Sexual Abuse Cases

Andrew Palmer*

No category of case more consistently gives rise to questions about the admissibility of evidence of extraneous criminal misconduct than child sexual abuse prosecutions.[1] This is partly because complainants are often the alleged victims of more offences than have been charged; and partly because the accused is often alleged to have abused more than just one child. No doubt it is also because the frequent paucity of evidence supporting the complainant's allegations, provides a strong incentive to prosecutors to seek the admission of such evidence; and because the highly prejudicial nature of such evidence makes the defence particularly keen that the evidence be excluded; and no doubt it is for these last two reasons

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1 The word 'extraneous' has been chosen - in preference to the dominant United States usage of '*prior* misconduct' - because it allows for the possibility that the criminal misconduct may have occurred *after* the conduct which is the subject of the charge, as in *Pfennig v R* (1995) 182 CLR 461. Roberts refers instead to 'extraneous *discreditable* misconduct' evidence; see Paul Roberts, 'All the Usual Suspects: A Critical Appraisal of Law Commission Consultation Paper No. 141' [1997] *Crim LR* 75, 78. Roberts' phrase may well be more accurate, given that the common law exclusionary rule extends to cases such as *R v Ball* [1911] AC 47, in which evidence of non-criminal conduct was used as the basis for an inference about the accused's criminal propensities: see Andrew Palmer, 'The Scope of the Similar Fact Rule' (1994) 16 *Adelaide LR* 161, 178-187. In this article, however, the issue is unimportant, because all of the conduct with which it is concerned is undoubtedly criminal. For the moment, the more familiar terms 'similar fact evidence' and 'propensity evidence' will be avoided. As Tapper has pointed out, referring to a 'similar fact rule' is 'doubly misleading because it describes the exclusionary rule in a

that child sexual abuse cases are disproportionately over-represented in appellate decisions on the similar fact rule.[2]

Despite the level of appellate activity in this area, however, the law remains unclear and confused. This uncertainty about the law is often characterised by a failure to distinguish between the different types of extraneous criminal misconduct evidence, and the different ways in which that evidence can be used. A primary purpose of this article, then, is to clarify the scope and operation of the rules which determine the admissibility of evidence which reveals or suggests that the accused has been guilty of criminal misconduct other than that which is the subject of the charge.[3] The article thus differentiates between the two main types of extraneous criminal misconduct which are used in child sexual abuse prosecutions, namely uncharged misconduct relating to a single complainant, and misconduct relating to persons other than the complainant. The former category is the subject of the second part of the article; the latter the subject of the third. The second part of the article examines two problematic uses of such evidence: as the basis for propensity reasoning; and for the purpose of providing 'context'. The third part examines these two uses and also a third: as the basis for coincidence reasoning.[4] The article

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phrase more apt to describe one of the principal exceptions to it, and because it suggests a unifying factor between the situations in this area which they do not necessarily possess': Colin Tapper, *Cross and Tapper on Evidence* (8th ed, London: Butterworths, 1995), 361. It is equally misleading to use the phrase 'similar fact evidence' to describe all of the evidence which falls within the scope of the exclusionary rules discussed in this article. Later in the article, however, the phrase 'similar fact evidence' will be used as a synonym for the type of evidence referred to in the *Evidence Act* 1995 (Cth) as 'coincidence evidence': see Part 1.1.3 below. The phrase 'propensity evidence' will be avoided for the moment for two reasons; first, because of the controversy about whether the exclusionary rules discussed in this article apply to all evidence which reveals propensity, or only to evidence which relies on a propensity chain of reasoning: see Part 1.1.2 below; secondly, because the phrase is inapt to describe the class of evidence referred to in the *Evidence Act* 1995 (Cth) as 'coincidence evidence'. Later in the article, however, the phrase 'propensity evidence' will be used as a synonym for the type of evidence referred to in the *Evidence Act* 1995 (Cth) as 'tendency evidence'.

2 This is particularly true of England, where all three of the House of Lords most recent pronouncements on propensity evidence involved child sexual abuse offences: see *DPP v Boardman* [1975] AC 421, *DPP v P* [1991] 2 AC 447 and *R v H* [1995] 2 AC 596. In Australia as well though five of the leading cases involve allegations of child sexual abuse: see *Hoch v R* (1988) 165 CLR 292, *S v R* (1989) 168 CLR 26, *Pfennig v R* (1995) 182 CLR 461, *BRS v R* (1997) 148 ALR 101 and *Gipp v R* (1998) 155 ALR 15.

3 This includes conduct which is the subject of another count of the indictment, conduct which has been or is being dealt with in other proceedings, and conduct which has not been the subject of any charges whatsoever. It is not intended to include criminal conduct committed on the same occasion as the conduct which forms the subject of the charge and which would for that reason be admissible as part of the 'res gestae', in the limited sense in which that doctrine was defined by McHugh J in *Harriman v R* (1989) 167 CLR 590, 632-634.

4 The article does not, therefore, deal with the use of extraneous misconduct evidence for the purpose of impeaching the credibility of the accused as a witness during cross-examination; nor does it deal with the question of corroboration. The question of corroboration is only concerned with the *effect* of evidence, not with its *admissibility*; this is because extraneous misconduct evidence is only available to be used for purposes of corroboration if it satisfies the requirements for admission into evidence of the 'similar

argues that even allowing for the uncertainty in the law, several aspects of the rules which regulate admissibility are operating in an unsatisfactory fashion and require reform.

Before examining the two main types of extraneous misconduct evidence in child sexual abuse cases, however, it is first necessary to examine the rules used to determine the admissibility of extraneous misconduct evidence in general. Ideally, this could be achieved in short compass. Unfortunately, fundamental aspects of those rules – in particular the scope of the rule at common law – remain clouded in confusion; and as the scope of the rule is crucial to the way in which it is applied in child sexual abuse cases, an attempt to clarify that confusion can not be avoided. The conclusions of this first part are obviously of general significance; and while the second and third parts of the article do focus on the specific context of child sexual abuse offences, their conclusions do have broader implications, particularly in relation to sexual offences against adults.

1 The admissibility of extraneous misconduct evidence in Australia

There are three sets of rules used to determine the admissibility of extraneous misconduct evidence in Australia. The first is the common law, which currently applies in Queensland, South Australia, Tasmania, Western Australia and the Northern Territory; the second is a statutory modification of the common law recently enacted in Victoria; and the third is the provisions of the *Evidence Act* 1995 (Cth) and *Evidence Act* 1995 (NSW) (referred to in this article as the 'uniform evidence legislation'). In analysing these rules it is important to notice that they have both exclusionary and inclusionary aspects. The exclusionary aspect of each rule holds that evidence falling within its scope is prima facie inadmissible; the inclusionary aspect of each rule allows evidence falling within the scope of the exclusionary rule to be admitted if it meets certain specified conditions.

fact rule': see Peter Mirfield, 'Proof and Prejudice in the House of Lords' (1996) 112 *LQR* 1, 2. The concept of corroboration is, moreover, one of rapidly diminishing significance in the law of evidence generally and in child sexual abuse cases in particular, given the abolition of corroboration requirements relating to children in almost all Australian jurisdictions: see *Evidence Act* 1995 (Cth) and *Evidence Act* 1995 (NSW), s 164; *Evidence Act* 1958 (Vic), s 23(2A); *Criminal Code* (Qld), s 632; *Evidence Act* 1906 (WA), s 106D; *Evidence Act* 1929 (SA), ss 12a and 12(3); *Evidence Act* 1910 (Tas), s 122D; and *Evidence Act* 1939 (NT), s 9C.

1.1 Common law

1.1.1 The inclusionary aspect of the rule

The common law rule was recently reconsidered by the High Court in *Pfennig v R* (1995). According to the court in that case, evidence falling within the scope of the exclusionary rule in *Pfennig* is inadmissible unless it possesses a particularly high degree of probative force, such that the probative force of the evidence clearly transcends its prejudicial effect. The majority insisted that such a conclusion can only be safely reached if 'the objective improbability of [the evidence] having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged', a view the court had earlier expressed in the case of *Hoch v R* (1988).[5] In other words, the evidence must 'if accepted ... bear no reasonable explanation other than the inculpation of the accused in the offence charged'.[6] This is obviously an extremely demanding test requiring the judge to consider the probative value of the proffered evidence before deciding whether or not to admit it. Despite the dissent of McHugh J, who favoured a more flexible test,[7] the 'no reasonable explanation consistent with innocence' test must now be regarded as having been authoritatively established.

1.1.2 The exclusionary aspect of the rule

Still uncertain despite *Pfennig*, however, is the scope of the exclusionary aspect of the rule; in other words, precisely what class of evidence is it that is inadmissible unless it satisfies the test described above? One view of the rule is that it only applies when both of two conditions are met. The first condition is that the evidence must disclose or suggest that the accused has committed offences other than those with which he or she is charged (a 'contents' or 'disclosure' condition); the second is that the evidence is being used as the basis for a particular, 'forbidden' chain of reasoning (a 'use' condition).[8] The second view is that the rule applies

5 *Pfennig v R* (1995) 182 CLR 461, 481-2 (Mason CJ, Deane and Dawson JJ).). See also *Hoch v R* (1988) 165 CLR 292, 294 (Mason CJ, Wilson and Gaudron JJ); and *BRS v R* (1997) 148 ALR 101, 111 (Toohey J), and 117 (Gaudron J).

6 *Pfennig v R* (1995) 182 CLR 461, 481 (Mason CJ, Deane and Dawson JJ). See also Andrew Palmer, '*Pfennig v R*: Two Versions of the Similar Fact Rule' (1995) 20 *MULR* 600, 603-604.

7 See *Pfennig v R* (1995) 182 CLR 461, 517 and 528-532.

8 See *DPP v Boardman* [1975] AC 421, 453 (Lord Hailsham); see also JD Heydon, *Cross on Evidence* (5th Australian edition), Butterworths, 1996, [21030]; Andrew Ligertwood, *Australian Evidence* (2nd ed), Butterworths, 1993, 93-94; Palmer, above n 1, 172-177; Andrew Palmer, *Principles of Evidence*, Cavendish, 1998, 218-221; and Wendy Harris, 'Propensity Evidence, Similar Facts and the High Court' (1995) 11 *QUTLJ* 97, 114-118.

whenever the first condition is satisfied; that is, to any evidence revealing extraneous criminal misconduct or disclosing criminal propensity, regardless of the purpose for which that evidence is being used. This view of the rule was undoubtedly adopted by McHugh J in *Pfennig*,[9] and seemingly maintained by him in the subsequent case of *BRS v R* (1997),[10] and it has since been adopted by a number of intermediate appellate courts.[11]

In order for evidence to be held to fall within the scope of the first version of the rule, then, the evidence must satisfy both a contents or disclosure condition and a use condition; in order for evidence to be held to fall within the scope of the second version, on the other hand, it need only satisfy a contents or disclosure condition. The second version of the rule is obviously, therefore, broader. The difference between the two versions of the rule can be illustrated with the following examples:

- In a case where the accused is charged with committing a crime which allegedly occurred in prison, evidence about the circumstances of the offence. Such evidence must, at the very least, suggest that the accused is a convicted criminal.[12]
- In a case where the accused is charged with murder, evidence that an object connected to the accused was found at the scene of the murder. If the object in question happens to be the proceeds of a bank robbery, then proof of a connection between the accused and the object, and hence the murder, will require proof that the accused committed the robbery in question.[13]
- In a case where the prosecution needs to establish that the accused was in a particular place at a particular time, evidence that the number plate of the accused's car had been photographed by a red light or speed camera at that time and place.[14]
- In a case where the accused is charged with attempting to bribe a police officer, evidence designed to prove that the accused had previously

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9 See *Pfennig v R* (1995) 182 CLR 461, 513-514; and Palmer, above n 6, 606.

10 See *BRS v R* (1997) 148 ALR 101, 122.

11 See, for example, *Wackerow v R* (1996) 90 A Crim R 297, 304 (QCA); *R v Rushton* (Unreported, Queensland Court of Appeal, 17 June 1997) and *R v Carne* (Unreported, Queensland Court of Appeal, 24 June 1997), discussed in Peter Franco, 'Pfennig Re-visited: Propensity Evidence in Queensland' (1998) 18 *Queensland Lawyer* 169, 179. Mark Aronson and Jill Hunter, *Litigation: Evidence and Procedure* (6th ed), Butterworths, 1998, 991-992, appear to take the same view.

12 This example is taken from the judgment of Gleeson CJ in *R v Ritter* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Handley JA and Hulme J, 31 August 1995, BC9505394), 10-11. An example of such a case is provided by *R v Evans and Gardiner (No 2)* [1976] VR 523.

