Professor William Twining was fond of quoting the story of Judge Bridlegoose from *Gargantua and Pantagruel*.¹ Judge Bridlegoose was summoned before the Cour de Cassation to explain a strange decision he had made and he pleaded that failing eyesight must have caused him to misread the dice. This caused the court to ask him to explain his whole process. Judge Bridlegoose explained that he listened to the parties with care and attention, then put all the papers in a bag for three weeks, then rolled dice to decide the case. When asked why he did not just roll dice straight away and spent so much time on listening to and reading the submissions, he said that this was for the sake of formality which lent validity to the proceedings and that in this way the losing party accepted the decision gracefully.

The point of the story of course is that there is more to litigation than accurate fact-finding. We hope that litigation will prevent people resorting to force and that losing parties will usually be satisfied that they have had a fair hearing. We would also like the system to be reasonably speedy, affordable and predictable and we criticise when it is not. The question then arises whether accuracy of decision-making should be sacrificed to any extent in pursuit of these other policy objectives. On the one hand it can be argued that a pre-requisite for a just outcome is an accurate assessment of the facts; on the other hand it is clear that too much investigation of the facts can lengthen and complicate proceedings and the risk of unwelcome publicity can even deter people from resorting to litigation to protect their rights.

These arguments crystallise in considering the admissibility of similar fact evidence in civil cases. The overwhelming majority of similar fact cases are criminal cases and the policy reasons for restricting the use of similar fact evidence in criminal cases have tended to be carried over into civil cases without careful consideration necessarily being given. There are numerous statements in cases and texts that the rules for the admission of similar fact evidence are the same in civil and criminal cases. *Halsbury’s Laws of Australia*, for example, at [195-875] tends to suggest that the same principles apply but that in civil cases there is a greater readiness to admit as the risk of prejudice is not as great. However, Gilles² supports the proposition that the prohibition operates differently, but then at 75 states that the ‘same rule of exclusion which operates in the criminal context operates in the civil context’, but also notes at 76 the ‘more relaxed’ way the exclusion is approached in civil contexts. Bates suggests that the tests are now the same but, given the different standards in proof, is of the view that they should not be.³ Both these

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² Barrister, Brisbane; B.Com, James Cook University; LLB (Hons), Queensland University of Technology.


articles were, of course, written before *Pfennig*.4

This paper explores whether the cases bear this out and if so, whether it should be so.

I SIMILAR FACT EVIDENCE

‘Similar fact evidence’ is not a term of art and different expressions have been used to describe much the same concepts, such as ‘propensity evidence’ and ‘discreet conduct’. What is meant by all these definitions is evidence relating to incidents which are not the basis of the charge or the statement of claim but which are said to be relevant to the proof of the facts charged or alleged.

The admissibility or otherwise of similar fact evidence has always been shrouded in mystery. The first question is whether there is any applicable rule beyond the requirements of all evidence that it be relevant and that its probative force not be outweighed by its prejudicial effect. The second question is, if so, what is the content of the rule? The third question is to what it applies. Some authorities regard it as applying only when the argument is based on propensity, others that it applies to all discreet conduct and even that propensity reasoning is forbidden. It has been suggested by more than one author that the House of Lords and Privy Council have always decided each case on its own facts and that Courts of Appeal and commentators then set about creating rules of doubtful utility.5

The position in criminal cases is now dealt with by statute in England and Wales, leaving civil cases to the common law. In New Zealand the new Evidence Code, the *Evidence Act 2006* (in force 1 August 2007) specifically regulates similar fact evidence in criminal cases but leaves such evidence in civil cases to be dealt with under the fundamental principles of the Code. Outside New Zealand then, the question still arises as to whether the treatment of similar fact evidence is different in civil and criminal cases at common law and if not, whether the rationales for any rules are different.

In criminal proceedings Australia has for some time gone its own way, something ratified in *Pfennig v R*.6 *Pfennig*, at paragraph 60, requires that:

because [similar fact evidence] has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused.

In fact that requirement has been rejected elsewhere in respect of circumstantial evidence.7 In *Phillips v R*,8 the High Court of Australia reiterated that *Pfennig* was

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7 *R v McGreevy* [1973] 1 All ER 503 (HL); *R v Hart* [1986] 2 NZLR 408 (CA).

the governing case at present and quoted several clauses from *Pfennig* requiring ‘a really material bearing on the issues to be decided’ and a ‘specific connexion’ with the issues to be decided, but did not refer to paragraph 60 in *Pfennig*, which is the only paragraph which purports to put forward an operative rule.

As will be seen by a consideration of the cases, a consistent approach to admissibility in civil cases has not been adopted. However, it may finally be that, in civil proceedings, the cases have come back to the proposition that the test is simply relevance.9 This is certainly the position in England.10

Relevant evidence is usually defined as an item of evidence that could rationally affect the assessment of the probability of the existence of a fact in issue.11 That is, does the evidence rendered make the existence of a fact in issue more probable than it would have been without the evidence?12

Prejudicial effect is a term much used but seldom analysed. It is suggested that the term prejudicial effect can encompass a number of different risks such as that:

- the standard of proof will be lowered as it matters less whether this decision is wrong given the person’s record;
- the tribunal will use this case to punish further for past conduct inadequately dealt with at the time;
- the tribunal of fact will over-estimate the probative value of the evidence;
- a party will be faced with answering matters wider than the issue of which it may or may not have had notice;
- the case will become more complicated and expensive, especially where the similar facts are not previous convictions and may have to be proved by contested evidence;
- a party will be deterred from litigating if it results in his or her past being laid bare;
- the losing party will feel that any of the above is true, even if it is not.

