COMMENT

PERRY v. *THE QUEEN*: ANOTHER MISAPPLICATION OF THE DECISION IN *R.* v. *BOARDMAN* BY THE HIGH COURT OF AUSTRALIA

1. *Introduction*

The appellant in *Perry* v. *The Queen*[1] was tried before the Supreme Court of South Australia on two charges of attempted murder of Mr Perry, her third husband. The defence was that Mr Perry had accidentally ingested lead and arsenic while he was working. The jury found that she had for a protracted period in 1978 and again in 1979 poisoned her husband with intent to kill him. Mrs Perry's appeal, on various grounds, to the Court of Criminal Appeal, was dismissed. Her application to the High Court for special leave to appeal was granted and the appeal was allowed on the ground that evidence of the deaths by poisoning of two persons previously closely associated with the appellant had been wrongly admitted by the trial judge.

As it had done in *Markby*,[2] the High Court held that evidence of similar facts was not admissible at law unless it possessed a strong degree of probative force. In *Markby* the court had not distinguished between similar fact evidence relevant otherwise than *via* propensity and similar fact evidence relevant *via* propensity. Gibbs C.J., Wilson and Brennan J.J. in the instant case specifically held that similar fact evidence which was relevant for some reason other than to show propensity to commit the sort of crime charged had to have a strong degree of probative force. Murphy J. applied an entirely new principle, *viz.*, evidence of the poisoning of each of the three other persons was to be excluded unless, taken with all the other evidence in the case, it could justify a finding beyond reasonable doubt that the accused was guilty in relation to that poisoning.[3]

It is the aim of this article to show that the High Court in *Markby* misinterpreted the decision of the House of Lords in *Boardman*[4] and

1 (1983) 57 A.L.J.R. 110.

2 (1978) 52 A.L.J.R. 626.

3 His disregard for precedent extended to taking a novel approach of what constituted similar fact evidence to disprove accident. He restricted the principle to rebutting 'a defence that the accused unintentionally committed the act charged'. *Op. cit.* 115. Suffice it to say that similar fact evidence has been admitted to disprove accidental death, although the *actus reus* has not been admitted, in the familial poisoning cases as well as in the classical cases of *Makin* [1894] A.C. 57 and *Smith* (1915) 11 Cr.App.R. 229.

that both *Markby* and now *Perry* are inconsistent with that decision, which has been described, albeit for the wrong reason, as, '... by far the most important decision on similar fact evidence since *Makin* v. *Attorney-General for New South Wales*'.[5 & 6]

It is submitted that the High Court in *Markby* and *Perry* incorrectly applied the views of two law lords, Lords Cross and Wilberforce, on evidence which, in their opinion, was relevant only *via* propensity, to evidence of a different kind, *i.e.* evidence which was relevant in some other way. A careful study of the judicial reasoning in *Boardman* will show that Lords Cross and Wilberforce laid down a test of exceptional probative value only for similar fact evidence which was relevant solely *via* propensity and not for similar fact evidence, which was relevant in some other way. Lords Hailsham, Salmon and Morris, on the other hand, favoured exclusion of evidence relevant solely *via* propensity and a test of relevance *per se* for similar fact evidence which was relevant some other way. They saw the evidence in *Boardman* as relevant *via* the improbability of the hypothesis of mere coincidence and therefore held it to be admissible. They did not see it as propensity evidence as their colleagues did.

The decision in *Chee*,[7] in which the Full Court of the Supreme Court of Victoria favoured a test of relevance *per se*, and which was disapproved by the High Court, is in fact consistent with three out of the five judgments in *Boardman*.

2. *Judicial Reasoning in* Boardman

In *Boardman*, strikingly similar accounts of homosexual advances by the accused were given by different witnesses.

Lords Hailsham, Salmon and Morris all endorsed Lord Herschell's statement in *Makin*[8] which prohibits the admission of similar fact evidence relevant only *via* propensity in its first limb and requires mere

4 (1975) 60 Cr.App.R. 165.

5 [1894] A.C. 57.

6 L. H. Hoffman, 'Similar Facts after *Boardman*' (1975) 91 *L.Q.R.* 193. He thought the judgments of Lords Cross and Wilberforce were an intellectual breakthrough.

7 [1980] V.R. 303. Other recent Australian decisions have taken a similar line: *Zaphir* [1978] Qd.R. 151, *Crawford* [1981] Qd.R. 85. In the latter case the test used by Lord Salmon in *Boardman* was adopted *viz.* whether the evidence was capable of tending to persuade a reasonable jury of the accused's guilt on some ground other than his bad character and disposition to commit the sort of crime with which he was charged. 'Capable of tending to persuade' is a phrase denoting relevance and not exceptional relevance.

8 [1894] A.C. 57, 65: 'It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to commit the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.'

relevance and not exceptional relevance as the test of admissibility at law in the second limb. Thus Lord Herschell prohibited the admission of evidence of crimes on other occasions if the purpose thereof was to show disposition to commit the offence for which he was being tried. However, evidence which was 'relevant to an issue before the jury', *i.e.* relevant in some other way, was admissible albeit it also tended to show criminal conduct by the accused on other occasions.