13 This example is taken from the judgment of McHugh J in *Pfennig v R* (1995) 182 CLR 461, 516.

14 This example is taken from the judgment of Hunt CJ at CL in *R v Beserick* (1993) 30 NSWLR 510, 520.

committed, or had told the police officer he had committed, an offence which he did not want investigated.[15]

In each of these examples, the evidence reveals the commission by the accused of offences other than that with which he or she is charged; the evidence therefore falls within the scope of the second, broader version of the rule, and would be inadmissible unless it satisfied the 'no reasonable explanation consistent with innocence' test laid down by *Pfennig*. In none of the examples, however, is the evidence being used as the basis for a chain of propensity (or for that matter coincidence) reasoning. In the prison example, the prosecution is not arguing that because the accused is a convicted criminal he or she is more likely to have committed the crime charged; the fact that the crime occurred in prison is simply a necessary part of the background or context of the case. Similarly, in the second example, the significance of the robbery is in providing a link between the accused and an object found at the scene of a crime; the fact that the object found at the scene of the crime is the proceeds of a bank robbery is besides the point; the process of reasoning would be precisely the same had the object instead been an item of clothing which could be proven to be the accused's. Similar arguments can be made about the final two examples.

All of the examples would therefore fall outside the scope of the first version of the rule, and would therefore be admissible subject only to the general judicial discretion to exclude evidence on the grounds of prejudice. It is obviously therefore important to decide which of the two competing views is the correct one, because the different versions of the rule demand completely different approaches to determining the admissibility of evidence which reveals criminality, but which is not used as the basis for a chain of propensity or coincidence reasoning. The answer to this question is also crucial to the arguments advanced in the subsequent parts of this article, particularly in relation to the admissibility of what is sometimes described as 'context' or 'relationship' evidence.[16]

Unfortunately, the High Court's pronouncements on this question are so ambiguous that there is little to be gained from a close textual analysis of them. In *Pfennig*, for example, the majority observes that 'There is no one term which satisfactorily describes evidence which is received notwithstanding that it *discloses* the commission of offences other than those with which the accused is charged',[17] a formulation which is obviously more consistent with the broader version of the rule. At another point in the judgment, however, the majority approvingly quotes the words of Lord Herschell LC in *Makin v Attorney-General (NSW)* (1894), to the effect

[15] This example is taken from the judgment of Gleeson CJ in *R v Ritter* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Handley JA and Hulme J, 31 August 1995, BC9505394), 11.

[16] See Parts 2.2 and 3.4 below.

[17] *Pfennig v R* (1995) 182 CLR 461, 464 (Mason CJ, Deane and Dawson JJ; emphasis added).

that the prosecution cannot 'adduce evidence tending to show that the accused has been guilty of criminal acts other than those charged *for the purpose* of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the crime charged';[18] these words are obviously more consistent with the narrower version of the rule.

Similarly in *BRS v R* (1997), Kirby J comments that 'the law generally excludes evidence of incidents other than those charged, where such evidence would tend to reveal the criminal or discreditable propensities of the accused'.[19] Again, this suggests that Kirby J supports the broad view of the rule, that it applies to all extraneous misconduct evidence regardless of the purpose for which the evidence is being used; his actual approach to the evidence in that case, however, suggests the opposite. The misconduct evidence in *BRS* was admitted for a non-propensity purpose; Kirby J did not suggest that the judge ought nevertheless to have approached the evidence in the light of *Hoch* and *Pfennig*. Instead, his whole approach was expressly founded on an assumption that the judge would only have had to apply the test in those cases if the evidence had actually been offered as the basis for a chain of propensity reasoning.[20] Of the present High Court only Gleeson CJ has unambiguously endorsed the narrower version of the rule, having been quite emphatic prior to his elevation to the High Court that the test in *Pfennig* need not be applied 'whenever the Crown tenders evidence, for any purpose, which is evidence tending to show that an accused is guilty of a criminal offence other than that charged', but only when the evidence is being used as the basis for either propensity or similar fact reasoning.[21]

With the authorities ambiguous, then, the main argument for preferring the narrower view of the rule is that the broader view of the rule would bring within the scope of the exclusionary rule a host of evidence which would be incapable of satisfying the 'no reasonable explanation consistent with innocence' test laid down in *Hoch* and *Pfennig*.[22] Gleeson CJ thus put forward the first and fourth examples above specifically in order to argue for the narrower version of the exclusionary rule, as did Hunt CJ at CL with the third example.[23] While it is true that McHugh J did assume that the second example fell within the scope of the exclusionary rule, he was actually using this assumption as the basis for an argument that the 'no rational explanation consistent with innocence' test favoured by the majority in *Pfennig* was too demanding.[24] The basis

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[18] See *Pfennig v R* (1995) 182 CLR 461, 475 (Mason CJ, Deane and Dawson JJ), quoting *Makin v Attorney-General (NSW)* [1894] AC 57, 65 (emphasis added).

[19] *BRS v R* (1997) 148 ALR 101, 135. See also *Gipp v R* (1998) 155 ALR 15, 54-55 (Kirby J).

[20] See *BRS v R* (1997) 148 ALR 101, 140. See also *Gipp v R* (1998) 155 ALR 15, 19-20 (Gaudron J).

[21] *R v Ritter* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Handley JA and Hulme J, 31 August 1995, BC9505394), 10-11.

[22] For discussion of that test, see Part 1.1.1 above.

[23] *R v Beserick* (1993) 30 NSWLR 510, 520 (Hunt CJ at CL).

[24] See *Pfennig v R* (1995) 182 CLR 461, 516.

for this argument is the obvious fact that in cases like the examples given above there would be reasonable explanations of the evidence which are consistent with the accused's innocence of the crime charged, so that the evidence would be incapable of satisfying the test in *Pfennig*.

McHugh J concludes from this that the test for admissibility of evidence falling within the scope of the exclusionary rule is something other than the 'no rational explanation consistent with innocence' test. But this conclusion is actually only one of three possible conclusions. The other two are that evidence in cases like the examples above actually falls outside the scope of the exclusionary rule and is not therefore subject to the 'no rational explanation consistent with innocence' test; and that the evidence in such cases is inadmissible. This final possibility is clearly unthinkable: how could, for example, the prosecution in the first example possibly be required to keep from the jury the fact that the crime occurred in prison? This leaves only the first two possibilities; and as *Pfennig* is absolutely clear – the dissent of McHugh J notwithstanding – in its endorsement of the 'no rational explanation consistent with innocence' test, McHugh J's conclusion simply can not be reconciled with authority. This means that the second possibility – that the evidence falls outside the scope of the exclusionary rule – must be the correct one.[25]

An additional reason for confining the exclusionary rule at common law to certain, specific uses of extraneous misconduct evidence is the fact that this is the approach taken under the uniform evidence legislation, where the exclusionary rules are only invoked if the extraneous misconduct evidence is being used either as 'tendency' evidence or as 'coincidence' evidence. In *R v Swaffield; Pavic v R* (1998), the High Court indicated that consistency should be maintained between the operation of the common law and the uniform evidence legislation, to the extent that principle permits.[26] In the case of propensity evidence principle clearly does permit. This article will therefore proceed on the basis that evidence only falls within the scope of the exclusionary rule at common law if it satisfies both use and contents conditions.

1.1.3 Which uses satisfy the use condition?

Assuming that the narrower view of the rule is correct, there remains the issue of identifying the uses which satisfy the use condition. There is no doubt that the rule applies when the extraneous misconduct evidence is being used as propensity evidence. Extraneous misconduct evidence is

[25] The same argument is made by Gleeson CJ in *R v Ritter* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Handley JA and Hulme J, 31 August 1995, BC9505394), 11.

[26] *R v Swaffield; Pavic v R* (1998) 151 ALR 98, 127 (Toohey, Gaudron and Gummow JJ), 132 (Kirby J).

used as propensity evidence when it is used as the basis for an inference that the accused has a propensity (or, to use the language of the uniform evidence legislation, a 'tendency') to behave in a particular way; and this is used as the basis for an inference that the accused acted in accordance with this propensity on the occasion in question. There is, however, another use of extraneous misconduct evidence which also falls within the scope of the exclusionary rule. This is the use of the evidence as what the uniform evidence legislation calls 'coincidence' evidence. When extraneous misconduct evidence is used as coincidence evidence, the phrase 'similar fact evidence' is actually appropriate, and if restricted to this meaning, 'similar fact evidence' could be used interchangeably with 'coincidence evidence', just as 'propensity evidence' can be used interchangeably with 'tendency evidence'.[27] Coincidence reasoning is quite different from propensity reasoning, as McHugh J pointed out in *Pfennig*:

> In similar fact cases ... evidence is often admitted for the reason that the association of the accused with so many similar deaths, injuries or losses, as the case may be, makes it highly improbable that there is any innocent explanation for the accused's involvement in the matter. In these cases, the propensity of the accused will usually only be established by the verdict.[28]

Americans call this process of reasoning 'the doctrine of chances', and recognise it as a non-character or non-propensity basis of admissibility.[29] As several of the leading 'similar fact' cases involve precisely this type of reasoning – including *Makin v Attorney-General (NSW)* [1894] AC 57, *Perry v R* (1982) 150 CLR 580 and (in a different way) *Sutton v R* (1984) 152 CLR 528[30] – it is clear that coincidence evidence also falls within the scope of the exclusionary rule and must satisfy the stringent requirements for admissibility laid down in *Pfennig*.

1.2 Victoria

1.2.1 The exclusionary aspect of the rule

The second set of rules apply only in Victoria, and do so as a result of the

[27] Thus in *R v Ritter* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Handley JA and Hulme J, 31 August 1995, BC9505394), 11, Gleeson CJ refers to 'propensity or similar fact evidence' as distinct categories.

[28] *Pfennig v R* (1995) 182 CLR 461, 530.

[29] See, for example, Edward Imwinkelried, 'The Evolution of the Use of the Doctrine of Chances as Theory of Admissibility for Similar Fact Evidence' (1993) 22 *Anglo-American Law Review* 73; and Mark Cammack, 'Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: *People v Ewoldt* Reconsidered' (1996) 29 *University of California, Davis Law Review* 355.

[30] For a discussion of the reasoning involved in these cases, see Palmer above n 8, 224-227.

Crimes (Amendment) Act 1997 (Vic), which inserted s 398A into the *Crimes Act* 1958 (Vic). The new provisions apply to 'propensity' evidence, and judging by the Attorney-General's Second Reading Speech,[31] the phrase is used as an umbrella phrase in the same way that the majority of the High Court used it in *Pfennig v R* (1995).[32] In *R v Best* (1998), however, the Victorian Court of Appeal indicated that it could determine the scope of the exclusionary rule in s 398A without entering into the debate about the scope of the rule in *Pfennig*;[33] that, in other words, the scope of s 398A was independent of the scope of the common law rule which it replaced. The court then indicated that s 398A applied to 'evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged', acknowledging that this involved 'adopting the "disclosure" approach rather than the "purpose" approach'.[34] The court immediately qualified this approach, however, by endorsing the following passage from *Cross on Evidence*:

> The exclusionary rule is not directed to evidence of discreditable conduct per se; it is concerned with the impermissible use which may be made of it. Discreditable conduct will therefore not attract the rule unless it has features which may cause the jury to infer that a person who has been responsible for or involved in those acts is likely by reason of that fact to have committed the offence charged. This will normally require, in order to attract the operation of the exclusionary rule, that the discreditable conduct in question has some common features with or shows an offence of the same general character as the offence charged.[35]

The effect of this qualification is actually to restore a use condition to the scope of the exclusionary rule; rather than the 'invited use' test advocated above,[36] however, the use test endorsed by the court is a 'risk of use' test. In cases where the prosecution are actually inviting the tribunal of fact to draw propensity or coincidence inferences from the evidence there will be no difference between the two tests: if the tribunal of fact are actually invited to draw propensity or coincidence inferences from the evidence, then obviously there is a risk that they will do so. However, in cases where the prosecution are not inviting the tribunal of fact to do this, but there is a risk that they will do so anyway, the evidence would fall

31 The Attorney-General commented that the new provisions dealt with 'the admissibility of propensity evidence (which includes similar fact evidence)': see Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 1997, 431.

32 See *Pfennig v R* (1995) 182 CLR 461, 464 (Mason CJ, Deane and Dawson JJ).

33 See *R v Best* [1998] 4 VR 596, 611 and 616. For a discussion of *Best*, and its companion case *R v TJB* [1998] 4 VR 621, see HNG Austin, 'Propensity for Change: the *Crimes (Amendment) Act* 1997 (Vic), Similar Facts and Separate Trials' (1999) 23 *Criminal Law Journal* 26, and K. Arenson, 'Propensity Evidence in Victoria: A Triumph for Justice or an Affront to Civil Liberties' (1999) 23 *MULR* (2) 263.

34 *R v Best* [1998] 4 VR 596, 607.

35 Heydon, above n 8, [21070], quoted in *R v Best* [1998] 4 VR 596, 608.

36 See Part 1.1.2.

outside the scope of the version of the common law exclusionary rule advocated above, but inside the scope of s 398A as interpreted in *Best*.