The question is whether and to what extent any of these factors apply in civil litigation and whether, if so, this affects the reception of similar fact evidence in civil proceedings.

A line of cases, based on s 52 of the *Trade Practices Act 1974* (Cth) has arisen which consider the admission of similar fact evidence.13 In these ‘representations cases’, evidence of similar representations, as the representation upon which the proceedings are based, have sought to be admitted. Consideration will be given those cases, to assess whether the ‘test’ is simply relevance or something else.

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9 Butterworths, *Cross on Evidence*, vol 1 (at 101) [21280], which is also of the view that in civil proceedings the main trend of the cases is relevance. E Webb, ‘Evidence of Tendency and Coincidence in Matters Arising under s 52 of the Trade Practices Act 1974 (Cth) – Potential Uses in Real Property Transactions’ (1997) 5 *Australian Property Law Journal* 145, 148, notes that similar fact evidence was freely admitted in cases of old.
13 It should be noted that there are obviously additional cases in civil proceedings considering ‘similar fact’ evidence; however, it is simply not feasible to review them all in this paper.
II Historic Cases

A starting point in civil proceedings is Hales v Kerr. This was the case of the barber’s dirty razors and the client (plaintiff) suing for ‘barber’s itch’. The trial Judge allowed evidence of two other clients who had developed the same disease after being shaved by the defendant in the month prior to the plaintiff. Channell J (at 604) noted that in criminal proceedings it was certainly not admissible to adduce evidence that the accused had committed a similar offence on an earlier occasion. However, his Honour was of the view that where the evidence was of a practice to do, or omit to do, a particular act, and the material issue was the continuation (or not) of that practice, then evidence as to the continuation (or not) of that practice was ‘always’ admissible. It is admissible to establish that its occurring (or not) on a particular occasion was not mere accident or an isolated event. However, Channell J did note the difficulty with similar fact evidence was that one was in effect finding that because of the earlier occasion this occurrence must have taken place. The defendant may, of course, have mended his ways. However, Channel J clearly regarded the evidence as relevant and probative even if he did not say as much, as the evidence was admitted. The earlier occurrence does not mean that this incident must have taken place, but it increases the probability that it took place.

Channell J (with whom Sutton J agreed) noted that it was argued that this was a habitual practice of keeping razors and appliances dirty and infectious and that the evidence was admissible to go to establish this habitual practice. His Honour may not have allowed the evidence had the case been run differently. This may appear to be creating or applying a rule that such evidence is admissible to prove a continuing practice. However, it is simply explaining how and why the evidence is relevant in this case. Evidence can only be relevant to an hypothesis, it does not have intrinsic value. A vital question is what the evidence is said to prove. The system or practice, on one view, is just more than one occurrence of a similar fact, perhaps making the occurrence in question more probable, but even one occurrence might increase the probability.

In Mood Music the defendants supplied music for a television programme which the plaintiff claimed infringed its copyright. The plaintiff, on giving proper notice to the defendant, sought to adduce evidence of three other occasions where the defendant had reproduced musical works subject to copyright. Lord Denning MR, with whom Orr and James LJJ agreed, stated (at 766):

The criminal courts have been very careful not to admit such evidence unless its probative value is so strong that it should be received in the interests of justice; and its admission will not operate unfairly to the accused. In civil cases the courts have followed a similar line but have not been so chary of admitting it. In civil cases the courts will admit evidence of similar facts if it is logically probative, that is if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it.

14 [1908] 2 KB 601.
15 Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] 1 All ER 763 (CA).
Therefore, if the evidence is logically probative, that is, relevant to proving a matter in issue, provided that it is not unfair or oppressive and the other side has had notice, it will be admissible. There is a view that what this actually seeks to embody is a probative value over prejudicial effect test in civil proceedings.16

Lord Denning MR (at 766) goes on to find that the evidence was correctly admitted and that as more occurrences of the alleged infringement occur, it becomes less likely to be a mere coincidence and more likely to be an infringement, as claimed by the plaintiff. This is the very fact in issue in the proceedings.

Quite simply, admissibility depends on the evidence being ‘logically relevant’ subject to procedural issues (eg the reference to fair notice) or (as expanded on below) a residual discretion to exclude.

In Berger v Raymond Sun Ltd17 however, Warner J cited the passage from Lord Denning MR above and then stated (at 630):

The first is that the test of the admissibility of evidence of similar facts, as distinct from the criteria according to which the court should exercise its discretion to exclude such evidence, is the same in civil and in criminal cases.

Lord Denning MR (at 766) appears to be stating that the test is different for civil and criminal proceedings, applying a test of, ‘logically probative’ or ‘logically relevant’ with a residual discretion to exclude.