Lord Hailsham viewed the first limb as excluding similar fact evidence which was irrelevant except for the purpose of showing that the accused was a person likely to act in a certain way, *viz.*, evidence relevant *via* propensity. Evidence relevant *via* propensity bears on the probability of the accused having committed the act, solely because it is a statistical fact that misconduct is likely to be repeated and therefore he is more likely than most men to have done it on the instant occasion. It rests on the assumption that he has not mended his ways and it violates the presumption of innocence because of this. This was a line of reasoning which was not involved in any of the 'categories' of relevance developed by the courts because such evidence was either based on reasoning *via* the unacceptability of the hypothesis of coincidence or it was relevant in some other context.[9] Thus, there was no inconsistency between the two limbs of the *Makin* formula.

Lord Hailsham's endorsement of the 'striking similarity' test was merely an expression of the presently relevant factor tending to make the hypothesis of coincidence unacceptable. His use of the phrase '... an affront to common sense' was related to the standard of cogency required for a verdict and not for admissibility at law.

---

9 This is the crux of Lord Hailsham's judgment but it has not been recognised generally, either by the judiciary or academics. It is a view that is substantiated by authorities prior to *Makin* although the processes of reasoning were not explained and it is unlikely that Lord Herschell himself saw the matter as lucidly. What obscured this even further was that some 'categories', such as guilty knowledge, identity and intent, overlapped the two different kinds of relevance admitted under the second limb. Categorisation into issues made it appear as if what was important was what had to be proved instead of what kind of reasoning should be allowed. For example, early cases of 'guilty knowledge' being proved by similar facts can be divided into those in which such an inference could be drawn because the accused had uttered similar coins or banknotes before and had acted suspiciously or been apprehended and therefore presumably knew what forged notes looked like, and those in which (a) subsequent utterings or (b) utterings of dissimilar coins or notes were involved. In the former cases the evidence was simply relevant evidence which is classified as similar fact evidence merely because it incidentally shows the accused has been guilty of misconduct before. (Similar fact evidence is a broad concept, embracing the notion that all misconduct is 'similar' in the sense that someone with a history of bad conduct is more likely than most men to behave badly.) In the latter cases the evidence is relevant via the unlikelihood of coincidence. That admissibility of similar fact evidence had not always depended on the nature of the issue to be proved is shown by *R.* v. *Ball* (1807) Russ & Ry 132 in which evidence of sixteen or twenty banknotes forged in the same way and endorsed by the accused was admitted on a charge of uttering a forged banknote but only after much

doubt felt by Heath J. and consultation with other judges. There was no evidence to show he knew any of the banknotes to be bad. The evidence was relevant via the unlikelihood of so many forged notes passing through his hands being mere coincidence. Guilty knowledge was merely a synonym for guilty intent inferred from the unacceptability of coincidence. The court did not explain it thus, of course, and merely concluded that the circumstances were such as to leave no doubt in the minds of the jury that he knew the note in the instant case to be forged.

R. v. *Ball* is a forerunner of the cases in which evidence of subsequent utterings and utterings of dissimilar objects was admitted to prove guilty knowledge.

In the earliest cases in which similar fact evidence was admitted to prove 'identity', evidence was also simply relevant evidence. For example, in *R.* v. *Richman* 2 East P.C. 1035 and *R.* v. *Rooney* 7 C & P 517, the accused in each case was known to have taken an article from the scene of a previous crime and it was left at the scene of a crime. This supported the inference that he had committed the latter crime and it was simply relevant evidence. On the other hand, evidence of a 'hallmark' serving to identify the accused is evidence relevant via the unlikelihood of coincidence. The reasoning does not proceed via the likelihood of misconduct being repeated but via the irrationality of the hypothesis that anyone else could have, coincidentally, committed the crime, given its distinctive nature and the connection of the accused with it. After all, if in *Straffen* [1952] 2 All E.R. 658 the accused had not admitted committing the first two distinctive murders but he was the only known common factor the evidence would clearly qualify as relevant via the coincidence approach. The concept of 'identity' was used because it was an issue which had been proved before by similar facts — although the reasoning was different.

The category of 'intent' also spans evidence which is simply relevant (as in *Markby,* see p. 9) and that which is relevant via the unlikelihood of coincidence (when it is synonymous with 'accident'):

'The argument here is purely from the point of view of the doctrine of chances — the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all.' — Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1940) at p. 196.

The category of 'accident' has been termed 'the use of similar fact evidence most easy to justify', J. Sklar, 'Similar Fact Evidence: Catchwords and Cartwheels' (1977) 23 *McGill L.J.* 6063. Sklar accepts Wigmore's analysis of the reasoning on which accident is based but does not point out that Wigmore equated this with the reasoning for 'intent'. Cowen and Carter, however, contend that multiplication does not make accident or mistake any less likely in any *one* given case. *Essays on the Law of Evidence,* 1956, at p. 138. The inference is that proving intent actually involves reasoning from the existence of an intentional act or even numerous intentional acts to the probability of the intent being repeated if the act is i.e. the probability of mental misconduct being repeated. But this is not so. The reasoning originally used to prove intent and accident or mistake depended on the unlikelihood of mere coincidence not at one but at two levels. Thus, in the first place, the repetition of similar acts cannot be explained as mere coincidence and in the second place, the recurrence of a single act fitting neatly into this series or general system without the repetition of intent would seem like an impossible coincidence.

System is usually used, as in *Martin* v. *Osborne* (1936) 55 C.L.R. 367 as a concept from which the act itself can be inferred if the specific system and repetition of part only of the elements which constitute the course of conduct (or specific system) are considered. As Wigmore has pointed out, cogency of the evidence from which such an act can be inferred would generally have to be greater than needed for the category of intent, mistake or accident: 'The object here is not merely to negative an innocent intent at the time of the act charged but to prove a pre-existing design, system, plan or scheme directed forwards to the doing of the act.' *Op. cit.* 202. Here, given the existence of the system, the completion of part only of the course of conduct tends to show it would be impossibly coincidental for the other acts not also to have taken place. The reasoning is the same as in the categories of accident, mistake and intent.