1.2.2 The inclusionary aspect of the rule

Another difference between the common law rule and the new statutory rule is the test for admissibility. Section 398A(2) provides that:

> Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.

Section 398A(3) further provides that the 'possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2)'. In *Best* the court held that s 398A(2) was a balancing test of the kind described by McHugh J in *Pfennig*,[37] and that in determining whether the evidence had sufficient probative value for it to be just to admit it, '[a]ll the circumstances bearing on probative value and prejudicial effect are relevant, but not factors impugning the reliability of the evidence'.[38] The non-consideration of 'factors impugning the reliability of the evidence', the result of s 398A(3), is a major departure from the common law, the significance of which is discussed below in Part 0. This departure aside, however, the court held that, 'properly applied', the enactment of s 398A(2) 'will not greatly alter the conduct of criminal trials', and that extraneous misconduct evidence will still only be received 'with great caution'.[39]

1.3 The uniform evidence legislation

The third set of rules applies in New South Wales, the Australian Capital Territory and in federal courts and is contained in Part 3.6 of the uniform evidence legislation, which deals with 'Tendency and Coincidence' evidence.

[37] *R v Best* [1998] 4 VR 596, 617, referring to *Pfennig v R* (1995) 182 CLR 461, 528-530 (McHugh J).
[38] *R v Best* [1998] 4 VR 596, 616.
[39] *R v Best* [1998] 4 VR 596, 612.

1.3.1 The exclusionary aspect of the rules

Under the uniform evidence legislation, evidence of extraneous criminal misconduct is prima facie inadmissible if it is being used as either 'tendency' or 'coincidence' evidence. If it is being used for any other purpose, then the tendency and coincidence rules need not be applied, and the evidence is admissible subject only to the other exclusionary rules and discretions. The approach of the uniform evidence legislation is, thus, consistent with the view of the common law advanced in this article subject to one important difference: unlike the common law rule which they have replaced, the tendency and coincidence rules are of general application, applying in both civil and criminal proceedings and regardless of which party is attempting to adduce the evidence.

Section 97(1) of the uniform evidence legislation defines tendency evidence as 'Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had' when used to prove 'that a person had a tendency ... to act in a particular way, or to have a particular state of mind'. Tendency evidence, in other words, is evidence designed to prove that because a person has behaved in a particular way on occasions other than that which is the subject of the proceedings, they are likely to have acted in the same way on the occasion which is the subject of the proceedings. Coincidence evidence, on the other hand, is defined in s 98(1) of the uniform evidence legislation as 'evidence that 2 or more related events occurred' when led to prove 'that, because of the improbability of the event occurring coincidentally, a person did a particular act or had a particular state of mind'. Events are 'related events' according to s 98(2), if 'they are substantially and relevantly similar' and 'the circumstances in which they occurred are substantially similar'.[40]

1.3.2 The inclusionary aspect of the rules

In general, tendency and coincidence evidence can only be admitted if the court is satisfied that the evidence 'either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence [has] significant probative value'.[41] It is also subject to notice requirements: ss 97(1)(a) and 98(1)(a). Where the tendency or coincidence evidence relates to the accused and is being adduced by the prosecution, however, a higher standard applies; in such cases the evidence is only admissible if 'the probative value of the evidence substantially outweighs any prejudicial effect it may have on' the accused: s 101(2). Although this

[40] For a discussion of the problems with this definition, see Aronson and Hunter, above n 11, 1003-1004.

[41] Sections 97(1)(b) and 98(1)(b).

test would appear to represent a departure from the common law test articulated in *Hoch* and *Pfennig*,[42] it has in fact been interpreted by the New South Wales Court of Criminal Appeal as simply a restatement of the *Hoch/Pfennig* test that there be 'no reasonable view of the evidence which is consistent with the innocence of the accused'.[43] As currently interpreted, therefore, the test for the admissibility of tendency and coincidence evidence is the same at both common law and under the uniform evidence legislation.

1.4 Summary

Despite legislative changes there remains a remarkable degree of consistency between the rules applying in all of the various Australian jurisdictions. In terms of the exclusionary aspect of those rules, it is clear that the provisions of the uniform evidence legislation only apply to evidence used for particular purposes; that is, as either tendency or coincidence evidence. Despite considerable uncertainty about the scope of the common law exclusionary rule, it was argued that the best view of the rule is that - like its uniform evidence legislation equivalents - it only applies when the evidence in question both discloses criminality and is being used as the basis for a chain of either tendency/propensity or coincidence/similar fact reasoning. In Victoria, on the other hand, the new s 398A of the *Crimes Act* 1958 has been interpreted as applying whenever the evidence in question discloses criminality other than that which is the subject of the charges; in *R v Best* (1998), however, the Court of Appeal added a rider to this view which goes a long way towards bringing s 398A into line with its common law and uniform evidence legislation equivalents. That rider was that s 398A only applies when there is a *risk* that the jury will use the evidence as the basis for propensity or similar fact reasoning.

In terms of the inclusionary aspects of the various common law and statutory rules, *Pfennig* decisively established that propensity and similar fact evidence are only admissible at common law if there is no reasonable explanation for the evidence which is consistent with the accused's innocence of the crime charged. Surprisingly perhaps, the provisions of the uniform evidence legislation have been interpreted as imposing the same standard. In Victoria too - with one important exception to be discussed in Part 3.2 below - the Court of Appeal has indicated that the enactment of s 398A of the *Crimes Act* 1958 'will not greatly alter the conduct of criminal trials'. It is therefore possible to move in to the next parts

[42] See, for example, the discussion of the test in Stephen Odgers, *Uniform Evidence Law* (3rd ed), 1998, 277-279, and in Palmer, above n 8, 231-232.

[43] See, inter alia, *R v Lock* (1997) 91 A Crim R 356, 363; *R v NJF* (Unreported, New South Wales Court of Criminal Appeal, 5 June 1997); *R v AH* (1997) 98 A Crim R 71, 78-79; and *R v Fordham* (1997) 98 A Crim R 359, 370.

of the article on the basis that - except where specifically addressed - the differences between the law applying in the various Australian jurisdictions can be largely disregarded.

2 Uncharged misconduct relating to a single complainant

The first main class of extraneous misconduct evidence relied on in child sexual abuse cases is uncharged misconduct relating to a single complainant. This class of evidence is often referred to as 'relationship' evidence, and it is not restricted to child sexual abuse cases, or even to sexual offences.[44] But the class is particularly common in child sexual abuse prosecutions because of the fact that child sexual abuse offences often occur in the context of an ongoing relationship between the perpetrator and the victim, rather than as a one-off event between strangers. In the context of that ongoing relationship, the abuse may have continued for a considerable period of time, and many, many individual offences may have been committed. When this is the case, it will generally simplify things if the indictment only contains a limited number of specimen or representative counts. Also, the requirement that an alleged offence must be particularised and identified, if not by date, then by reference to some other event or surrounding circumstance, means that the accused can only be charged with those offences in respect of which such particulars can be given.[45] The question will then arise as to whether the complainant must confine her or his testimony to the act or acts which are the subject of the charge or charges, or whether, on the other hand, the complainant will be permitted to testify about the entire relationship including those acts which are not the subject of any charges. If the complainant is permitted to do so, the uncharged misconduct evidence may be used in either of two ways:

> first, in order to establish a sexual relationship which makes the complainant's allegation more likely to be true. The 'guilty passion' of the adult for the child which such conduct shows may well make more credible the complainant's evidence that the sexual activity took place upon the particular occasion which is the subject of the charge. In other words, it makes it more likely that the offence was committed ... Secondly, the evidence is admissible in order to place the evidence of the offence charged into a true and realistic context, in order to assist the jury to appreciate the full significance of what would

[44] See, for example, *Harriman v R* (1989) 167 CLR 590.

[45] See *S v R* (1989) 168 CLR 266; *Podirsky v R* (1990) 3 WAR 128; and *R v S* (1992) 58 SASR 523. In several Australian jurisdictions an offence of maintaining a sexual relationship with a child has been created in order to overcome this requirement: see *Crimes Act* 1958 (Vic), s 47A; *Criminal Code* (Qld), s 229B; *Criminal Code* (WA), s 321A; *Criminal Law Consolidation Act* 1935 (SA), s 74; and *Criminal Code* (NT), s 131A. For discussion of the Queensland provisions, see *R v Kemp* [1997] 1 Qd R 383, 397 (Fitzgerald P) and Franco, above n 11, 175-176.

> otherwise appear to be an isolated act occurring without any apparent reason.[46]

There is no doubt that the first of these two uses - discussed in Part 2.1 below – is a 'propensity' use which falls within the scope of the common law exclusionary rule and its statutory equivalents. As such it is clearly only admissible if it satisfies the *Pfennig* 'no reasonable explanation consistent with innocence' test. The admissibility of uncharged misconduct evidence for the second of the above purposes, however, is far less certain and is therefore the subject of more detailed scrutiny.

2.1 The propensity use

One of the most common grounds for admitting uncharged misconduct evidence is that it shows a 'guilty passion' on the part of the accused towards the complainant, or an 'unnatural relationship' between the two.[47] As Gleeson CJ pointed out in *R v Wickham* (1991):

> The relationship in question need not be completely mutual, and the emotions or tendencies involved need not be shared for there to be a relevant relationship. The expression 'guilty passion' is sometimes used in relation to an accused. It conveys an idea most people would recognise as being of significance in determining whether a particular incident of a sexual nature has occurred. If past conduct shows that a child is an object of a parent's sexual desire then that may well make more credible an allegation that a particular alleged sexual incident occurred between them.[48]

When used in this way, uncharged misconduct evidence should be seen as a particularised form of propensity evidence; that is, as evidence of a propensity to commit offences of a particular type against a specific individual, namely the complainant. That view of the evidence was confirmed by Dawson J in *S v R* (1989):

> evidence of acts of intercourse other than those charged may have been

[46] *R v Beserick* (1993) 30 NSWLR 510, 515 (Hunt CJ at CL).

[47] See, for example, *R v Ball* [1911] AC 47; *W v R* (Unreported, Western Australia Court of Criminal Appeal, Kennedy, Pidgeon and Rowland JJ, 31 July 1995, BC9504000), 10 (Kennedy J), 9 (Pidgeon J), 10 (Rowland J); *J v R* (1996) 88 A Crim R 399, 411 (VCA); *Young v R* (1996) 90 A Crim R 80, 89 (VCA); *Wackerow v R* (1996) 90 A Crim R 297, 300 (QCA); and *R v Kemp* [1997] 1 Qd R 383, 398 and 403.

[48] *R v Wickham* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Carruthers and Mathews JJ, 17 December 1991, BC9101334), 7. It should be acknowledged that 'the term "guilty passion" is perhaps outmoded, and may in any event be inappropriate to describe the extended seduction by a parent of his young daughter': *R v TJW; Ex parte Attorney-General* [1988] 2 Qd R 456, 457 (Thomas J); of course, the word 'seduction' is open to precisely the same objection.

> admissible as similar facts of sufficient probative force to warrant their admission in evidence. I attempted to explain in *Harriman v R* (1989) 167 CLR 590 that when such evidence is admitted in a case of this kind its relevance is said to lie in establishing the relationship between the two persons involved in the commission of the offence, or the guilty passion existing between them, but it is in truth nothing more than evidence of a propensity on the part of the accused of a sufficiently high degree of relevance as to justify its admission.[49]

R v Ball [1911] AC 47 is a classic example of 'relationship' evidence which is clearly a form of propensity evidence. In that case the two accused, brother and sister, were charged with incest. There was evidence that they lived in the same house, and that they shared a bed. On its own this evidence would obviously have been insufficient to prove that the two had sexual intercourse. In order to establish this fact, the prosecution led evidence showing that the two had earlier lived as man and wife, and had had a child together. This suggested that 'the proper inference from their occupying the same bedroom and the same bed was an inference of guilt'.[50]

When evidence of uncharged misconduct is adduced in order to establish the existence of a relationship for the purposes of inviting the jury to infer that the accused acted in conformity with that relationship on the occasion in question, the evidence is clearly being used as the foundation for 'propensity' or 'tendency' reasoning, and equally clearly falls within the scope of the exclusionary rules described in the first part of this article.[51] That being so, it must be capable of satisfying the stringent admissibility requirements which apply to propensity and tendency evidence, although as McHugh and Hayne JJ pointed out in *Gipp v R* (1998), the satisfaction of these requirements in a case where all the offences are alleged to have been committed against one complainant will not ordinarily require the use of a 'distinctive modus operandi'.[52]

McHugh and Hayne JJ did suggest, however, that where uncharged misconduct is offered as propensity evidence the jury should be instructed that it can only be used for that purpose if it has been proven beyond reasonable doubt.[53] The basis for this claim was not, however, explained.