The difficulty in Berger was that despite being a civil proceeding, a criminal offence, namely forgery, was in issue. It was alleged that the son had forged the mother’s signature on certain share transfer documents. The similar fact evidence sought to be adduced was that of a handwriting expert who had examined previous documents where, the expert would say, the son had forged the father’s and sister’s signatures. The evidence in relation to the father’s signature was excluded on the basis of it being oppressive. The transactions involving the father, except one, went back 30 years and the father had since passed away. The evidence in relation to one transaction was admitted, as it occurred at a time when the relationship between the son and father had broken down and the authority of the father would not be in issue.

The evidence in relation to the sister’s signature was the subject of orders of the court and a settlement between the parties. On balance Warner J (at 633) thought the potential injustice to the plaintiff was greater than the burden on the defendants akin to Lord Denning MR’s discussion.

Hence, although Warner J stated that the rule of admission of similar fact evidence was the same in criminal and civil proceedings, his Honour then applied the test for civil proceedings outlined by Lord Denning MR: that is, relevance with a residual balancing discretion.

Bollen J, in Sheldon v Sun Alliance Australia Ltd18 also referred to this passage of Lord Denning MR but went further. The insured were seeking to claim on an insurance policy for a fire which severely damaged their house in 1985. Coverage had been declined on the basis of fraud and a conspiracy to burn down their own house. The insurer called evidence of previous fires to the insured’s family homes in 1963, 1972, and 1980. The trial Judge, according to the Court of Appeal, imposed the criminal standard of proof and applied the criminal test to the admissibility of similar fact evidence. Bollen J noted the reference by the trial Judge to Lord

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17 [1984] 1 WLR 625.
Denning MR’s passage in *Mood Music* but, in his opinion the trial Judge had not applied it. This was not the correct approach, Bollen J declared at 148:

In civil cases the courts of South Australia will admit evidence of ‘similar facts’ if that evidence is logically probative, ie if it is logically relevant in determining the matter which is in issue.\(^{19}\)

However, it is interesting that in Bollen J’s ‘declaration’ of the law in South Australia he did not include any qualification in relation to unfairness or oppression, but did note that it will play a part in the exercise of the Judge’s discretion.\(^{20}\) This suggests that these considerations are always available for a Judge in the admission of evidence in civil proceedings.

### III THE REPRESENTATION CASES

Section 52 of the *Trade Practices Act 1974* (Cth) (‘TPA’) states:

A corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or likely to misled or deceive.

This can be enforced by civil proceedings.\(^{21}\) One of the first cases was *Mister Figgins Pty Ltd v Centrepoint Freeholds Pty Ltd*.\(^{22}\) Mister Figgins had entered into two leases as tenant in a shopping centre and alleged that a number of fraudulent and misleading and deceptive representations were made to it to induce it to enter into the leases. Mister Figgins proposed calling eight witnesses who would give evidence that the landlord’s agent made similar (or identical) representations to them as well. Northrop J said (at 28):

> there are many instances where evidence of ‘similar facts’ is admissible. Thus evidence of ‘similar facts’ is admissible where the facts include ‘circumstances whose relation to the fact in issue consist in the probability or increased probability, judged rationally upon common experience and that they would not be found unless the fact to be proved also existed’.

And further (at 30):

> The fact in issue is whether Mr Robertson made representations to Mister Figgins, which representations constituted engaging in conduct under s 52 of the Act. If it is established by evidence that Robertson made representations which constituted conduct under s 52 of the Act to other prospective tenants of shops in the same complex, there is a probability or increased probability judged rationally upon common experience, that

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\(^{20}\) At 148, saying, ‘Perhaps unfairness and oppression will bring into play some discretion of the judge.’


\(^{22}\) (1981) 36 *ALR* 23.
similar representations were made to Figgins. The representations, if constituting conduct of the requisite kind, established a pattern which would lead to support the proof of the fact in issue. The evidence of the eight witnesses would, in my opinion, have probative value and is logically probative of a fact in issue.

Northrop J referred to the above passage of Lord Denning MR from *Mood Music* but concluded (at 31) that otherwise logically probative evidence was not rendered inadmissible by reason of oppression and unfairness. His Honour did note that the question of admissibility is quite different from the question of the weight to be given to the evidence (at 29) and allowed the evidence.

Northrop J was simply determining whether or not the evidence was relevant. Did the evidence increase the probability that similar representations, as those alleged in the proceedings, were made? The answer must be yes. In stating that otherwise admissible evidence is not rendered inadmissible by unfairness or oppression, it is submitted that Northrop J was not saying that there is no residual discretion to exclude, as is indicated by his comment that it should not be taken as a pre-judgment to any application by the respondent. His Honour was dividing consideration of the evidence into distinct steps, the first of which was the question of relevance and probative value only.

Shortly after the decision in *Mister Figgins*, Ellicott J was asked to consider the representations of an insurance salesman in *Gates v City Mutual Life Assurance Society Ltd*.