As long as the 'categories' developed by the courts are not abused, most should survive as useful guides to when similar fact evidence will be relevant as tending to show the irrationality of the hypothesis of coincidence.

Lord Hailsham's formulation of these views is of great practical value in guiding the trial judge, who might choose the phrase appropriate to the case at hand in his direction to the jury:

> In all these cases it is for the judge to ensure as a matter of law in the first place, and as a matter of discretion where the matter is free, that a properly instructed jury, applying their minds to the facts, can come to the conclusion that they are satisfied so that they are sure that to treat the matter as pure coincidence by reason of the "nexus", "pattern", "system", "striking resemblances" or whatever phrase is used as 'an affront to common sense'.[10]

Although Lord Hailsham cited with approval Lord Aitchison's warning in *Ogg* v. *Lord Advocate*[11] that the question of admission of similar fact evidence should be cautiously approached, the test for admissibility at law, he reiterated, was relevance. He quoted Lord Wark to that effect in the same case.[12]

Lord Salmon did not see the evidence in *Boardman* as evidence relevant only *via* propensity. The latter kind of evidence was clearly inadmissible:

> The test must be — is the evidence *capable of tending* to persuade a reasonable jury of the accused's guilt on *some ground other* than his bad character and disposition to commit the sort of crime with which he is charged ?[13]

'Capable of tending to persuade . . .' is a concept denoting relevance, not exceptional relevance.

In this case Lord Salmon was prepared to accede that the similarities were so unique or striking that common sense made it inexplicable on the basis of coincidence — and he immediately explained this by stressing that the question as to whether the evidence was *capable* of being so regarded by a reasonable jury was a question of law.[14] If it had not been so capable it would have been irrelevant except by the forbidden line of reasoning and thus would have been inadmissible.

The judgment of Lord Morris has been interpreted similarly to those of Lords Cross and Wilberforce.[15] It is indeed difficult to see how he

10 (1975) 60 Cr.App.R. 165, 182. This formulation explains to the jury the precise use to which the evidence should be put and allows them a real role. If evidence similar to that admitted in *Boardman* is viewed as nothing but propensity evidence which is admissible because it is exceptionally relevant, and instances of when this may be so are laid down in a code, the judge is forced to perform the function of the jury. If he admits 'propensity' evidence it will inevitably be decisive of the case because he will not be able to explain to the jury any other use for it than to infer the accused was indeed likely to have committed the crime in question. Attention will be directed away from the possibility that all can be explained as coincidence. The result will be for the judge always to exclude similar fact evidence unless he himself is convinced of the guilt of the accused.

11 [1938] J.C. 152.

12 Ibid.

13 *Op. cit.* at p. 188; author's italics.

14 Ibid at p. 189.

15 F. Bates, 'What Happened After *Boardman*' [1978] *NZLJ* 178, at p. 179. R. Cross, *Evidence* (5th ed., 1980) at p. 375. L. H. Hoffman, 'Similar Facts After *Boardman*' (1975) 91 *L.Q.R.* 193 at p. 195.

could reconcile his view that 'evidence of similar facts should be excluded unless such evidence has a really material bearing on the issues to be decided'[16] with his endorsement of *Makin* — unless he meant this as a rule of practice and not as a rule of law. There is support for this interpretation in his words: 'It will be for the judge in his *discretion* to rule whether the circumstances are such that evidence directed to one count becomes available and *admissible* as evidence when consideration is being given to another count.'[17] (my emphasis).

Although he did not attempt a formulation, he quoted Hallet J. in *Robinson*,[18] in which the latter judge used the term 'common sense' in relation to the jury's role:

> If the jury are precluded by some rule of law from taking the view that something is a coincidence which is against all the probabilities if the accused is innocent, then it would seem to be a doctrine of law which prevents a *jury* from using what looks like common sense.

That he, like Lords Hailsham and Salmon, saw the tendency to show the irrationality of the hypothesis of coincidence as the basis of relevance (and not exceptional relevance) is clear:

> But there may be cases where a judge, having both limbs of Lord Herschell's famous proposition in mind, considers that the interests of justice (of which the interests of fairness form so fundamental a component) make it proper that he should permit a jury when considering the evidence on a charge concerning one fact or set of facts to consider the evidence concerning another fact or set of facts if between the two there is such a close or striking similarity or such an underlying unity that *probative force* could fairly be yielded.[19]

Although it was the degree of similarity of the facts in *Boardman* that supplied the 'underlying unity' which made them inexplicable on the basis of coincidence, it is not always the similarity of such facts which gives them probative force in this way. Lord Hailsham juxtaposed the concepts of 'striking resemblances', 'nexus', 'pattern' and 'system', but these could all be subsumed under the term'underlying unity'.

Only two of the law lords in *Boardman*, Lords Cross and Wilberforce, thought a strong degree of probative force was necessary before similar fact evidence was legally admissible. Neither of these two law lords referred to the *Makin* formula. Thus they retained consistency of reasoning. They were in effect admitting, that, in their opinion, evidence relevant solely *via* propensity had, in practice, been admitted by the courts while paying lip service to the *Makin* formula which excluded such evidence. They were both careful to restrict the requirement of a strong degree of probative force to evidence relevant only *via* propensity. (The words 'striking similarity' to them denoted exceptional relevance).