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49 *S v R* (1989) 168 CLR 266, 275; see also 287 (Gaudron and McHugh JJ); 271 (Brennan J); 279 (Toohey J); *B v R* (1992) 175 CLR 599, 619 (Dawson and Gaudron JJ); and *Pfennig v R* (1995) 182 CLR 461, 464 (Mason CJ, Deane and Dawson JJ).

50 *R v Ball* [1911] AC 47, 71.

51 See *R v Wickham* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Carruthers and Mathews JJ, 17 December 1991, BC9101334), 7 (Gleeson CJ); *R v Sakail* [1993] 1 Qd R 312, 316; *Hardingham v R* (Unreported, Western Australia Court of Criminal Appeal, Rowland, Franklyn and Anderson JJ, 3 March 1994, BC9401555), 8-9 (Rowland J), 2-4 (Franklyn J); *W v R* (Unreported, Western Australia Court of Criminal Appeal, Kennedy, Pidgeon and Rowland JJ, 31 July 1995, BC9504000), 10 (Kennedy J), 10 (Rowland J); and *R v AH* (1997) 98 A Crim R 71, 78.

52 *Gipp v R* (1998) 155 ALR 15, 37.

53 *Gipp v R* (1998) 155 ALR 15, 35-36. Kirby J's finding that the judge misdirected the jury suggests that he may have been in agreement with this view: see *Gipp v R* (1998) 155 ALR 15, 55-56.

As Kirby J pointed out, facts other than those which constitute the offence charged generally only need to be proven beyond reasonable doubt when they are 'indispensable links in a chain of reasoning towards an inference of guilt'.[54] Where the evidence is a strand in a cable of proof – rather than a link in a chain – then it need not be proven to that standard.[55] How the evidence should be classified will no doubt vary from case to case, but it is submitted that it would be very unusual indeed for uncharged misconduct evidence to constitute a link in a chain of proof, rather than a strand in a cable. That being the case, the decision in *Shepherd v R* (1990) should not usually require the judge to direct the jury that they can only use the uncharged misconduct if satisfied beyond a reasonable doubt that it occurred. If such a direction is required it would seem instead to be a response to the well-recognised dangers associated with propensity evidence.[56]

2.2 The context use

Far more problematic is the second basis for admitting uncharged misconduct evidence; that is, to argue that the jury can only properly understand the allegations and evaluate the competing testimony if they know something about the context in which the events allegedly occurred.[57] In child sexual abuse prosecutions, a most important part of that context is the fact that the abusive relationship was an ongoing one involving many instances of abuse in addition to those charged.[58] If the jury are deprived of this context, then it might appear that a particular act had come out of the blue, or occurred in a vacuum, and because of this might seem implausible. The context has therefore been held admissible on the basis of

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[54] *Gipp v R* (1998) 155 ALR 15, 54, quoting *Shepherd v R* (1990) 170 CLR 573, 579 (Dawson J).

[55] See *Shepherd v R* (1990) 170 CLR 573, 579 (Dawson J); *Gipp v R* (1998) 155 ALR 15, 36-37 (McHugh and Hayne JJ).

[56] There is some support for this view in the fact that counsel in *Gipp* based his argument that the jury could only have used the uncharged misconduct if satisfied beyond reasonable doubt that it occurred on the claim that the evidence 'was so prejudicial that it was *analogous* to "those intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt"': *Gipp v R* (1998) 155 ALR 15, 34 (McHugh and Hayne JJ; emphasis added).

[57] See Aronson and Hunter, above n 11, 684-685. For an argument about the admissibility of hearsay on a context basis, see Andrew Palmer, 'Child Sexual Abuse Prosecutions and the Presentation of the Child's Story' (1997) 23 *Monash University Law Review* 171, 177-180.

[58] Although evidence of the uncharged misconduct will ordinarily be given by the complainant, this is simply due to the fact that the complainant will ordinarily be the only person who witnessed the uncharged misconduct. If there is another witness, though, then he or she will be permitted to give evidence about the uncharged misconduct, provided that the complainant him or herself would have been permitted to give such evidence. See, for example, *W v R* (Unreported, Western Australia Court of Criminal Appeal, Kennedy, Pidgeon and Rowland JJ, 31 July 1995, BC9504000), 8 (Pidgeon J), where the other witness was the complainant's sister.

what might be called the 'principle of completeness',[59] a principle analogous to the res gestae rule.[60] There is an abundance of authority for this approach.[61] The facts of *R v Wickham* (1991) provide a perfect illustration of the justification for the admission of extraneous misconduct evidence on this basis:

> The account the complainant gave of the act of sexual intercourse the subject of the first charge against the appellant was such that it would have appeared astonishing, and almost unbelievable, if the jury had not been aware of the previous sexual relationship between father and daughter. When describing the first incident, the complainant, who at the time of the incident was aged fourteen, simply said that her father came and got into bed with her and lay on top of her and started having sexual intercourse. The only conversation that passed between them was that the appellant inquired whether she had been having sex with another young man and explained his comment by reference to the condition of her genitalia. She answered in the negative, her father finished having intercourse with her, and then rolled over and went to sleep. For a jury to have been given that information as though they were being told about the first occasion of any sexual activity between the appellant and his daughter would have created an utterly misleading impression, and it is impossible to see how they could have evaluated the evidence of the complainant if that occurrence were recounted to them as an isolated incident. The appellant denied that any such thing took place, and the jury would probably have looked upon the evidence of the complainant with the greatest suspicion if the event had been presented to them as something that occurred without any precedent.[62]

Absent the background or context of the entire relationship, the acts charged might seem so isolated, unexpected, inexplicable, brazen or bizarre, that they either seem inherently implausible, or would raise

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[59] *R v Hasler, ex parte Attorney-General* [1987] 1 Qd R 239, 243.

[60] See *R v Etherington* (1982) 32 SASR 230, 235 and *R v TJW; Ex parte Attorney-General* [1988] 2 Qd R 456, 458 where a parallel was explicitly drawn between uncharged sexual misconduct evidence relating to a single complainant and the res gestae case of *O'Leary v R* (1946) 73 CLR 566. See also *Gipp v R* (1998) 155 ALR 15, 35 (McHugh and Hayne JJ), quoting *R v Bond* [1906] 2 KB 389, 400, where uncharged misconduct evidence was said to be admissible because it is 'so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances'.

[61] See *R v Witham* (1962) Qd R 49, 63 and 77-80; *R v Garner* (1963) 81 WN (Pt 1) (NSW) 120, 123; *R v Dolan* (1992) 58 SASR 501, 503 (King CJ); *R v S* (1992) 58 SASR 523, 526 (King CJ); *B v R* (1992) 175 CLR 599, 610 (Deane J); *R v Beserick* (1993) 30 NSWLR 510, 515; *Hardingham v R* (Unreported, Western Australia Court of Criminal Appeal, Rowland, Franklyn and Anderson JJ, 3 March 1994, BC9401555), 5 (Anderson J); *R v Vonarx* [1999] 3 VR 618, 625; *R v T* (1996) 86 A Crim R 293, 299-300 (VCA); J v R (1996) 88 A Crim R 399, 412 (VCA); *G v R* (1996) 88 A Crim R 489, 494 (VCA); *R v Alexander* (Unreported, South Australian Court of Criminal Appeal, Doyle CJ, Duggan and Williams JJ, 24 April 1996, BC9601561), 5; *Varney v R* (Unreported, Western Australia Court of Criminal Appeal, Ipp, Wallwork and Owen JJ, 23 August 1996, BC9603899), 5 (Wallwork J); *Wackerow v R* (1996) 90 A Crim R 297, 308 (QCA); and *R v Kemp* [1997] 1 Qd R 383, 398 (Fitzgerald P).

[62] *R v Wickham* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Carruthers and Mathews JJ, 17 December 1991, BC9101334), 5 (Gleeson CJ).

questions such as why the complainant had submitted to the accused, why she or he had not immediately complained,[63] or why she or he had seemed composed immediately after the alleged assault.[64] The fact that the acts charged occurred against the backdrop of an ongoing relationship of abuse might well help the jury to answer such questions.

In the pre-*Pfennig* case of *Hardingham v R* (1994), Anderson J commented that 'although my researches have not been exhaustive, I have not been able to find a single reported case in which it has been held that such evidence ought to be excluded'.[65] Post-*Pfennig*, however, there has been considerable confusion about whether the 'no reasonable explanation consistent with innocence' test propounded in that case applied to context evidence; with some intermediate appellate courts taking the view that it did,[66] others dodging or deferring the question,[67] and others asserting that the context use of uncharged misconduct evidence falls outside the scope of the rule in *Pfennig*.[68] This confusion about the scope of the rule in *Pfennig* is, of course, precisely the same confusion that was discussed above in Part 1.1.2 above: does the rule in *Pfennig* apply to any evidence which discloses criminal misconduct other than that which is the subject of the charges, or does it only apply when that evidence is used as the basis for propensity or coincidence reasoning? This question is of great practical importance in child sexual abuse cases, because if the extremely demanding test in *Pfennig* does apply, then it is highly unlikely that extraneous misconduct evidence could ever be admitted for the

63 See, for example, *R v Rearden* (1864) 4 F & F 76, 80; 176 ER 473, 476; *R v Etherington* (1982) 32 SASR 230, 235; *R v Dolan* (1992) 58 SASR 501, 503; and *J v R* (1996) 88 A Crim R 399, 408 and 412 (VCA).

64 See, for example, *R v Hendy* (Unreported, South Australian Court of Criminal Appeal, Doyle CJ, Millhouse and Williams JJ, 29 May 1996, BC9602282).

65 *Hardingham v R* (Unreported, Western Australia Court of Criminal Appeal, Rowland, Franklyn and Anderson JJ, 3 March 1994, BC9401555), 4 (Anderson J).

66 See *Wackerow v R* (1996) 90 A Crim R 297, 298 and 300 (Macrossan CJ), 304 (Pincus JA); see also *R v Kemp* [1997] 1 Qd R 383, 398 (Fitzgerald P). Some judges have also then felt compelled to re-interpret the test in *Pfennig* so as to ensure the admission of evidence which would not appear to be capable of meeting its requirements: see, for example, *Wackerow v R* (1996) 90 A Crim R 297, 304, where Pincus JA suggested that the test was whether there is 'no reasonable view of [the evidence] other than as supporting an inference that the accused is guilty'. As Franco, above n 11, 170, shows, this test simply requires that 'the evidence be unequivocally relevant, and relevant in favour of the prosecution'. In Victoria, the adoption of a 'disclosure' approach to s 398A of the *Crimes Act* 1958 (Vic) obviously means that the Court of Appeal has taken the view that context evidence amounts to 'propensity' evidence for the purposes of s 398A: see *R v Best* [1998] 4 VR 596, *R v GAE* [2000] VSCA 18 (Unreported, Victorian Court of Appeal, Winneke P, Callaway and Chernov JJA, 25 February 2000), and text above n 34.

67 See, for example, *W v R* (Unreported, Western Australia Court of Criminal Appeal, Kennedy, Pidgeon and Rowland JJ, 31 July 1995, BC9504000), 9 (Pidgeon J); *G v R* (1996) 88 A Crim R 489, 494 (VCA); *Young v R* (1996) 90 A Crim R 80, 88 (VCA); and *R v Kemp* [1997] 1 Qd R 383, 398 (Fitzgerald P).

68 See, for example, *R v Vonarx* [1999] 3 VR 618, 622 and 624-5; *R v Massey* (Unreported, Queensland Court of Appeal, McPherson JA, Davies JA and Demack J, 12 July 1996, BC9603357), 6-8 (McPherson JA and Demack J); and *R v Kemp* [1997] 1 Qd R 383, 403 (Shepherdson J).

purpose of providing context.