The representation alleged was that the disability policy would be paid out in full if the applicant was injured such that he could not carry out his usual profession or occupation. The actual wording of the policy provided for injury to such an extent that he could not attend to any gainful employment. The applicant sought to adduce evidence of five additional witnesses who would give evidence that similar representations about how the disability policy applied were made to them as well. Ellicott J allowed this evidence to be admitted, succinctly stating (at 327):

> As stated earlier, the applicant also relied on the similar fact evidence of some five witnesses. Such evidence is admissible if its relation to the fact in issue (in this case, whether the representations alleged were made) consists in the probability or increased probability that it would not be found unless the fact to be proved also existed (see *Martin v Osborne* (1936) 42 ALR 261).

Ellicott J continued (at 328):

> their evidence does establish that representations of a similar nature were made during this period by Mr Rainbird and the making of them, in my view does, within the principles stated, make it more probable that they were also made to the applicant.

The decision was appealed, but not on the basis of the admission of the similar fact evidence. This was because Ellicott J said that even without the contested evidence he would have come to the same conclusion, making appeal on that issue almost impossible.

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24 (1983) ATPR 40-335 (Full Court); (1986) 160 CLR 1 (HCA).
Ellicott J also admitted similar fact evidence in *Smolonogov v O’Brien*\(^{26}\) where the applicants purchased land, sight unseen, from the respondents, by relying on the representations made by the respondents. The land purchased was in fact nothing like as represented. Evidence of another purchaser (who subsequently rescinded his contract also on the basis of false representations) was admitted on the basis that if those representations were made it increased the probability that these representations were also made.\(^{27}\) That is, it was relevant and logically probative.

However, the tide turned in *H W Thompson Building Pty Ltd v Allen Property Services Pty Ltd.*\(^{28}\) The applicant sought to adduce evidence of other purchasers who had entered into similar contracts for home units on the basis of similar conduct (or representations). St John J specifically referred to *Mister Figgins* and *Gates*, denied to follow them and ruled the evidence inadmissible. His Honour referred to Dixon J in *Martin v Osborne* saying:\(^{29}\)

> There Dixon J said: ‘If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference’. With respect, I decline to follow Northrop J, as in my view, the opening words of that quotation were not heeded. It appears to me that *Martin v Osborne* does not alter the law which was succinctly stated in *Makin v Attorney-General*.

It is difficult to ascertain what opening words needed to be heeded for the admissibility of similar fact evidence.\(^{30}\) *Martin v Osborne* was a criminal case: Osborne was charged with driving a commercial passenger vehicle without the appropriate licence. The High Court held that evidence of the conduct of the two previous days, as well as the day charged was admissible. Dixon J explained that\(^{31}\)

> The moral tendencies of persons, their proneness to acts or omissions of a particular description, their reputations and their associations are in general not matters which it is lawful to take into account, and evidence disclosing them, if not otherwise relevant is rigidly excluded. But the class of acts or occurrences that may be considered includes circumstances whose relation to the fact in issue consists in the probability or increased probability, judged rationally upon common experience, they would not be found unless the fact to be proved also existed. The application of this, as of any other general statement about relevancy is subject to the well-known specific rules of exclusion.

Continuing:\(^{32}\)

> The repetition of acts or occurrences is often the very thing which makes it probable that they are accompanied by some further fact. The frequency with which a set of circumstances recurs or the regularity with which a

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\(^{26}\) (1982) 44 ALR 347.
\(^{27}\) Ibid 358, interestingly not referring to his own earlier decisions in *Gates v City Mutual Life* but to Northrop J’s decision in *Mister Figgins*.
\(^{28}\) (1983) ALR 667.
\(^{29}\) Ibid 675.
\(^{30}\) A point also noted by Forbes, above n 4, [8.26].
\(^{31}\) *Martin v Osborne* (1936) 55 CLR 367, 375.
\(^{32}\) Ibid 376.
course of conduct is pursued may exclude, as unreasonable any other explanation or hypothesis than the truth of the fact to be proved.

As Dixon J recognises this is simply a re-statement of a general relevancy test, which all evidence must satisfy. The concept of repetition of acts again creeps into the analysis. However, it is submitted that this is simply an observation that one repetition may be relevant, in that it increases the probability of the existence of an allegation in issue. With further repetitions, the probability increases.

Spender J was faced with similar fact evidence in *Boyce v Cafred Pty Ltd*[^33] where the applicant had agreed to purchase a block of land. A representation was alleged that the block was not subject to flooding. The applicant sought to adduce evidence from other purchasers in relation to the land of the representations made by different agents. His Honour referred to *Mister Figgins*, to the passage of Lord Denning MR in *Mood Music* and to *Gates*, concluding that ‘the principle on which similar facts are admissible has not changed since *Makin v The Attorney-General for New South Wales* (1894) AC 57’, preferring instead the approach of St John J in *H W Thompson*.

The English decision of *Berger v Raymond Sun Ltd* was also referred to, in particular the concept that the evidence could be unfair or oppressive to the other party. Spender J concluded that the evidence was not admissible under the similar facts doctrine.[^34] It seems that his Honour may have been applying the standard that if the similar facts did not prove the point (as opposed to merely increasing the probability of the facts in issue) they were inadmissible. Further, Spender J stated that even if the evidence was admissible it would be excluded on the basis that it would multiply the issues and prolong the trial without greatly contributing to the issues in dispute.