16 *Op. cit.* 171.
17 *Op. cit.* 172.
18 (1953) 37 Cr.App.R. 95 at p. 106.
19 *Op.c it.* at p. 172.

Only after dismissing cases of 'system' and 'underlying unity' from consideration, did Lord Wilberforce conclude:

> The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force.[20]

That he meant the evidence was relevant only *via* propensity is shown in the words:

> This is simply a case where evidence of facts similar in character to those forming the subject of the charge is sought to be given in support of the evidence on that charge.[21]

Lord Cross considered that in this case the coincidence approach involved nothing but reasoning *via* propensity. After explaining that the prosecution was not, as a general rule, allowed to adduce evidence that the accused had done acts other than those with which he was charged in order to show that he was the sort of person who would have been likely to have committed the offence in question, he pointed out that circumstances might arise in which such evidence was so 'very relevant, that to exclude it would be an affront to common sense'.[22]

He then referred to the well known 'hallmark' case, *Straffen*,[23] and reasoned as follows:

> It would, indeed, have been a most extraordinary coincidence if this third murder had been committed by someone else, and though an ultra-cautious jury might still have acquitted him, it would have been absurd for the law to have prevented evidence of the other murders being put forward although it was *simply evidence to show that Straffen was a man likely to commit a murder of that particular kind*.[24]

The perceived general rule of exclusion of similar facts which could only be overcome by exceptional relevance, it is noteworthy, was qualified by Lord Cross with the words:

> ... in order to show that he is the sort of person who would be likely to have committed the offence in question.[25]

3. *Misinterpretation of the decision in* Boardman *by the High Court of Australia in* Markby

There are two areas in which the High Court in *Markby* did not recognise the divergence of the views of Lords Hailsham, Salmon and Morris on the one hand and Lords Wilberforce and Cross on the other. The court did not distinguish the roles of judge and jury in its reference to the phrase 'an affront to commonsense' and it ignored the words '(of the kind now in question)' in the judgment of Lord Wilberforce.

---

20 Ibid at p. 174.
21 Ibid. at p. 173.
22 Ibid. at p. 184.
23 [1952] 2 All E.R. 658.
24 *Op cit.* at p. 184. Author's italics.
25 Ibid. at p. 184.

Thus Gibbs A.C.J. did not draw a distinction between the treatment of the test 'an affront to common sense' in the judgments of Lords Hailsham and Cross. He stated in *Markby*, '... it may not be going too far to say that it will be admissible only if it is "so very relevant that to *exclude* it would be an affront to common sense" '[26] (my emphasis), and he attributed this reasoning to both the above judges in *Boardman*. Yet Lord Hailsham in fact reasoned thus: '... it was not perhaps so unambiguously and consistently displayed as to render it a kind of signature which would make it an "affront to common sense" *in the jury* to regard it as coincidental'.[27] Thus he thought it was for the jury to decide if the evidence could not possibly be explained as coincidence. After stating that evidence relevant *via* propensity should be excluded, Lord Hailsham stated: '... where the purpose is an inference of another kind, subject to the judge's overriding discretion to exclude, the evidence is admissible, if in fact the evidence be logically probative'.[28] Being logically probative in this regard means simply tending to show that evidence cannot be regarded as mere coincidence without affronting common sense. Gibbs A.C.J. in fact correctly reflected the views of Lord Cross but not of Lord Hailsham.

The statement by Lord Wilberforce that, 'The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force.', was partially cited by Gibbs A.C.J. in *Markby*, but he omitted the crucial words in brackets.[29]

By these means[30] the High Court was able to conclude not only that the judgments in *Boardman* supported a test of exceptional relevance for the admission of similar fact evidence but also that this principle was accepted without qualification — whereas the two law lords who in fact supported it, restricted its application to propensity evidence.

In *Markby*, the High Court, purporting to apply *Boardman*, required a strong degree of probative force in similar fact evidence which could not be classified as propensity evidence. The evidence of the previous drug transactions in which the accused had been involved was relevant to show knowledge of the likely consequences of cheating in the drug trade and therefore a motive for murdering the victim of his own cheating scheme. The evidence was not admitted for the purpose of showing that the accused was likely to take part in another illicit drug transaction and was therefore not relevant *via* propensity. Such evidence

26 (1978) 52. A.L.J.R. 626 at p. 629.

27 *Op. cit.* at p. 183.

28 *Op. cit.* at p. 182.

29 (1978) 52 A.L.J.R. 626 at p. 630.

30 Both these points were considered by the Victorian Supreme Court in *Chee* [1980] V.R. 303. At p. 305 they refer to the different degrees of cogency required of evidence at different stages of the trial process and at p. 308 they point out that Lord Wilberforce restricted the requirement of a strong degree of probative force to evidence of the kind in question.

is called 'similar fact' evidence solely because of the broadness of the concept, embracing all kinds of misconduct, and, most ironically, its degree of relevance does not even depend on 'striking similarity', which was the test adopted by the High Court in *Markby*.

The Crown in fact led the evidence in order to show intent and motive. The 'category' of 'intent' is liable to abuse and degeneration into a ticket of automatic admissibility for what is in fact mental propensity evidence. However, it is only when intent on one occasion is inferred from a similar intent on another that reasoning *via* propensity is involved. In *Markby's* case, intent and motive could be inferred from knowledge of consequences which could be inferred from participation in a similar transaction before. On the authority of all five law lords of the House of Lords in *Boardman*, the decision whether such evidence should be admitted lay within the discretion of the trial judge since it was relevant in some other way than *via* propensity.