The High Court's recent decision in *Gipp v R* (1998), however, indicates that extraneous misconduct evidence need not satisfy a 'no reasonable explanation consistent with innocence' test in order to be admitted for the purpose of providing context. The facts of *Gipp* are typical of the kind of case presently under discussion, with the accused being charged with a number of specimen counts involving allegations of indecent assault and rape against his stepdaughter. Before dealing with the specific incidents which were the subject of the charges, the prosecutor elicited evidence from the complainant to the effect that the acts charged formed part of a 'pattern of behaviour' which had been going on for a considerable period of time; and at other points in her evidence the complainant was permitted to testify that the acts charged were not 'the only ones', and that acts of abuse had occurred 'on a regular basis'.[69] McHugh and Hayne JJ unequivocally endorsed the context use of this uncharged misconduct evidence, commenting that the evidence of uncharged acts:

> was admissible to show the relationship which existed between the parties and to explain why the complainant so readily complied with the various demands of the appellant. Without evidence of the background and the continuing nature of the conduct of the appellant, the evidence of the complainant may have seemed 'unreal and unintelligible'. Without knowing the course of the relationship, the jury may have had great difficulty in accepting that the incidents could have occurred in the way the complainant described.[70]

The views expressed by Gleeson CJ prior to his elevation to the High Court also endorse this approach.[71] Callinan J, on the other hand, clearly rejected the idea that evidence could be admitted for the purpose of providing context, absent any 'forensic conduct' by the defence in raising issues such as delay in making complaint.[72] Similarly, Gaudron J, while acknowledging the difference between context evidence and propensity evidence,[73] commented that:

> evidence of prior sexual abuse may explain lack of surprise or failure to complain. If they are issues in the trial, evidence of general sexual abuse is relevant and admissible. But they can only be made issues by the way in which the defence case is conducted.[74]

In other words, according to Gaudron and Callinan JJ, context evidence only becomes admissible in cases where the credibility of the

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[69] See *Gipp v R* (1998) 155 ALR 15, 45.
[70] *Gipp v R* (1998) 155 ALR 15, 34.
[71] See above n 62.
[72] *Gipp v R* (1998) 155 ALR 15, 64; Callinan J did, however, believe that the evidence was admissible as 'propensity evidence'.
[73] *Gipp v R* (1998) 155 ALR 15, 19-20.
[74] *Gipp v R* (1998) 155 ALR 15, 20.

complainant's story is attacked on some basis such as 'lack of surprise or failure to complain'; absent such an attack, evidence of the background to the offences provided by the relationship is inadmissible. Kirby J's views are less clear; he approvingly quoted a passage from *Vonarx_v R* (1995), which described the context use of uncharged misconduct evidence; but then approached the uncharged misconduct evidence in *Gipp* itself on the basis that it was 'tendency' evidence, admissible only if its probative value outweighed its prejudicial effect.[75]

Kirby J aside, however, all members of the court in *Gipp*, as well as Gleeson CJ prior to his elevation to the court, have clearly taken the view that the context use of uncharged misconduct evidence is distinct from the propensity or tendency use of such evidence, and is admissible on a different basis.[76] This is consistent with the position in the uniform evidence legislation jurisdictions, where the context use of uncharged misconduct clearly falls outside the definition of 'tendency' evidence contained in s 97.[77] For Gleeson CJ (assuming he adheres to his earlier views), McHugh and Hayne JJ, evidence of the general relationship of abuse is admissible if the complainant's account would be 'unreal or unintelligible' without it; for Gaudron and Callinan JJ it is admissible for that purpose, but only if the defence actively raises an issue or issues which renders evidence of the general background necessary. Existing jurisprudence also indicates that in order to be admissible for the purpose of providing context the court must be satisfied that the evidence of the uncharged misconduct will indeed help the jury to assess and evaluate the prosecution case; and the evidence will still be open to exclusion on the discretionary grounds that its prejudicial effect exceeds its probative value.[78] As Smith AJA commented in *J v R* (1996):

> Care is needed in proceeding on the basis that it is necessary to consider the evidence of other incidents to enable the events the subject of the counts to be considered in a real and intelligible context. Evidence providing a context will be logically relevant but its probative value may be slight and its prejudicial effect great. It is necessary, in my view, to establish why it is that it may be said that the evidence in question will provide a relevant context in which to consider the charges. Only then can the probative value be assessed and compared with its prejudicial effect. When this is done it may be found that the evidence is relevant to the relationship or lack of complaint. To rely simply on 'context' will usually not assist in determining admissibility'.[79]

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75 *Gipp v R* (1998) 155 ALR 15, 55, quoting *R v Vonarx* [1999] 3 VR 618, 625.

76 See *Gipp v R* (1998) 155 ALR 15, 19-20 (Gaudron J), 35-36 (McHugh and Hayne JJ), and 64 (Callinan J). See also the very strong comments of Gleeson CJ in *R v Ritter* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Handley JA and Hulme J, 31 August 1995, BC9505394), 10-11, to the effect that *Pfennig* had not changed the basis of admissibility for 'context' or 'relationship' evidence.

77 See *R v AH* (1997) 98 A Crim R 71, 78; and *R v Fordham* (1997) 98 A Crim R 359, 369.

78 See *R v Bradley* (1989) 41 A Crim R 297, 298 (QCA); and *R v Beserick* (1993) 30 NSWLR 510, 515-516.

79 *J v R* (1996) 88 A Crim R 399, 415 (VCA).

Other cases have suggested that the uncharged misconduct evidence might be properly excluded if it is substantially removed in time from the acts which form the subject of the charge;[80] if it can 'be omitted without inconvenience and without distorting [the] narrative;[81] or if it seems unlikely to add weight to the prosecution case.[82] In any case, the evidence should be restricted to the minimum necessary to allow the proper evaluation of the prosecution case, lest the jury be overwhelmed by the number and weight of the allegations.[83] Evidence of uncharged misconduct *subsequent* to the acts which form the subject of the charges will also be difficult to have admitted on the grounds that it forms part of the context and background to the offences charged.[84]

Where uncharged misconduct evidence is admitted for the purpose of providing context then the jury need not be directed that they may only use the uncharged misconduct if satisfied beyond reasonable doubt that it occurred. This is because uncharged misconduct evidence used for this purpose is not an indispensable link in a chain of proof.[85] The judge must be careful, however, to ensure that the jury is properly instructed about the use to which the evidence may be put, and in particular warned not to use it as propensity evidence;[86] and if in truth the uncharged misconduct evidence is unnecessary for the purpose of providing context, then its only relevance lies in its use as propensity evidence, and it must be approached as such.[87]

80 See, for example, *R v Beserick* (1993) 30 NSWLR 510, 522 and 525; *R v Vonarx* [1999] 3 VR 618, 622; and *J v R* (1996) 88 A Crim R 399, 412 and 415 (VCA).

81 *Young v R* (1996) 90 A Crim R 80, 88-89 (VCA); see also *Hardingham v R* (Unreported, Western Australia Court of Criminal Appeal, Rowland, Franklyn and Anderson JJ, 3 March 1994, BC9401555), 9 (Rowland J), 2 (Franklyn J); and J v R (1996) 88 A Crim R 399, 412-415 (VCA).

82 See, for example, *C v R* (1991) 59 A Crim R 47, 57 (VCCA); and *R v Kemp* [1997] 1 Qd R 383, 398.

83 See *R v Bradley* (1989) 41 A Crim R 297, 302 (QCA, Shepherdson J); and *R v Kemp* [1997] 1 Qd R 383, 398 and 402.

84 See, for example, *R v Beserick* (1993) 30 NSWLR 510, 522 and 525; but cf *R v Massey* (Unreported, Queensland Court of Appeal, McPherson JA, Davies JA and Demack J, 12 July 1996, BC9603357), 9 (McPherson JA and Demack J).

85 See *Gipp v R* (1998) 155 ALR 15, 36-37 (McHugh and Hayne JJ); but cf *Gipp v R* (1998) 155 ALR 15, 55 (Kirby J).

86 See *Gipp v R* (1998) 155 ALR 15, 19 and 22 (Gaudron J), 36 (McHugh and Hayne JJ); *C v R* (1991) 59 A Crim R 46, 63 (VCCA); *R v Beserick* (1993) 30 NSWLR 510, 516; *R v T* (1996) 86 A Crim R 293, 299 (VCA); *G v R* (1996) 88 A Crim R 489, 494 (VCA); and *R v Kemp* [1997] 1 Qd R 383, 398.

87 *Young v R* (1996) 90 A Crim R 80, 89 (VCA); see also *R v Vonarx* [1999] 3 VR 618, 622 and 624; and *J v R* (1996) 88 A Crim R 399, 412 (VCA).

3 Extraneous misconduct relating to persons other than the complainant

The second main class of extraneous misconduct evidence in child sexual abuse cases is misconduct relating to persons other than the complainant. The relevance of extraneous misconduct evidence seems intuitively obvious; as Gleeson CJ observed in *R v ACK* (1996):

> To say of a man accused of sexual abuse of one of his children that he has a propensity to sexually abuse his children, that he has treated his children as objects of sexual gratification, and that he has regularly and systematically forced all his children, or a number of them, to submit to sexual activity, is to say something that is obviously relevant to the question of his guilt or innocence of the particular charges against him.[88]

The admissibility of evidence of misconduct relating to a person or persons other than the complainant will arise for consideration in two situations. First, when the indictment on which the accused is to be tried contains counts relating to different complainants; and secondly, in cases where the prosecution seeks to lead evidence from witnesses – who are not complainants in the trial – to the effect that the accused also committed offences against them. Like uncharged misconduct relating to a single complainant, misconduct relating to a person other than the complainant can be used either as the basis for propensity reasoning, or for the purpose of providing context; unlike the former category, however, it can also be used as the basis for a particular form of coincidence reasoning, and it is in relation to this third use that most of the controversy about this type of evidence has arisen. Before looking at the different ways of using this class of misconduct evidence, however, it is first necessary to examine the issue of joinder.

3.1 Joinder of charges relating to multiple complainants

Although the details of criminal procedure vary from jurisdiction to jurisdiction, as a general rule counts involving offences against different persons can be joined in the same indictment or presentment if they constitute a series of offences of the same or similar character. In cases involving sexual offences, however, it has been accepted that the joinder of counts relating to different complainants creates a risk of prejudice to the accused in that the jury may impermissibly use the evidence relating to one complainant as propensity evidence on the counts relating to the other

[88] *R v ACK* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Studdert and Dowd JJ, 22 April 1996, BC9601665), 9.

complainants and vice versa. Accordingly, the High Court has held that the counts relating to the different complainants should be severed unless either the evidence relating to each complainant is actually admissible on the counts relating to the other complainants; or an instruction directing the jury to decide whether the counts relating to each complainant have been proven without taking into account the evidence admitted on the counts relating to the other complainants is likely to be effective.[89]

For reasons which will become apparent in the following sections, the first of these conditions is rarely satisfied. In sexual offence cases, the second condition is also difficult to satisfy, with courts taking the view that it is almost impossible for a jury to give effect to an instruction requiring them to disregard the evidence relating to one complainant while considering the charges relating to another complainant and vice versa.[90] As a result, 'one rarely sees a trial where more than one victim is involved',[91] even though the accused will frequently have been the subject of allegations by multiple complainants.[92]

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89 See *Sutton v R* (1984) 152 CLR 528, 531 (Brennan J); *De Jesus v R* (1986) 68 ALR 1; and *Hoch v R* (1988) 165 CLR 292, 294 (Mason CJ, Wilson and Gaudron JJ), 298 (Brennan and Dawson JJ). *R v B* [1989] 2 Qd R 343 provides an example of just how strictly this rule can be applied. There the accused was charged on an indictment containing counts relating to all three of his daughters. Most of the counts, however, related to his daughter Serena. The trial judge severed any counts relating to his two other daughters, Cynthia and Catherine, which had not been committed in the presence of Serena; however, he allowed the prosecution to proceed with two counts, alleging offences against Cynthia and Catherine respectively, the offences relating to occasions when the accused was alleged to have committed acts of indecency on all three of his daughters at the same time. The Queensland Court of Criminal Appeal held that the judge had erred. Cynthia and Catherine would have to be permitted to testify about occasions when the accused had abused Serena (such testimony constituting either direct evidence of the offences charged, or, if the occasions did not involve charges, circumstantial evidence showing relationship or guilty passion); and if they could not give this evidence without disclosing the fact that the accused had also abused them on those occasions, then this must also be permitted. But even though Cynthia and Catherine were entitled to give evidence of the fact that on those occasions they had been abused, any charges relating to them should nevertheless have been dealt with in a separate trial, because of the risk that the jury would use the evidence on the charges relating to Serena alone in reaching its verdict on the charges relating to Cynthia and Catherine.

90 In the rare cases where counts relating to different complainants are heard together even though the evidence relating to one complainant is not admissible as propensity evidence on the counts relating to the other complainant, the jury must be warned not to use the evidence for that purpose: see *R v Mitchell* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Cole and Sterling JJ, 5 April 1995, BC9504682) and *T v R* (1996) 86 A Crim R 293 (VCA), in both of these cases counts relating to different complainants were heard together because counsel for the accused failed to seek an order for separate trials. The warning requirement may be relaxed in cases where there is no real risk that the jury will engage in impermissible propensity reasoning, as in *R v Arthur* (1992) 163 LSJS 18, where the counts relating to the different complainants all arose out of a single incident.

91 *T v R* (1996) 86 A Crim R 293, 299 (VCA).

92 For example, of the cases discussed above under the heading '2 Uncharged misconduct relating to a single complainant', all of the following involved an accused who had also been the subject of allegations by a person other than the complainant, of which allegations the jury remained unaware: *R v Wickham* (Unreported, New South Wales Court of Criminal Appeal, 17 December 1991, BC9101334); *R v Beserick* (1993) 30 NSWLR 510; *J v R* (1996) 88 A Crim R 399 (VCA); *Young v R* (1996) 90 A Crim R 80; and *R v Kemp* [1997] 1 Qd R 383.