On analysis, however, the similar facts before Spender J were simply not relevant. The allegation in issue was representations made by a particular agent about a block of land. Representations made by a different agent to other purchasers, possibly about different blocks of land,[^35] could not be said to increase the probability that the particular agent in question made the representations alleged, unless some business practice or agreement between them were alleged.

Beaumont J briefly considered the position in *Turner v Jenolan Investments Pty Ltd*[^36] and held that the ‘similar fact’ evidence of what a Mr Lundy had said to the proposed witnesses was inadmissible as it ‘cannot be probative of the facts in issue in respect of which it was tendered, ie the terms of the conversations between Mr Lundy and Messrs Turner’. However, Beaumont J thought the position might have been different if ‘what was sought to be proved was a business practice’.[^37]

This focuses attention on the fact that whether evidence is relevant and probative depends not on the intrinsic qualities of the evidence but on what the evidence is said to prove. If what is sought to be established by the similar fact evidence is an increased probability that the representations in issue were made, one way of doing this is by attempting to establish is a business practice of the agents in relation to the selling of the units off-the-plan. However, given Beaumont J’s comment, it appears that this was not pleaded.

[^33]: (1985) ATPR 40-527.
[^34]: Ibid 46256.
[^35]: It is not from the face of the report whether it was in relation to the same block of land or another block in the same estate, with the effect of a different block making the evidence even more remote.
[^36]: (1985) ATPR 40-571.
[^37]: Ibid 46637.
Beaumont J went on to observe that even if the evidence were admissible, its weight would be assessed against the background that many of the witnesses had an interest in the outcome of this litigation. These witnesses, at first blush, may appear to be independent of the litigation and hence offer a more impartial version of events. This was obviously not the case; however, this goes to the issue of weight and use of the evidence once admitted. It should not bear on whether the evidence is admissible if relevant.

Hill J in *Arountidis v Illawarra Nominees Pty Ltd*[^38^] considered the position in relation to representations made to prospective tenants to a shopping centre. A submission was made that the respondent had embarked on a course of conduct or system or pattern which made the evidence of the other two prospective tenants logically probative of the allegation that the respondent had made the same representation to the applicant.[^39^] There were a number of tenants in the centre concerned but only two others could be found to give such evidence. His Honour therefore did not find any pattern or system. It was said that in *Mister Figgins* the evidence of the other representations established a pattern which would tend to support the proof of the fact in issue. It must be remembered that in that case there were eight additional witnesses who gave similar evidence as to the representations made not two.

Further, the evidence of the two witnesses in *Arountidis* did not support a pattern or system due to the variations in representations made. One of the representations to be proved was that the applicant was told that the centre was already 85% leased. The two witnesses providing similar fact evidence said they had been given figures of 90% and 95% respectively. Much would therefore depend on exactly what was pleaded and what the nature of the defence was. If a criterion is imposed that the representation must be identical or that a system or business practice had to be proved, then this is to adopt a rule-based approach presumably informed by some policy consideration.

Hill J noted that in civil cases the risk of evidence operating oppressively or being prejudicial would not be as great as in criminal cases,[^40^] but still seemed to discuss the principles concerning similar fact evidence in criminal cases.[^41^] A new approach is seen by Gummow J in *D F Lyons Pty Ltd v Commonwealth Bank of Australia*.[^42^] The representations alleged were made by a bank manager to the customer regarding foreign currency loans. The customer sought to adduce similar fact evidence from three other persons who had dealings with the same bank manager regarding foreign currency loans. His Honour referred to a number of the cases above including *Mood Music* and *Martin v Osborne* and the comments of Professor Julius Stone that the law for similar fact evidence was the same in civil and criminal cases,[^43^] but with the qualification that in practice there was probably a very real difference.

His Honour approached the evidence in this way: The first question was to determine whether the ‘facts’ are ‘similar’,[^44^] either by striking similarities or an underlying unity.[^45^] What is meant by this is a process of classification of the

[^38^]: (1990) FCR 500.
[^39^]: Ibid 509.
[^40^]: Ibid.
[^41^]: Ibid 508.
[^42^]: (1991) ALR 468 and see Webb, above n 9, 152.
[^44^]: This of course may seem obvious when considering similar fact evidence.
significant features of the given fact. There are two meanings of similarity, the first a wider sense:

a fact is similar to another whenever the two possess a common characteristic; but that common characteristic may be insufficient to render the first fact relevant in the legal sense …

The second meaning is in a narrow sense that:

a fact is similar to another only when the common characteristic is the significant one for the purpose of the inquiry at hand.

His Honour elaborated by saying:46

If facts similar, in the wider understanding, to the facts in issue are irrelevant in the legal sense, they are inadmissible for that reason and there is no occasion to deal with the restrictions imposed by the ‘similar fact’ doctrine … Facts similar, in the narrow meaning, to the fact in issue will be relevant thereto in the legal sense; it is only when this kind of relevance has been found that the question arises as to whether such similar facts, although relevant, are not admissible, because of the operation of the exclusionary rule or discretion restricting the admissibility of ‘similar facts’ evidence.