4. *The Ultimate Result: the decision in* Perry

Gibbs C.J. lucidly stated the basis upon which evidence of the deaths by poisoning of the other three close associates of the appellant was admitted:

> However, where a number of poisonings have occurred, and the victims have all been associated with the accused person, the evidence of the other poisonings may be admissible to support the inference that the accused was responsible for the death in issue, because it would be contrary to ordinary experience that a series of poisonings, caused by accident or suicide, would occur by coincidence in the circle of persons with whom the accused was associated.[31]

Thus the evidence in *Perry* too was obviously not relevant solely *via* propensity *viz.* to prove the accused was a poisoner and therefore statistically more likely than most to poison someone. Yet Gibbs C.J.[32] and Wilson J.[33] held that a strong degree of probative force was required for legal admissibility of such evidence, basing this view upon *Markby* and purporting to apply Lord Herschell's statement in *Makin*. The *Makin* statement is inconsistent with the assertion that evidence of similar facts should possess a strong degree of probative force, requiring admissible similar fact evidence merely to be 'relevant to an issue before the jury', was disapproved of by Murphy J. in *Perry*, who thought the requirement of (mere) relevance in the context of the wording of the second limb rendered the whole statement meaningless,[34] and is, in fact, inconsistent with *Markby*.

Brennan J. adopted Gibbs A.C.J.'s description, in *Markby*, of Lord Herschell's principles and stated the first one thus:

---

31 (1982) 57 A.L.J.R. 113.
32 Ibid. at p. 112.
33 Ibid. at p. 120.
34 Ibid. at p. 115.

> The first principle, which is fundamental, is that the evidence of similar facts is not admissible if it shows *only* that the accused had a propensity or disposition to commit crime. . . .[35]

Brennan J. followed this by reasoning that, since every piece of similar fact evidence was 'likely to show that the accused has committed another crime on another occasion . . .'[36] — which is hardly surprising since this is the definition of similar fact evidence — the exclusionary rule of the first principle applied in every case in which similar facts were offered as evidence. He thus ignored the word 'only'. He was able to conclude, therefore, that admission of similar fact evidence was exceptional and would be legally admissible only 'when the probative force of the evidence clearly transcends its prejudicial effect'.[37]

Murphy J. disapproved in principle of all circumstantial evidence on the ground that it tended to undermine the presumption of innocence and that highly improbable events do occur in fact.

Murphy J. rejected all the similar fact evidence.

Gibbs C.J. rejected the evidence in relation to the death of the appellant's brother since there was no 'striking similarity' between it and the poisoning of Mr Perry, although he died after ingesting a mixture of arsenic and wine. Wilson J. held this evidence admissible although he thought it a borderline case, and Brennan J. thought it was of sufficient force to be admissible.

Gibbs C.J. rejected the evidence of the death of Mrs Perry's *de facto* husband on the ground that the inference that the latter had been poisoned with arsenic before he died of an overdose of barbiturates could only be drawn if it was assumed that she was guilty of the other offences. Brennan and Wilson J.J. rejected the evidence for substantially the same reason. Their reasoning here could only follow by holding that the fact in issue in the case of the *de facto* husband was whether he had in fact suffered arsenic poisoning. Certainly, such an inference was capable of being drawn but the evidence was offered in the first instance to disprove the hypothesis of coincidence in exactly the same way as the evidence of the other episodes of poisoning *viz.* the unlikelihood of four broadly similar calamities befalling a single person. As White J. so ably explained,[38] the 'connective' evidence *viz.* evidence tending to connect the accused in a guilty way with each particular poisoning, is admissible to give *added* strength to evidence already legally admissible to disprove the hypothesis of the above coincidence. A third stage would be reached when these further facts, *per* White J., 'may be combined to become so strikingly similar as to warrant admission into evidence in their own right as evidence of similar facts to the facts charged as offences'.[39]

In *Perry*, there were actually six separate episodes of poisoning of close associates of the accused, because her second husband and Mr

35 Ib'd. at p. 123.
36 Ibid. at p. 123.
37 Ibid. at p. 123.
38 (1981) 28 S.A.S.R. 417 at p. 448.
39 Ibid. at p. 449.

Perry both suffered two episodes. In addition, points of similarity between the poisonings of her three husbands albeit not her brother tending to show the irrationality of the hypothesis of coincidence were: these three were all spouses (one was a *de facto* spouse), all insured at Mrs Perry's instigation and each was relatively healthy before becoming insured and became very ill thereafter. Added to these two levels of similar fact evidence was the connective evidence of suspicious circumstances in particular cases for *e.g.* giving a false name to police after the death of her brother before the cause of death was known to be ingestion of arsenic, forging her second husband's signature on an additional policy and denial of knowledge that his life was insured, at all, thereafter and timing of illnesses in correspondence with the terms of insurance policies.

The High Court decision of *Perry* can only be characterised as an affront to the principle of trial by jury, no more clearly exemplified than in the words of Murphy J.:

> The Court was not asked to enter judgement of acquittal, but if it had been and if a complete review of the evidence had disclosed no more against the applicant than was revealed on the appeal, judgement of acquittal should have been entered.[40]

*Catherine de Wit**

STATE PRIVILEGE — IS THERE A MIDDLE WAY ?