In Victoria legislation aiming to overrule the above approach has now been enacted. Section s 372(3AA) of the *Crimes Act* 1958 (enacted at the same time as s 398A, discussed in Part 1.2 above), creates a presumption that sexual offences properly joined in the same presentment will be tried together; s 372(3AB) adds that this presumption will not be rebutted merely because evidence on one count is inadmissible on another count. In *R v TJB* (1998),[93] however the Victorian Court of Appeal held that this presumption had not destroyed the trial judge's responsibility to ensure that the accused received a fair trial; that severance should always be ordered where this was necessary in order to ensure a fair trial; that this would be so in cases where a judicial direction to not use evidence of other offences charged in the same presentment as propensity evidence might prove ineffectual; and that such a warning was particularly likely to be ineffectual 'in the case of offences of an unnatural character or offences that arouse strong emotions or excite revulsion', such as sexual offences.[94] In short, the court effectively reinstated the common law position which the new provisions had supposedly replaced.

This reinstatement seems fortunate. It is surely expecting too much of a jury to ask them to reach a verdict on one count without taking into consideration the fact that the accused has actually been the subject of multiple complaints. This suggests that counts relating to more than one complainant should only be heard in the one trial if evidence relating to one complainant is actually admissible to support the counts relating to the other complainant or complainants and vice versa. In other words, the common law view that the decision on admissibility should generally also dictate the decision on joinder seems far more defensible than an approach which sought to allow the jury to hear highly prejudicial, but inadmissible, evidence.

3.2 The coincidence use

In cases where the accused is alleged to have abused several complainants, and claims not to have abused any of them, the probative value of the evidence of one complainant on the charges relating to a different complainant often lies, as the High Court pointed out in *Hoch v R* (1988), 'in the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred'.[95] The same point was made by Lord Wilberforce in the English case of *DPP v Boardman* (1975):

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93 *R v TJB* [1998] 4 VR 621; for discussion of *TJB*, see Austin, above n 33, 33-36.
94 *R v TJB* [1998] 4 VR 621, 628 and 631.
95 *Hoch v R* (1988) 165 CLR 292, 295 (Mason CJ, Wilson and Gaudron JJ).

> This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence.[96]

If pure coincidence seems unlikely, and there is no possible 'cause common to the witnesses', then the only inference open is that the witnesses are telling the truth. This appears to be a form of coincidence or similar fact reasoning, rather than propensity reasoning.[97] Coincidence reasoning is defined in the uniform evidence legislation as being 'evidence that 2 or more related events occurred' when used to 'prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind'. In coincidence cases such as *Makin v Attorney-General (NSW)* [1894] AC 57 and *Perry v R* (1982) 150 CLR 580, the issue is whether an event which undoubtedly occurred - the death of a baby or the poisoning by arsenic of a husband - occurred by accident or by design. The association of the accused with so many similar events is intended to eliminate the possibility of accident.

In cases such as *Hoch* on the other hand, where the dispute is as to whether the alleged events actually occurred, the reasoning relies on a 'coincidence of story' rather than a 'coincidence in the facts'.[98] In such cases the 'related events' (to use the language of the uniform evidence legislation) are not the alleged offences themselves, but the making of similar complaints by different persons. The prosecution's argument is that it is so improbable that similar complaints could have been made coincidentally, that there must be another explanation for the occurrence of these related events, namely that the accused did the acts alleged. As already noted, this form of reasoning is referred to by American scholars as 'the doctrine of chances', and is said to rely 'on the improbability that one individual would be the subject of repeated false accusations':[99] 'Because the probability that an innocent person will be falsely accused of child abuse or rape is low, evidence that a defendant on trial for one of those crimes has previously been accused of the same thing suggests that some force other than chance is at work in producing this improbable outcome'.[100] That 'force' is obviously the conduct of the accused in committing the offences.[101]

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96 *DPP v Boardman* [1975] AC 421, 444.

97 Contrary to what I argued in Palmer, above n 8, 223-224. For a discussion of the differences between these two types of reasoning, see Parts 0 and 0 above.

98 See *DPP v Boardman* [1975] AC 421, 452 (Lord Hailsham).

99 See Cammack, above n 29, 393.

100 Cammack, above n 29, 397.

101 Of course, it is our belief in the constancy of human nature that makes the conduct of the accused seem a more plausible explanation than coincidence for multiple similar complaints. In other words, the reason why the inference of guilt is so attractive is that it meshes with our belief that a person who has behaved in a particular way on one occasion is likely to have behaved in the same way on another occasion. This does not mean,

The great advantage of coincidence reasoning in multiple complainant cases is that it enables the prosecution to combine two or more allegations, each of which might individually be incapable of proof beyond reasonable doubt, in a way that - if accepted - will remove doubt in respect of all of them. However, before the allegations of multiple complainants can be combined in this way two issues must be addressed: first, the degree of similarity required between the different allegations; and secondly, the need for the allegations to be independent of each other.

3.2.1 The need for similarities

In *Pfennig*, the High Court emphasised that in general 'striking similarity, underlying unity and other like descriptions of similar facts are not essential to the admission' of extraneous misconduct evidence, although they added that 'usually the evidence will lack the requisite probative force if the evidence does not possess such characteristics'.[102] In cases where there is a coincidence of story between multiple complainants, however, the High Court has pointed out that the probative value of the extraneous misconduct evidence 'lies in the improbability of the witnesses giving accounts of happenings having the *requisite degree of similarity* unless the happenings occurred'.[103] In other words, absent the 'requisite degree of similarity', the evidence will not be considered to have the probative value necessary for admission. This raises an obvious question: what is the 'requisite degree of similarity'? In Australia, cases involving multiple complainants have generally been approached on the basis that 'striking similarity' is essential, even though the cases do not generally involve issues of identification.[104]

In England by contrast, the House of Lords has held that 'striking similarity' is not required. In *DPP v P* (1991) the accused was charged with two counts of rape and eight counts of incest against his two daughters. The Court of Appeal certified the following questions for the House of Lords:

> 1. Where a father or stepfather is charged with sexually abusing a young daughter of the family, is evidence that he also similarly abused other young children of the family admissible (assuming there to be no collusion) in support of such a charge in the absence of any other striking similarities?
>
> 2. Where a defendant is charged with sexual offences against more than

however, that the evidence is being used as propensity evidence, because we are relying on general assumptions about human nature, rather than on specific assumptions about the propensities of the accused: see Cammack, above n 29, 399-400.

[102] *Pfennig v R* (1995) 182 CLR 461, 484 (Mason CJ, Deane and Dawson JJ).

[103] *Hoch v R* (1988) 165 CLR 292, 295 (Mason CJ, Wilson and Gaudron JJ, emphasis added).

[104] See, for example, *R v The Queen* (1989) 45 A Crim R 441, 464-465 (TCCA); *J v R* [1989] Tas R 116, 133 and 137; and *R v Glennon* [1993] 1 VR 97, 114-115.

one child or young person is it necessary in the absence of 'striking similarities' for the charges to be tried separately?[105]

In the course of answering these questions,[106] Lord Mackay made the following comment about the use of propensity evidence in child sexual abuse cases:

> The view that some feature of similarity beyond what has been described as the paederast's or the incestuous father's stock in trade before one victim's evidence can be properly admitted upon the trial of another victim seems to have been stated for the first time in those terms in *R v Inder* (1977) 67 Cr App R 143. Although that case also contains a reference to a warning not to attach too much importance to Lord Salmon's vivid phrase "uniquely or strikingly similar" I think that in the context this is what has occurred. This trend has been followed in later cases ... In so far as these decisions required, as an essential feature, a similarity beyond the stock in trade they fall to be overruled.[107]

Following *DPP v P*, no particular similarity has been considered necessary, at least in cases where the extraneous misconduct evidence was offered for purposes other than to prove identity. In *R v Simpson* (1994) 99 Cr App R 48, for example, the accused was charged with eight counts alleging offences against his stepdaughter and two nieces, allegedly committed over a five year period. The Court of Appeal held that the trial judge had correctly admitted evidence relating to the accused's alleged abuse of three other children (in relation to whom charges had not been laid). The only points of similarity between all of the alleged offences (including the uncharged offences) was that all of the girls were either members of the accused's family, or friends visiting his home, and that all occurred in the accused's home or garden at times when the girl concerned was either alone, or all but alone, with the accused.

In deciding which view is to be preferred, it needs to be borne in mind that the basis for admitting the evidence is the improbability of the accused being falsely accused of similar misconduct by more than one person. Where there are no similarities (other than those of the most general kind) between the stories told by the different complainants the inference of guilt depends entirely on the improbability of a person being unfortunate enough to be the subject of multiple false accusations of criminality. But just how unlikely is it that a person in the position of a school teacher (as in *Boardman*), or an employee in a home for boys (as in *Hoch*), would be the subject of a false accusation of sexual misconduct? And is it so unlikely that when it happens more than once we are entitled to conclude that all of the accusations must be true?

[105] See *DPP v P* [1991] 2 AC 447, 452.
[106] For the actual answers, see *DPP v P* [1991] 2 AC 447, 462-463.
[107] *DPP v P* [1991] 2 AC 447, 461.

No doubt the answer to this question would depend on a number of factors. The first is the independence of the accusations, a factor considered in detail below. A second factor would be the time interval between the accusations. If, for example, a school teacher was accused of sexually abusing a pupil, the fact that twenty years earlier he had been the subject of a similar accusation might seem of marginal relevance; but if the accusation had been made the previous year (and independence can be assumed), then this might seem far more significant. A third factor is the number of accusations which have been made (again, assuming independence); there would come a point where, regardless of the degree of similarity, one might be entitled to conclude that no one person could be so unfortunate as to have been the blameless victim of such a large number of false accusations.

The final factor is, of course, the degree of similarity. Again, if independence can be assumed, the fact that there are 'features common to the two stories which ... liars concocting false stories independently of one another would have been unlikely to have hit upon',[108] would mean that we are likely to feel confident in our conclusion that the accused is not just the victim of an unfortunate coincidence, even if the actual number of accusations is quite small or the time interval between them lengthy. In short, similarity should be seen as merely one factor to be taken into consideration. As the number of accusations increases, the degree of similarity required for admission must correspondingly decline. The question should always be: is it so improbable that this number of persons should have come forward with accusations bearing this degree of similarity by coincidence that the accusations must all either be true or have arisen from some other cause common to the witnesses?[109]

In light of all this, the Australian insistence on 'striking similarity' is probably too extreme: similarity should be recognised as merely one factor among several, and the degree of similarity required will vary according to those other factors. If this proposition is all that *DPP v P* (1991) stands for, then it would be hard to object to; but if, as *Simpson* arguably suggests, it stands for the proposition that no 'similarity beyond the stock in trade' is ever required then, in this author's view, it is wrong. It is surely *not* too much of a coincidence for an innocent person to be falsely accused by no more than two people of offences which have only the most vague and general similarities; and if it is not too much of a coincidence then we are not entitled to conclude that both accusations must be

[108] *DPP v Boardman* [1975] AC 421, 461 (Lord Cross of Chelsea); approvingly quoted in *BRS v R (1997) 148 ALR 101, 117 (Gaudron J).*

[109] It is important to note that in answering this question, the issue for the court is not whether the alleged behaviour is itself unusual or striking or distinctive; indeed this is a question about which, as Lord Cross pointed out in *DPP v Boardman* (1975), the court need 'have no idea whatever': *DPP v Boardman* [1975] AC 421, 460. Rather the question is whether it would be unlikely that multiple complainants making false accusations would each have concocted a story bearing these similarities.

true. Just as important as the degree of similarity, however, is the need for independence.