Gummow J considered that the similar fact evidence was within the wider meaning of similarity, in that there was ‘an underlying unity’ but as would be expected with foreign currency loans, the dealings varied in each particular circumstance.47

Since relevance is a logical concept and no one has ever offered a definition of ‘legal relevance’ (as opposed to admissibility) mention of ‘legal relevance’ almost always conceals the application of some policy consideration relating to the appearance of a fair trial. This was another case where different agents were alleged to have made the representations. If no plan or system were pleaded then the plaintiff had to show how the allegation that a representation was made by agent A increased the probability that such a representation was made by agent B.

Even if the evidence fell within the narrow meaning of ‘similar’, Gummow J would have excluded it on the basis of overcomplicating the matter and causing further delay.48 It has been suggested that this is an issue of general trial conduct rather than an issue of similar fact evidence.49 However, the earlier comments of Lord Denning MR where he refers to unfairness, oppression and fair notice would seem to encapsulate these very issues.50 It has to be born in mind that unlike a criminal case where past convictions may be in issue, in a civil case it is likely that the other allegations would themselves have to be proved by evidence which might be contested.

46 Ibid.
47 Ibid 478. However, Gummow J does not detail what these ‘particular circumstances’ are.
48 Gummow J notes that the original estimate for the trial was 8 to 10 days which needed to be extended by ‘several further weeks’ and this was without allowing the similar fact evidence.
49 Bates, above n 3, 204.
50 Bates (ibid 205) does recognise that this could be argued.
In Jaldiver Pty Ltd & Ors v Nelumbo\textsuperscript{51} seven applicants brought proceedings together, for representations which were misleading and deceptive. Heerey J noted the apparent conflict of the law in relation to the admission of similar fact evidence in civil cases but in effect attempted to satisfy all tests. However, he did endorse the comments of Bollen J in \textit{Sheldon} where it was said:\textsuperscript{52}

> It is circumstantial evidence. It should be admitted where it is logically probative of a fact in issue. The safeguards required in criminal proceedings are not required in civil proceedings.

As all the evidence sought to be adduced in this case was that of parties, and not strangers to the proceedings, issues of fair notice do not arise. Heerey J also found that the representations supported a business practice or pattern\textsuperscript{53} and that each of the prospective tenants would be in a like position in that they would all need to know about outgoings, tenant mix and the like.\textsuperscript{54}

In \textit{Jaldiver Pty Ltd} there was also a quantitative element\textsuperscript{55} to the similar fact evidence as each of the seven applicants would give evidence in relation to its own proceedings but which would in effect also be similar fact evidence for the other applicants. The concerns of Beaumont J that a party’s ‘interest’ in the outcome of the proceedings may affect the weight of the evidence was not referred to. However, as already noted, that is an issue of weight and not of admissibility.

In 1995 the Commonwealth \textit{Evidence Act} came into force. However, certainly in its early days, there did not appear to be a substantial change in approach.\textsuperscript{56}

On notice of motion before Sunberg J in \textit{Jacara Pty Ltd v Auto-Bake Pty Ltd}\textsuperscript{57} the applicants sought admission of similar fact evidence. This case involved representations made to induce the applicant to enter into a shopping centre lease. Five additional witnesses were sought to be called. Sunberg J considered their evidence and the representations which were alleged in this case and concluded that the differences in accounts by the witnesses did not reveal a striking similarity or underlying unity or a system or pattern of behaviour or business practice so as to satisfy the significant probative value required for this kind of evidence.\textsuperscript{58} Further, even if the evidence did have a significant probative value, Sunberg J would have excluded it as it would ‘result in undue waste of time’.\textsuperscript{59} Sunberg J also noted\textsuperscript{60} that the five additional witnesses had been in litigation with the respondent in relation to representations about their own shops and this would be taken into account in weighing the evidence.

\textsuperscript{51} (1993) ATPR 46-097.
\textsuperscript{52} Ibid 53400.
\textsuperscript{53} Thereby satisfying the ‘test’ in \textit{Aroutsidis}.
\textsuperscript{54} Thereby satisfying the disqualifying comments about the bank manager and different customers of Gummow J in \textit{DF Lyons Pty Ltd}.
\textsuperscript{55} (1993) ATPR 46-097, 53401.
\textsuperscript{56} Zaknic \textit{Pty Ltd v Svelte Corporation Pty Ltd & Ors} (1995) 140 ALR 701, 705. Ligertwood, above n 16, [3.152], who formed a similar view.
\textsuperscript{57} (1999) FCA 417.
\textsuperscript{58} Ibid [14], [17], [18].
\textsuperscript{59} Ibid [19]: Again seemingly adopting the comments of Lord Denning MR in \textit{Mood Music} in relation to oppression.
\textsuperscript{60} Following the comments of Beaumont J in \textit{Turner v Jenolan Investments Pty Ltd} (1985) ATPR 40-571.
At trial in Jacara counsel for the applicants sought to cross-examine the respondent’s agent in relation to the additional representations made to the five witnesses. Sunberg J disallowed that questioning, as going only to the credit of the witness. The matter was appealed to the Full Federal Court. The appeal was dismissed. Sackville J delivered the main judgment and discussed the effect of the Evidence Act 1995 (Cth) on the common law’s approach to similar fact evidence.

The Evidence Act 1995 (Cth) s 55 states that:

except as otherwise provided … evidence that is relevant … is admissible … and evidence that is not relevant is not admissible.