The long term history of the rise and fall of state privilege has been traced many times before[1] and one might have been forgiven for thinking that the matters had been resolved in a manner satisfactory to most commentators. That solution was represented by the decision of the House of Lords in *Conway* v. *Rimmer*.[2] However, certain recent developments in Australia and Canada suggest that the position is not quite so clear cut as it might have been thought to be and, accordingly, it is the purpose of this note to consider and evaluate them.

The Australian example occurred in the state of New South Wales in 1979. In the leading case of *Sankey v. Whitlam*,[3] the High Court of Australia had followed *Conway* v. *Rimmer* and held that the question of disclosure was a matter for the courts. The case involved a request for the production of certain Cabinet papers which related to allegations of a government's having illegally sought to raise certain loans. In what

40 *Op. cit.* at p. 119.

* B.A. (*Stell.*), S.T.D. (*C.T.*), B.Juris (*W.A.*), LL.B. (*Tas.*).

1 H. W. R. Wade, *Administrative Law* (5th Ed. 1982) at p. 721 *ff*; P. W. Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (1971) at p. 38 *ff*; D. H. Clark, 'The Last Word on the Last Word' (1969) 32 *M.L.R.* 142.

2 [1968] A.C. 910.

3 (1978) 53 A.L.J.R. 11. For comment, see S. Campbell (1979) 53 *A.L.J.* 212.

might be described as the leading judgment, Gibbs A.C.J. followed the approach of the House of Lords in *Conway* v. *Rimmer* in saying[4] that, '... it is inherent in the nature of things that government at a high level cannot function without some degree of secrecy... The public interest therefore requires that some protection be afforded to documents of that kind.' However, it was not all such high level documents, regardless of their subject-matter, which would be absolutely protected and, '... in a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice... it will not treat all documents as entitled to the same measure of protection — the extent of protection required will depend to some extent on the general subject-matter with which the documents are concerned'.[5] Stephen J. took a somewhat different line of argument: first, he suggested that conferring a privilege in respect of these particular documents[6] would, '... come close to conferring immunity from conviction' upon people holding high government office. Second, the traditional justification for the application of privilege (*i.e.* the need for government secrecy) was inappropriate in proceedings where improper government behaviour was alleged. Third, the high offices held by the defendants and the nature of the charges made it a matter of more than usual public interest that the administration of justice should not be impeded. Mason J.[7] commented that Cabinet proceedings had always been regarded as secret and confidential and that the efficiency of the cabinet system might be impaired were not secrecy and confidentiality to be maintained. However, Mason J. said[8] it followed that, '... if the proceedings, or the topics to which those proceedings relate, are no longer current, the risk of injury to the efficient working of government is slight and that the requirements of the administration of justice should prevail'. In the event, disclosure of the relevant documents was ordered.

Subsequent developments occurred in England, in the shape of *Burmah Oil Co.* v. *Bank of England*.[9] In that case, the House of Lords held that documents which related to government policy, containing information given in confidence by businessmen to government and document which related to a decision that the Bank of England should give financial help to a private undertaking were protected by privilege.[10] Still more recently, in the case of *Air Canada* v. *Secretary of State for Canada (No. 2)*[11] the House of Lords similarly precluded discovery of documents which related to government policy. In *Air Canada*, the documents were communications between government ministers, documents which had

4 Ibid at p. 22.
5 Ibid. at p. 22.
6 Ibid. at p. 28.
7 Ibid. at p. 44.
8 Ibid. at p. 44.
9 [1979] 3 All E.R. 700. For comment, see D. G. T. Williams [1980] *C.L.J.* 1.
10 Affirming the decision of the Court of Appeal on other grounds.
11 [1983] 1 All E.R. 910.

been prepared for the use of ministers formulating government policy. It seems, however, that the key issue in this case[12] was that the party who was seeking disclosure had failed to show that the documents were materially likely to assist his case. Indeed, Lord Fraser expressed the view[13] that, although cabinet minutes were entitled to a high degree of protection from disclosure, they were not automatically immune.[14]

In Australia, as a direct result of the *Sankey* v. *Whitlam* decision, the legislature of the state of New South Wales enacted the *Evidence Amendment Act* 1979, which introduced a novel part VI into the principal act.[15] This legislation, first, provides[16] that a written certificate by the Attorney-General that a particular communication is a government document, is confidential and it is not in the public interest that the document be disclosed is sufficient, of itself, to prevent that document being disclosed in legal proceedings. Even if such a certificate has not been obtained, if a person presiding in legal proceedings considers that the document in question is a government communication and that the Attorney-General has not had an opportunity to give a certificate, then, if the publication has not previously been duly authorised, the document may not be disclosed.[17] Thus, in New South Wales, the full rigour of the *Duncan* v. *Cammell, Laird & Co.*[18] principle has been restored. Inevitably, this legislation, which passed through both Houses of the New South Wales Parliament in a day and which also contained a wide and inclusionary definition of 'government communication',[19] caused a not inconsiderable furore. Allegations regarding the present integrity and future intentions of the New South Wales government were made: '[I]t is difficult to imagine', said one commentator,[20] 'how a government embattled in a Watergate situation, could resist the temptation to certify that all relevant communications cannot be examined by the courts'.