3.2.2 The need for independence

The argument that a multiplicity of complaints renders innocence improbable assumes that the complaints are independent of each other:

> Since the probative value of similar accusations evidence rests on the improbability of chance repetition of the same event, the various accusations should be independent of each other. Events are independent ... if the occurrence of one does not influence the likelihood of the other.[110]

If the complaints are independent, then the only possible causative link between them is the conduct of the accused. The inference of guilt is probably therefore safe. If the complaints are not independent of each other, however, then the conduct of the accused is not the only possible causative link between the complaints, and the inference of guilt may be unsafe. It is for this reason that the High Court has insisted that it is only when the fact that multiple similar accusations have been made is not explicable on the basis of 'a cause common to the witnesses'[111] that the extraneous misconduct evidence relating to multiple complainants has sufficient probative value to justify its admission. In *Hoch v R* (1988), the High Court was concerned with the possibility of joint concoction and indicated that:

> the admissibility of similar fact evidence in cases such as the present depends on that evidence having the quality that it is not reasonably explicable on the basis of concoction.[112]

Of course joint concoction is only one possibility which would deprive the accusations of their independence. Others include the possibility that a later complainant became aware of the details of an earlier complaint through the media,[113] through the investigating police officers,[114] through joint counselling sessions,[115] or through some other source.[116] Australian courts have accepted that it is only where such possibilities can be excluded as unreasonable that the evidence of multiple

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[110] Cammack, above n 29, 402.
[111] *DPP v Boardman* [1975] AC 421, 444.
[112] *Hoch v R* (1988) 165 CLR 292, 297 (Mason CJ, Wilson and Gaudron JJ); see also 302 (Brennan and Dawson JJ).
[113] See *R v Von Einem (No 2)* (1991) 52 A Crim R 402.
[114] See *R v The Queen* (1989) 45 A Crim R 441, 450 and 458-459 (TCCA).
[115] See *R v Robertson* (1997) 91 A Crim R 388 (QCA).
[116] See *BRS v R* (1997) 148 ALR 101, 119 (Gaudron J).

complainants can be held mutually admissible.[117] The process by which this is determined was described in the following way in *Hoch v R* (1988):

> This is a matter to be determined ... in the light of common sense and experience. It is not a matter that necessarily involves an examination on a *voir dire*. If the depositions of witnesses in committal proceedings or the statements of witnesses indicate that the witnesses had no relationship with each other prior to the making of the various complaints, and that is unchallenged, then, assuming the requisite degree of similarity, common sense and experience will indicate that the evidence bears that probative force which renders it admissible. On the other hand, if the depositions or the statements indicate that the complainants have a sufficient relationship to each other and had opportunity and motive for concoction then, as a matter of common sense and experience, the evidence will lack the degree of probative value necessary to render it admissible. Of course there may be cases where an examination on the *voir dire* is necessary, but that will be for the purpose of ascertaining the facts relevant to the circumstances of the witnesses to permit an assessment of the probative value of the evidence by reference to the consideration whether, in the light of common sense and experience, it is capable of *reasonable* explanation on the basis of concoction. It will not be for the purpose of the trial judge making a preliminary finding whether there was or was not concoction.[118]

Several aspects of this approach are noteworthy. The first is that it is not necessary for the defence to establish that there was joint concoction (or some other cause common to the witnesses); it is sufficient that joint concoction (or some other cause common to the witnesses) is a 'real possibility'.[119] Secondly, in order to show that joint concoction is a real possibility it is necessary to establish both opportunity *and* motive; one of these on its own will not suffice. As far as opportunity is concerned, however, this will be extremely easy to establish in any case where the complainants know each other, and in particular, in any case where the complainants are members of the same family. If the complainants are members of the same family then the complainants will obviously 'have a sufficient relationship to each other and [have] had opportunity ... for concoction'. In *Hoch v R* (1988), for example, the three complainants comprised two brothers and a friend of one of the brothers; because of the close relationship they clearly had an opportunity for concoction. It is only where the complainants do not know each other, or where their complaints emerge independently and a significant time after their last contact, that the

[117] See, for example, *R v The Queen* (1989) 45 A Crim R 441, 450 and 458 (TCCA); *J v R* [1989] Tas R 116, 124; and *R v Glennon* [1993] 1 VR 97, 113.

[118] *Hoch v R* (1988) 165 CLR 292, 297 (Mason CJ, Wilson and Gaudron JJ). See also *BRS v R* (1997) 148 ALR 101, 140 (Kirby J); *J v R* [1989] Tas R 116, 124.

[119] *J v R* [1989] Tas R 116, 144. See also *R v ACK* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Studdert and Dowd JJ, 22 April 1996, BC9601665), 11 (Gleeson CJ).

opportunity to concoct will not be present.[120]

As the trial judge pointed out to counsel in *R v McKellin* (1997), however, 'I cannot say they are sisters, therefore they must have been concoction';[121] this is because as well as opportunity, there must also be motive. Motive is, however, often easy to suggest: the emergence of allegations of abuse may coincide with a family breakdown, and the defence may claim that the complainant has been encouraged by the other parent to make a false complaint;[122] or where the accused is a step-parent, the motive alleged may be that the complainant resented the fact that the accused had taken a disciplinary role in the family,[123] or that the complainant was being encouraged by the non-custodial birth parent to make a false complaint.[124] In cases of non-familial abuse, the defence might attempt to portray the complainant as, for example, a disaffected former student with an axe to grind.[125] Or the accused might simply claim that the complainant bears him or her ill-will for some unknown or unspecified reason.[126]

The important point to make, perhaps, is that there is a difference between *suggesting* that the complainant had a motive to make false allegations, and *establishing* the existence of such a motive.[127] Take, for example, a case where the accused suggests that the complainant bears him or her ill-will. Hostility on the part of the complainant towards the accused is actually entirely consistent with the prosecution case; it is only if the hostility can be clearly shown to have pre-dated the alleged abuse - as it apparently could in *Hoch*[128] – that the hostility is anything other than equivocal. There must be a reasonable evidential basis before the court finds that the complainants did indeed have a motive to jointly concoct the evidence; a vague suggestion that the complainants disliked the accused should not suffice.

A third point is this: it has already been noted that the question for the judge is not whether there was joint concoction, but whether the fact that similar complaints has been made is reasonably explicable on that basis. What happens, however, when the trial judge is actually satisfied that there was no joint concoction? Does this mean that the judge should also find that joint concoction was not a real possibility; or can joint concoction still be a real possibility even when the judge is satisfied that there

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[120] See, for example, *J v R* [1989] Tas R 116, 124-125; *R v The Queen* (1989) 45 A Crim R 441 (TCCA); and *BRS v R* (1997) 148 ALR 101, 129.

[121] See *R v McKellin* [1998] 4 VR 757, 767 (Vincent AJA).

[122] See, for example, *C v R* (1992) 59 A Crim R 46, 58 (VCCA); and *R v ACK* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Studdert and Dowd JJ, 22 April 1996, BC9601665), 2-3.

[123] See, for example, *R v Macdonald* (1995) 65 SASR 322, 325.

[124] See, for example, *R v Mitchell* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Cole and Sperling JJ, 5 April 1995, BC9504682), 2.

[125] See, for example, *R v Glennon* [1993] 1 VR 97.

[126] See, for example, *Palmer v R* (1998) 151 ALR 16, 29.

[127] See *R v McKellin* [1998] 4 VR 757, 764-5 (Phillips CJ and Charles JA).

[128] See *Hoch v R* (1988) 165 CLR 292, 297 (Mason CJ, Wilson and Gaudron JJ).

was no joint concoction? In *R v McKellin* (1997), the four complainants were sisters; on the voir dire they steadfastly denied that they had discussed their allegations with each other, and the trial judge found these denials credible. He was therefore satisfied that there had been no collusion between the complainants, and accordingly held that the fact of similar complaints being made was not reasonably explicable on the basis of collusion. The majority of the Victorian Court of Appeal saw no problem with this approach, reiterating that 'there was absolutely no evidence of collusion'.[129]

Vincent AJA, on the other hand, held that the trial judge had asked the wrong question, and argued that the existence of 'material pointing to the possibility of motives for concoction' combined with the obvious opportunity given the relationship between the complainants, meant that joint concoction could not be excluded as a reasonable possibility, notwithstanding that there was no actual evidence of joint concoction and that the judge was personally satisfied that there had been none.[130] Technically speaking, Vincent AJA's approach is probably correct. However, it overlooks the important fact that the reason why the judge is required to consider whether concoction is reasonably possible, rather than to ask whether it actually happened, is to relieve the *defence* of the need to prove that there *was* concoction, not to prevent the *prosecution* from proving that there *was not*. If the judge is satisfied that the complainants did not jointly concoct their allegations, notwithstanding that they may have had the opportunity and motive to do so, then surely the judge should be entitled to conclude that the fact of similar complaints being made is not reasonably explicable on the basis of joint concoction.

The fourth, and most fundamental, point to note about the approach in *Hoch* is that the possibility of concoction goes to the *admissibility* of the extraneous misconduct evidence rather than to its *weight*. As Gleeson CJ pointed out in *R v ACK* (1996):

> This is the point of departure between the common law in Australia and the common law in England as declared recently by the House of Lords. In England, in a case such as the present, the trial judge would receive the evidence of similar facts, or propensity, and leave it to the jury to determine whether, in the light of the whole of the evidence in the case, there was a possibility that the witnesses were making common cause against the accused. In Australia, on the other hand, the law, as declared in Hoch, requires the trial judge to determine the admissibility of the evidence and, in that connection, to consider for himself or herself whether there is a 'real chance' of conspiracy or collaboration ...[131]

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[129] *R v McKellin* [1998] 4 VR 757, 764 (Phillips CJ and Charles JA).
[130] *R v McKellin* [1998] 4 VR 757, 771.
[131] *R v ACK* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Studdert and Dowd JJ, 22 April 1996, BC9601665), 12.

The English position was thus stated by the House of Lords in *R v H* (1995) as follows:

> Where there is an application to exclude evidence on the ground that it does not qualify as similar fact evidence and the submission raises a question of collusion (not only deliberate but including unconscious influence of one witness by another) *the judge should approach the question of admissibility on the basis that the similar facts alleged are true* and apply the test set out by this house in *DPP v P* accordingly. It follows that generally collusion is not relevant at this stage.[132]

Of course, if collusion is raised as an issue in the trial, then the judge should direct the jury's attention to that danger;[133] nevertheless, the importance of the difference between the English and Australian approaches can scarcely be overstated. When added to the fact that English courts are satisfied with a far lesser degree of similarity than Australian courts require,[134] the result is that trials involving allegations by multiple complainants, and in particular multiple complainants who are all members of the same family, will inevitably be much, much more common in England than in Australia. Aspects of the English approach have now been adopted in two Australian jurisdictions, namely Queensland and Victoria. Section 132A of the *Evidence Act* 1977 (Qld) reads:

> Admissibility of similar fact evidence
>
> In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.[135]

As the Victorian Attorney-General's Second Reading Speech makes clear, s 398A(3) of the *Crimes Act* 1958 (Vic) was intended to achieve a similar result, with the Attorney-General explicitly referring to the House of Lord's decision in *R v H* [1995] 2 AC 596.[136] In *R v Best* (1998), the Victorian Court of Appeal confirmed that these provisions had achieved their aim, so that the 'possibility, even a strong possibility, of collusion or any other matter affecting the reliability of the evidence is a matter for the jury'.[137]

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[132] See *R v H* [1995] 2 AC 596, 612 (Lord Mackay LC, emphasis added); see also 622 (Lord Mustill). For commentary on the case, see [1995] *Crim LR* 717; Roderick Munday, 'Similar Fact Evidence and the Risk of Contaminated Testimony' [1995] *Cambridge Law Journal* 522; and Mirfield, above n 4.

[133] See *R v H* [1995] 2 AC 596, 612 (Lord Mackay LC).

[134] See above nn 105-107.

[135] Section 132A was inserted by the *Criminal Law Amendment Act* 1997 (Qld), and is discussed in Franco, above n 11, 175.

[136] Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 1997, 431 (Jan Wade, Attorney-General).

[137] *R v Best* [1998] 4 VR 596, 616.

So which approach is to be preferred: the English (and now Victorian and Queensland) approach; or the mainstream Australian approach? In the ordinary course of things, the possibility of concoction is a question of witness credibility, and witness credibility is a matter for the jury: a court does not, for example, exclude the evidence of a witness because of the possibility that he or she may be lying. Instead the court determines the admissibility of the witness's evidence on the assumption that the witness is telling the truth, leaving it to the jury to decide whether he or she is in fact doing so. The same appears to be true – in general – for extraneous misconduct evidence: although the court in *Pfennig* argued that 'the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed',[138] the court nevertheless affirmed that 'the basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, *if accepted*, it bears no reasonable explanation other than the inculpation of the accused in the offence charged'.[139]

This seems to suggest that the probative value of extraneous misconduct evidence should be assessed on the assumption that the extraneous misconduct occurred; that is, on the assumption that the witnesses attesting to that misconduct are telling the truth. It would seem then, that in cases where extraneous misconduct evidence is adduced on the basis of a coincidence of story, the possibility that one or more of the complainants might be *independently* lying is a question of credibility for the jury, not a question of admissibility for the judge. It is only where *joint* concoction is alleged that a question of witness credibility becomes a question of admissibility to be determined by the judge. When one adds the fact that the defence need only establish that joint concoction (or some other common cause) is a 'real possibility', and that this will usually be relatively easy to establish in cases where the complainants are known to each other, it is submitted that the approach laid down by *Hoch* is overly cautious. Moreover, its clear effect is to render it extremely unusual for the prosecution to be able to avoid separate trials in cases where the accused faces allegations from more than one complainant; it is submitted that this confers an unwarranted advantage on the accused.

It is therefore submitted that other Australian jurisdictions should follow the lead of Victoria and Queensland and enact legislation to overrule the approach laid down in *Hoch*. The next section of the article will, however, examine the possibility that the excessively strict approach laid down in *Hoch* can be avoided if the prosecution offers extraneous misconduct evidence as the basis for propensity, rather than coincidence, reasoning.

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[138] *Pfennig v R* (1995) 182 CLR 461, 482 (Mason CJ, Deane and Dawson JJ).