Relevant evidence is defined in s 56 as:

evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue.

Despite this legislative intervention into the law of evidence, the statutory concept of relevance does not involve ‘any real departure from the common law’. The Evidence Act 1995 (Cth) also has a provision regarding what is referred to as ‘tendency’ evidence (s 97) which requires significant probative value before being admissible. Significant probative value is not defined but probative value:

means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.

Therefore, tendency evidence is only admissible where the evidence would have significant probative value or, to put it another way, would significantly affect the assessment of the probability of the existence of a fact in issue.

As noted by Sackville J at para 49, it is now clear that in form at least, different rules apply to tendency/similar fact evidence in federal civil proceedings and criminal proceedings, as criminal proceedings are subject to s 101. Sackville J does recognise that similar fact evidence is ordinarily relevant as it tends to show a propensity in the relevant person to act in a certain way which tends to establish that the person did in fact act in such a way as alleged.

In my opinion, it is clear in the present case that the evidence tendered by Jacara was relevant (if at all) to the fact in issue (whether Ms Kelly had

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61 Jacara Pty Ltd v Perpetual Trustees WA Ltd (2000) 185 ALR 463, [38]-[39].
63 With whom Whitlam and Mansfield JJ agreed.
64 Jacara Pty Ltd v Perpetual Trustees WA Ltd (2000) 180 ALR 569, [47].
66 Jacara Pty Ltd v Perpetual Trustees WA Ltd (2000) 180 ALR 569, [48].
67 As also noted by A Ligertwood, above n 16, [3.153].
68 Which incorporates the ‘the probative value of the evidence substantially outweighs any prejudicial effect’ test.
69 By reference to an article of Professor Cowen and Mr Carter, ‘The Admissibility of Evidence of Similar Facts: A Re-Examination’ in Essays on the Law of Evidence (1956).
70 Jacara Pty Ltd v Perpetual Trustees WA Ltd (2000) 180 ALR 569, [59].
71 Ibid [63].
made any of the representations alleged to Mr Williams) only because it tended to establish a propensity on her part to act in a particular way (to make the representations of a particular kind to prospective tenants of the centre). … [I]t was not admissible if the primary judge formed the view that the evidence would not have significant probative value.

The submission was made that the evidence was relevant as it tendered to establish a system or business practice.72 Sackville J rejected that submission.73 The establishment of a business practice or system is simply another way of saying that what you are trying to prove is that a person acts or has a tendency to act in a particular way. It was not a different ground upon which to admit the evidence. Sackville J noted that there may be occasions where this is not the case, eg where the lessor gave instructions that certain representations should be made to prospective tenants.74 In that case, the existence of the system supports an inference it was implemented in a particular situation and it is that system which makes it more likely that the fact in issue occurred, rather than an agent’s propensity to act in a particular way.

This does seem to be quibbling, as the applicant made a submission of a business system or practice. It may not have been a directive from the lessor but a business practice none-the-less which may have been supported by the evidence of the five additional witnesses.

The better way to prove the business system, rather than by inference of conduct would be to prove the system directly. This evidence, in normal circumstances, is going to be almost impossible for an applicant to obtain. If directives were given, then ex hypothesi the landlord was dishonest and documents get ‘misplaced’, memories fade, and a direct admission by the lessor is unlikely. The way this business practice is most likely to be established is by other prospective tenants saying that similar representations were made to them and by drawing the inference that there was a system.

Of course, all of this aside, the difficulty with the evidence actually proposed to be called in Jacara was that it was quite divergent. Jaldiver75 was different as the representations were almost identical. This of course may lead a more suspicious mind, particularly when all the similar fact evidence was from applicants in the case, to wonder about the possibility of collusion. ‘Striking similarity’ can be a double-edged sword.

IV CONCLUSION ON THE REPRESENTATION CASES

Despite the often complex and convoluted language used in these cases, it is submitted that what is actually being applied is the test of relevance. The way it is done is to look at the similar facts sought to be led with the fact which it is sought to prove and ask, ‘Do these facts increase the probability of the existence of the alleged facts in issue?’ Representation cases may require more than other cases because it is the precise representation itself,76 which must be proved. Any similar facts sought to

72 Ibid [64], one assumes following the arguments from Aroutsidis.
73 Jacara Pty Ltd v Perpetual Trustees WA Ltd (2000) 180 ALR 569, [65].
74 Ibid [67].
75 (1993) ATPR 46-097, 53401. It should be noted that the case was pre-Evidence Act.
76 Made by a particular person at a particular time.
be led are thought to need to be almost identical. This is not to satisfy some ‘strikingly similar’ test but simply to satisfy the admissibility requirement of relevance that the similar fact evidence will increase the probability of the existence of the alleged fact in issue, that is, the representation.