As that commentator had noted,[21] this remarkable piece of *ad hoc* legislation was the direct product of the legal and political situation in which the particular government found itself, but the legislation is not

12 See, for example, ibid. at p. 916 *per* Lord Fraser; ibid. at p. 919 *per* Lord Wilberforce; ibid. at p. 922 *per* Lord Edmund-Davies.
13 Ibid. at p. 915.
14 For other English cases touching on the same issue, see *Hehir* v. *Commissioner of the Police of the Metropolis* [1982] 2 All E.R. 335; *Campbell* v. *Tameside Metropolitan Borough Council* [1982] 2 All E.R. 791. In Australia, see *R.* v. *Robertson; Ex parte McAulay* (1983) 21 N.T.R. 11.
15 *Evidence Act* 1898 (N.S.W.).
16 Ibid. s. 61.
17 Ibid. s. 62.
18 [1942] A.C. 624.
19 *Evidence Act* 1898 s. 60. The phrase, 'government communication' refers to, '... a written or oral communication relating to the business of government at senior level, including, but without limiting the generality of the foregoing, a written or oral communication relating to — (a) proceedings of Cabinet, of a Committee of Cabinet or of the Executive Council; (b) the formulation of government policy; or (c) government administration at senior level'. The section, s. 60 (2), goes on to state that reference to a communication, '... includes a reference to a statement or record that is not communicated to any person'.
20 D.B. (1979) 4 *Legal Service Bulletin* 163 at p. 164.
21 Ibid. at p. 164.

unique in the Commonwealth. In Canada, it is provided by s. 41 (2) of the *Federal Court Act* 1970 that, 'When a Minister of the Crown certifies to any court... that the production... of a document... would be injurious to... national security... production shall be refused without any examination of the document by the court'. The Canadian Supreme Court was required to decide whether this provision was *intra vires* the Parliament of Canada in the case of *Human Rights Commission* v. *Attorney-General of Canada*[22] and whether the documents concerned were subject to privilege. In that case, the Solicitor General for Canada had filed an affidavit to the effect that the disclosure of particular information which was contained in the files of the Royal Canadian Mounted Police would be prejudicial to national security and the Solicitor-General, accordingly, apposed the production of the files. The Supreme Court held, first of all, that the relevant section was not unconstitutional.[23] This finding had the effect of saying, in the words[24] of Chouinard J., who delivered the judgment of the court, that once it was admitted that the power to legislate existed, it necessarily followed that the privilege could be made absolute. 'In my view', he said, 'saying that Parliament and the Legislatures cannot make the privilege absolute amounts to a denial of parliamentary sovereignty...' However, Chouinard J. went on to say,[25] on the direct issue of privilege, that it was important not to confuse the statutory provision with the action of the Executive performed in accordance with it. In a particular case, it is possible that an abuse of the power contained in s. 41 (2) could exist — for instance, in the case of a federal Minister exceeding his federal field of jurisdiction and encroaching on a provincial field of jurisdiction, or concealing any such encroachment from the courts. However, this kind of situation raised the applicability of the legislative enactment in a particular case,[26] not the constitutionality of s. 41 (2) itself. In that case, the courts would be required to decide as to whether the section was applicable; however, it was not necessary to decide the point in the present case. Hence, the *Human Rights Commission* case does leave open the possibility of judicial intervention, albeit in restrictive circumstances. However, it is not clear whether the hypothetical situations proposed by Chouinard J. were intended to be anything approaching exhaustive.

Most recently in Canada, the question of the privilege attaching to Cabinet documents arose before the Divisional Court of the Ontario High Court in the case of *Re Carey and the Queen*.[27] There, the plaintiff had sought disclosure of minutes, reports, records and notes pertaining to meetings of the Cabinet of the Ontario's government between January

22 (1982) 134 F.L.R. (3d) 17.
23 For comment on this issue, see a note by J.G.S. (1983) 57 *A.L.J.* 354.
24 (1982) 134 D.L.R. (3d) 17 at p. 27.
25 Ibid. at p. 27.
26 Ibid. at p. 28.
27 (1983) 4 C.C.C. (3d) 83.

1969 and May 1975. The purpose of the disclosure was to shed light on transactions in which the plaintiff had been involved over a Crown development as a result of which, he claimed, he had lost money and had suffered injury to his personal and business reputation. The Crown refused disclosure on the grounds, first, that the documents were not relevant to the instant proceedings and, second, were protected from production either by Crown privilege or public interest immunity. At first instance, it was held that the documents were relevant but were protected: the plaintiff unsuccessfully appealed to the Divisional Court.

The first point made by White J.[28] was that the appellant had not, '... shown to the court any *prima facie* case of criminality, malfeasence, misfeasence, non-feasance, irregularity or other improper conduct on the part of any member of the Cabinet or any person reporting to Cabinet, whose decisions and recommendations are incorporated in the documents under discussion'. The Ontario government contended that, even if the documents were not absolutely privileged, the courts could only require their production or disclosure only in the most exceptional and extraordinary circumstances, which were not present in the present circumstances. The major grounds on which the appellant based his appeal were, first, that even if immunity were claimed, the fact that the documents might have assisted his case was, of itself, a compelling reason for production. Second, that the presumption should be in favour of disclosure and that the onus is, therefore, on the Crown to show reason why the documents should not be produced. Third, on the authority of the *Burmah Oil* case,[29] no document of any particular class or category, including Cabinet minutes, could never be ordered to be produced by the Crown. Fourth, on the same authority, that he need not show 'special circumstances' so that the onus shifts to the Crown of proving that the public interest would be served by preserving the immunity and, finally, that once the documents were assumed to be relevant (even though they were Cabinet documents) on the appellant's request the court could embark on the exercise of balancing the public interest against non-disclosure against the private and, in a sense, public interest in seeing that all relevant evidence is produced to the courts. 'It is as to when the court will be moved to examine the documents,' said White J.,[30] 'and thereafter engage in that balancing process that this case is concerned.'