[139] *Pfennig v R* (1995) 182 CLR 461, 481 (Mason CJ, Deane and Dawson JJ; emphasis added); see also *Hoch v R* (1988) 165 CLR 292, 294 (Mason CJ, Wilson and Gaudron JJ); and *Sutton v R* (1984) 152 CLR 528, 564 (Dawson J). The point is discussed further in Part 3.3 below.

3.3 The propensity use

The propensity use of extraneous misconduct relating to persons other than the complainant can most clearly be seen in cases where the accused has already been convicted of the offences relating to one of the complainants. In a subsequent trial relating to a second complainant the prosecution might attempt to lead evidence of the earlier convictions in order to establish the accused's propensity for committing offences of the type charged. Assuming the evidence has sufficient probative value it can be admitted for this purpose and used by the jury as the basis for inferring that the accused acted in the manner alleged on the occasion in question.

The same reasoning process can also be adopted in cases where the charges relating to all of the complainants are being tried together. The approach to be taken to the evidence would, however, be fundamentally different from the approach taken when the evidence is used as coincidence evidence. In order to use the evidence as propensity evidence, the jury would, in the first place, have to approach the charges relating to one of the complainants without taking into consideration the evidence relating to the other complainants. If satisfied that the accused committed the offences against that complainant, then this would establish his or her propensity to commit offences of that type. Subject to the requirement of sufficient probative value laid down in *Pfennig* and its statutory equivalents, the fact that the accused had this propensity could then be added to the evidence going to prove the charges relating to the other complainants. In other words, evidence that the accused had abused A, could be taken into account in determining whether the accused had also abused B.

Of course, the judgments in *Gipp v R* (1998) suggest that extraneous misconduct evidence relating to a person other than the complainant could only be used as propensity evidence if the jury is first satisfied beyond reasonable doubt that the extraneous misconduct occurred.[140] In other

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[140] See text above nn 53-56. Approaching the question purely as one of logic, however, it would seem that evidence that the accused abused A is probative on charges relating to B, even if the accused's abuse of A cannot be proven beyond a reasonable doubt. This is because, given certain reasonable assumptions, evidence that the accused abused A will tend to increase the probability that the accused abused B, even if the fact that the accused abused A can only be proved to a probability of less than 50 per cent. Let T be the testimony from complainant A that the accused abused her; let E be the event that the accused did in fact abuse A; and let G be the event that the accused is guilty of abusing complainant B. It is reasonable to assume that T favours E, and let us also assume that E favours G; that is, that the fact that the accused abused A increases the probability of his guilt on the charges relating to B. In symbolic terms, $P(E \mid T)>P(E)$ and $P(G \mid E)>P(G)$. Let us also assume that T is relevant to G only through proof of E. That is, that given E or not-E, T has no impact on the probability of G: $P(G \mid E\&T)=P(G \mid E)$ and $P(G \mid \text{not-}E\&T)=P(G \mid \text{not-}E)$. Given these reasonable assumptions it can be proved that T increases the probability of G, that is, $P(G \mid T)>(P \mid G)$. Most significantly, this result is not conditional on $P(E \mid T)$ reaching any particular level. If the prior probability of E is very low - $P(E)<<0.5$ - then T may increase the probability of guilt significantly, even though the probability of E may remain less probable than not, that is, $P(E \mid T)<0.5$. I am grateful to

words, before evidence that the accused abused A could be used as the basis for an inference that the accused abused B, the jury would have to be satisfied beyond reasonable doubt that the accused had indeed abused A, and would have to be satisfied to that standard without taking into consideration the evidence relating to B. Of course, the evidence can only be used by the jury in this way, if it has been admitted by the judge.

In the previous section of the article it was argued that while 'the probative value of disputed similar facts is less than the probative value those facts would have if they were not disputed',[141] the credibility of the evidence used to establish the fact of extraneous misconduct is not otherwise to be taken into consideration in assessing the probative value of that evidence for the purposes of determining whether or not it should be admitted.[142] If credibility was a decisive factor in determining the probative value of extraneous misconduct evidence for the purposes of admission, then the judge could only admit evidence of extraneous misconduct if satisfied beyond a reasonable doubt that the misconduct had occurred; this is because if the judge was not so satisfied then there would clearly be a 'reasonable explanation of the evidence consistent with the accused's innocence of the crime charged', namely that the misconduct did not occur. Yet there is no authority suggesting that part of the function of a voir dire into the admissibility of extraneous misconduct evidence is for the judge to determine whether the prosecution has established beyond a reasonable doubt that the misconduct occurred.

If this argument is correct, then in cases where evidence that the accused abused A is offered as propensity evidence on the charges relating to the accused's alleged abuse of B, the court need not take into account the possibility that A is lying in determining the probative value of the 'fact' that the accused abused A. Instead, the court should commence its assessment of the probative value of the A evidence with the assumption that A is telling the truth. This conclusion would appear to follow whether it is alleged that A is lying independently of B, or that A and B are lying in concert with each other. If this argument is correct, then a 'possibility' of joint concoction would not appear to preclude the admission of extraneous misconduct evidence as the basis for propensity reasoning, even though it would preclude its use - because of *Hoch* - as coincidence evidence.

Of course, having the evidence admitted as propensity evidence deprives the prosecution of the great advantage of coincidence reasoning: that is, the ability to combine several complaints each of which is incapable of proof beyond reasonable doubt into one overwhelming case. With

David Hamer of the University of New England, for providing me with this justification; David also provided me with the proof referred to above, but I have not included this proof for reasons of space.

[141] *Pfennig v R* (1995) 182 CLR 461, 482 (Mason CJ, Deane and Dawson JJ).

[142] See above n 139. The exception to that general rule is the one which has just been discussed; that is, the issue of joint concoction.

the propensity use, by comparison, at least one of the complaints has to be capable of standing on its own two feet, capable of proof beyond reasonable doubt without support from any of the other complaints. Admission on the basis of coincidence reasoning is obviously, therefore, the preferred option. If, however, the court is not prepared to admit the evidence on that basis - because joint concoction is a real possibility - then approaching the evidence on a propensity basis may provide an alternative means of securing its admission.

3.4 The context use

A third way of using extraneous misconduct evidence is to provide context. The admission of extraneous misconduct evidence relating to a single complainant for the purpose of providing context was discussed in Part 2.2 of this article. It is unusual, but not unheard of, for evidence relating to persons other than the complainant to also be held admissible for this purpose. In particular, in cases where a complainant claims that the offences against her or him were committed in the context of a family in which such offences were common, then evidence of the offences committed against persons other than the complainant may be admitted for the purpose of providing context or background. In *R v H* (1994), for example, the accused was tried on numerous counts relating to his daughter M and step-daughter R. M and R were permitted to testify about events other than those which were the subject of charges in order to provide context. The trial judge also allowed other family members to give evidence about sexual activities involving the accused and family members other than the complainants, and evidence of acts of violence committed by the accused against family members other than the complainants. The New South Wales Court of Criminal Appeal held that all of this evidence had been properly admitted, with Dunford J providing the following reasons:

> Once it is accepted that the ratio for admission of the evidence of other sexual misconduct on the part of the appellant includes providing the proper background and setting for a complainant's evidence so that the jury may be in a better position to assess her credibility in relation to the events charged in the indictment, I see no reason why such evidence should be limited to that of other conduct involving the appellant and the complainants, and this case provides an ideal example of the relevance of such evidence.
>
> Some of the claims of the complainants taken by themselves were quite outrageous and such as would not invite credibility from the jury simply because they were so outrageous. However, there was a mass of evidence that this was a household where from a sexual point of view there were virtually no restrictions. It was, it seems, a case of "anything goes". Once that was established, and it was established by the evidence of a number of witnesses

> describing what went on in the house, the evidence of the complainants relating to the particular charges fitted into place and became much more credible. In many respects, such evidence was essential to a proper understanding of what the complainants were alleging.[143]

The reasoning of Dunford J was endorsed by Studdert J in *R v ACK* (1996), a case in which the accused was charged with offences against his eldest son Z and eldest daughter S, but evidence was led from two other sons M and O of the fact that the accused had also abused them. Studdert J held that the evidence of M and O was relevant for a variety of reasons including the following:

> The evidence of M and O rendered more credible the accounts of S and Z of sexual abuse by the appellant within the confines of the home in proximity to other children. This assumed particular significance because in responding to their charges, the appellant asserted to police when interviewed the impossibility of the claimed misconduct by him, bearing in mind the close living conditions and the proximity of the other members of the household ... [144]

In other words, the accused's argument that the offences charged were implausible given that they were alleged to have been committed in the proximity of other members of the household could be met with the evidence that those other members of the household had also been abused. The admission of the evidence of the uncharged offences committed against the other members of the household thus allowed the evidence of the complainants to be evaluated and assessed in its proper context. Cases where the evidence of one complainant can not be properly evaluated in the absence of evidence relating to other complainants or potential complainants might perhaps be limited to cases involving allegations that one member of a family has abused several other members of that same family, where it is alleged that the abuse was ongoing, systematic and a matter of common knowledge within the family. In such cases, it might well be said that the evidence of one member of the family could only be properly evaluated in the light of evidence of how the family as a whole operated.

Although *Gipp v R* (1998) dealt with the admissibility of uncharged misconduct evidence relating to a single complainant, it is submitted that there is no reason in principle why the approach laid down by the High Court in that case ought not also be applied to the context use of extraneous misconduct evidence relating to persons other than the complainant.[145] If this argument is correct, then such evidence need not satisfy the

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[143] *R v H* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Powell JA and Dunford J, 24 October 1994), 7-8.

[144] *R v ACK* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Studdert and Dowd JJ, 22 April 1996, BC9601665), 8.

[145] See Part 2.2 above.

Pfennig 'no reasonable explanation consistent with innocence' test in order to be admissible for the purpose of providing context,[146] although it will only be admissible for the purpose of providing context when the context which it provides is truly necessary for an understanding of the allegations which are the subject of the charge.

4 Conclusions

This article has sought to clarify the law which regulates the use of extraneous misconduct evidence in child sexual abuse cases, and to recommend reforms where this seems necessary. The first part of the article dealt with extraneous misconduct evidence in general. Its primary conclusions were that the exclusionary rule at common law only applies when extraneous misconduct evidence is being used as the basis for either propensity/tendency or coincidence/similar fact reasoning; and that, despite legislative intervention, there is a remarkable degree of homogeneity between the different rules applying in the various Australian jurisdictions.

The second part of the article examined the admissibility of uncharged misconduct evidence relating to a single complainant, arguing that there were two distinct uses of such evidence and that only one of them attracts the operation of the exclusionary rule in *Pfennig* and its statutory equivalents. When used to show guilty passion the uncharged misconduct is undoubtedly a form of propensity (or tendency) evidence, admissible only if there is no reasonable explanation of the evidence consistent with the accused's innocence of the crime or crimes charged. *Gipp v R* (1998) also suggests that the jury should be instructed that they can only use the evidence for this purpose if satisfied beyond reasonable doubt that the uncharged misconduct occurred, although the reasons for this ruling are not entirely clear.

The second use of uncharged misconduct evidence is to provide a context or background to the allegations which are the subject of the charges. Despite a great deal of uncertainty since *Pfennig* at the intermediate appellate level over the question of whether uncharged misconduct used for this purpose falls within the scope of the rule in *Pfennig*, it is submitted that the High Court's decision in *Gipp v R* (1998) establishes that uncharged misconduct evidence adduced for the purposes of providing context need not satisfy the *Pfennig* 'no reasonable explanation consistent with innocence' test in order to be admissible. It will, however, only be admissible for this purpose if truly necessary in order to render the complainant's account real and intelligible; and, according to Gaudron and

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[146] The view apparently taken in *R v H* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Powell JA and Dunford J, 24 October 1994); but cf *R v ACK* (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Studdert and Dowd JJ, 22 April 1996, BC9601665), 10.

Callinan JJ, that necessity will only arise where the conduct of the defence is such as to make something like lack of surprise or failure to complain an issue in the trial.

Finally, the third part of the article argued that the current common law approach to joinder is the correct one; that is, that the question of joinder should generally turn on the question of admissibility. As far as admissibility is concerned, however, the article argued that the current common law approach to the admissibility of extraneous misconduct offered on the basis of a coincidence of story is too strict, particularly in relation to the possibility of joint concoction, but also in its apparent insistence on the need for striking similarities. It argued that the degree of similarity between allegations should be seen as only one factor among several, varying according to those other factors; and that the English approach to the question of joint concoction is to be preferred to the current Australian common law approach as laid down in *Hoch*. That is, joint concoction should be treated as a question of witness credibility for the tribunal of fact rather than a question of admissibility for the judge; this approach has been adopted by legislation in Victoria and Queensland, and it was argued that other Australian jurisdictions should follow suit. In the meantime, a possible method of avoiding the strictness of *Hoch* was suggested: to put forward the evidence of the multiple complaints not as the basis for coincidence reasoning, but as the basis for propensity reasoning.