V POLICE MISCONDUCT

In the New Zealand case, Archbold v Attorney-General,77 allegations of impropriety were made against the police; Archbold was arrested and subsequently made complaints of assault against the arresting officers. One of the officers had been subject to disciplinary action in relation to excessive force used against another prisoner two hours after the arrest of Archbold. This was the similar fact evidence sought to be introduced. Young J did not discuss the principles of similar fact evidence except to say that clearly this evidence was relevant,78 particularly given the unity of time, place and circumstance. Young J said79 that he had been ‘significantly influenced by the similar fact evidence’. However, his Honour also noted that Archbold did not make a complaint at the time of his arrest or until many months had passed. In fact, it was not until that officer was subject to disciplinary proceedings that the complaint from Archbold arose.80 However, this was not put to him in cross-examination. Young J noted that the complaints were consistent with injuries sustained but conceded that he should allow for the possibility that Archbold had tailored his evidence.81 There was no medical evidence.

Archbold had made complaints against all three arresting officers and the difference in the evidence against all three was that there was no similar fact evidence in relation to the other two officers. Young J was not satisfied that the allegations had been proved to ‘the appropriate standard’ against the other two officers. This case shows the enormous influence that similar fact evidence can have. Of course, disciplinary proceedings against an officer for an incident on the same night would seem to have significant probative value and increase the probability that the allegations made by Archbold were correct. Again, much will depend upon the precise nature of the allegations and defences. It might have been in another case that the allegations could only stand or fall as a whole.

In ss 101 to 106 of the Criminal Justice Act 2003 (E&W) the reception of similar fact evidence in criminal cases in England and Wales has been codified. This potentially brings to an end the usefulness of English cases on the topic. As luck would have it, however, a rare civil appeal reached the House of Lords on this topic: O’Brien v Chief Constable of the South Wales Police. O’Brien’s conviction was quashed for murder after he had been in prison for some 11 years. O’Brien commenced civil proceedings alleging that the police had ‘framed’ him. He sought to lead evidence of two other occasions where the same police officers had allegedly acted with the same impropriety. Owing to the 2003 Act, the decision of the House of Lords could only formally apply to civil cases. The appropriate notice of such evidence was given and the defendant challenged its admissibility. The House of Lords discussed the principles involved in civil proceedings in relation to similar fact evidence and in particular Lord Bingham of Cornhill set out a two stage process.

78 Ibid [24], [26].
79 Ibid [40].
80 Ibid [27]-[30].
81 Ibid [39].
first question, his Lordship said, was whether the evidence was relevant in the sense expressed in *Director of Public Prosecutions v Kilbourne* \(^{82}\).

Evidence is relevant if it is logically probative or disprobative of some matter which requires proof … relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.

His Lordship then went on, in a passage which must be reproduced in extenso:

5. The second stage of the enquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted. For the party seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole.

6. While the argument against admitting evidence found to be legally admissible will necessarily depend on the particular case, some objections are likely to recur. First, it is likely to be said that admission of the evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues collateral to the issue to be decided. This is an argument which has long exercised the courts (see *Metropolitan Asylum District Managers v Hill* (1882) 47 LT 29, 31 per Lord O'Hagan) and it is often a potent argument, particularly where trial is by jury. Secondly, and again particularly when the trial is by jury, it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded. Thirdly, stress will be laid on the burden which admission would lay on the resisting party: the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections. It is, I think, recognition of these problems which has prompted courts in the past to resist the admission of such evidence, sometimes (as, perhaps, in *R v Boardman* [1975] AC 421) propounding somewhat unprincipled tests for its admission. But the present case vividly illustrates how real these

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burdens may be. In deciding whether evidence in a given case should be admitted the judge's overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties.

Although in form Lord Bingham can only be talking about civil cases it is clear that his Lordship is talking about all trials at common law. It is also clear that the two stage process his Lordship is discussing is nothing more than a setting out of the considerations that apply to all evidence. There is, and never has been, a special rule relating to similar fact evidence. His Lordship refers to the need for special care in jury trials. This would not apply of course to the mass of criminal cases which are tried summarily.

VI CONCLUSION

The enormous merit of setting the process out in two stages as in O'Brien v Chief Constable is that it makes clear the distinction between considerations of proof and policy rather than muddling them into concepts like ‘legal relevance’ or an all-encompassing “admissibility”.

It is now clear that in England, and probably in New Zealand, there are no special rules relating to similar fact evidence in civil cases. The primary question is proof and accuracy of decision-making, subject to the standard caveats about vexation, expense and delay. In criminal cases (or perhaps just jury trials) a number of policy issues arise with regard to a fair trial and preventing prejudice to the accused. In civil cases these policy questions do not apply, or at any rate no more than with all evidence.

In Australia, the situation is far from clear. In texts it is commonly stated that the rules are the same in civil and criminal cases, though usually with a recognition that some of the policy concerns apply less strictly in civil cases. A number of judgments also either import the criminal rules into civil cases without much consideration or suggest that the policy issues are the same in civil and criminal cases. Meanwhile, at trial level, judges find it difficult to implement these rules and resort to circumlocutions to bring the evidence within some precedent or impressive sounding exceptional rule.

It is submitted that Lord Bingham’s approach is the correct one. It has the advantage of clearly separating the considerations of proof and policy and making the policy issues transparent. The policy considerations which apply to similar fact evidence are simply those which apply to all evidence and which are designed to make the justice system run in a speedy and accurate way. The primary consideration in civil cases must be proof and not any over-riding policy carelessly adopted from criminal cases.