The judge considered that there were two judicial comments which represented the existing law in Ontario: first, in *Schemerchanski* v. *Lewis*,[31] Blair J.A. had said that 'There are certain classes of documents including those relating to Cabinet proceedings, the conduct of foreign affairs and security which by their very nature are generally assumed to

28 Ibid. at p. 88.

29 *Supra* n. 9.

30 (1983) 4 C.C.C. (3d) 83 at p. 88.

31 (1981) 120 D.L.R. (3d) 745 at p. 751.

be privileged'. White J. noted[32] that Blair J.A. had not said that Cabinet documents were absolutely privileged, but were generally acknowledged to be so. White J. construed the remarks of Blair J.A., '... to be consonant with the proposition that Cabinet documents are *presumed* to be privileged under the doctrine of Crown privilege or public interest immunity *in the absence of special circumstances*'.[33] In addition, White J. referred to the decision of the High Court of Australia in *Lanyon Pty. Ltd.* v. *The Commonwealth of Australia*,[34] where Menzies J. had upheld a claim for privilege in respect of Cabinet documents on the basis[35] that, '... the governmental process directed to obtaining a cabinet decision upon a matter of policy and cabinet's decision upon that matter should not, in the public interest, be disclosed by the production of cabinet papers including what I would describe as papers which have been brought into existence within the governmental organisation for the purpose of preparing a submission to cabinet. Such papers belong to a class of documents that, in my opinion, are of a nature that ought not to be examined by the Court, except, it may be, in very special circumstances.'

His honour went on to say that cases such as *Sankey* v. *Whitlam*[36] and *United States* v. *Nixon*[37] fell into the *very special circumstances* category because, in those cases, criminal charges had been made against senior government officials. The judge continued[38] by refuting the appellant's submission that the *Burmah Oil* Case had negated the principle expressed by Menzies J. in *Lanyon*.[39] The inevitable conclusion to be drawn[40] was that documents such as those presently in issue were, by virtue of their class, presumptively privilege and, furthermore, the onus of showing that documents fall within the test ennunciated by Menzies J. law on the appellant. Such appropriate circumstances were admitted not to have been present in the *Carey* case.[41]

In addition, the *Burmah Oil* case could not be regarded as real support for the propositions urged by the appellant: White J. quoted,[42] in particular, a *dictum* of Lord Wilberforce[43] that, 'A claim for public interest immunity having been made, on manifestly solid grounds, it is necessary for those who seek to overcome it to demonstrate the existence

32 (1983) 4 C.C.C. (3d) 83 at p. 89. The appellant had argued that Blair J.A.'s *dictum* was both *obiter* and made *per incuriam*.
33 White J.'s italics.
34 (1974) 129 C.L.R. 650.
35 Ibid. at p. 653.
36 *Supra* n. 3.
37 418 U.S. 683 (1974).
38 (1983) 4 C.C.C. (3d) 83 at p. 90.
39 White J., ibid at p. 90, commented that where the cases of *Gloucester Properties et al* v. *The Queen in right of British Columbia et al* (1981) 129 D.L.R. (3d) 275 and *Mannix* v. *The Queen in right of Alberta* (1981) 126 D.L.R. (3d) 155 taken to represent a view contrary to that in *Lanyon*, he would decline to follow them.
40 (1983) 4 C.C.C. (3d) 83 at p. 91.
41 *Supra* text at n. 28.
42 (1983) 4 C.C.C. (3d) 83 at p. 92.
43 [1979] 2 All E.R. 700 at p. 708.

of a counteracting interest calling for disclosure of particular documents. When this is demonstrated but only then, may the court proceed to a balancing process.' Relying on this comment, White J. considered[44] that the appellants suggestion that the document should be scrutinised first and then a decision made as to their admissibility was incorrect. 'Rather,' the judge stated, 'we do suggest to the appellant's counsel that it is incumbent upon the appellant, before we look at the documents, that he make out a *prima facie* case of "very special circumstances". If he does, we shall then embark on the balancing process...' In conclusion, the court adopted the view expressed by Lord Denning M.R. in *Neilson* v. *Laugharne*[45] that, 'In all "class" cases, I think the court should very rarely inspect the documents themselves'.

What do these cases tell us, then, about the present state of Crown privilege? In Canada, at least, it seems as though the heady days of *Conway* v. *Rimmer* are over: the philosophy represented by that decision has been replaced by an altogether more pragmatic approach, based, perhaps, on modern *realpolitik* has become apparent. In Australia, despite legislative intervention in New South Wales, the *Conway* v. *Rimmer* principle still seems to hold good. Given the political situation in both countries, developments of the kind described earlier were predictable, but, at the same time, by the very fact that they have so occurred, the reputation of government is unlikely to be enhanced. Although *Conway* v. *Rimmer* and *Sankey* v. *Whitlam* may not be wholly appropriate in the world scene, at least as it is perceived by many politicians, too great a retreat from them may be still less desirable. In particular, note should be taken of the Canadian cases and the retreat halted.

*Frank Bates**

44 (1983) 4 C.C.C. (3d) 83 at p. 92.

45 [1981] 1 All E.R. 829 at p. 836. This case was not concerned with Cabinet documents, but with documents containing records of statements made by police during investigation. See the cases referred to *supra* n. 14.

* LL.M. (*Sheff.*). Reader in Law, University of Tasmania.