
TENDENCY, COINCIDENCE & JOINT TRIALS

PREPARED FOR THE ROYAL COMMISSION
INTO INSTITUTIONAL RESPONSES TO
CHILD SEXUAL ABUSE

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Introduction

1 Instructions

- 1.1 Our advice has been sought to assist the Commission in its consideration of whether ‘the rules as to admissibility of tendency and coincidence evidence and as to when joint trials should be allowed – and the way they are being applied – are appropriate’. We understand that others, including academics and social scientists, are also contributing to this question with primary research and literary reviews.
- 1.2 In short, we think that the current rules are for the most part appropriate, particularly in the Uniform Evidence Act jurisdictions. One cannot help but be struck by the myriad of judicial opinions, apparently contradictory case outcomes and the (sometimes overwhelming) complexity that mars this area of law. However, attention to the reasoning processes that underlie the application of the rules of admissibility helps to explain and resolve contradictory outcomes and navigate unavoidable complexity. Having said that, some rules in South Australia, Western Australia and Queensland restricting the factors that the trial judge can take into account in determining admissibility are undesirable. It would be preferable if the Uniform Acts’ approach to tendency and coincidence were adopted in each jurisdiction.
- 1.3 We have also been asked, in answering the above question, to consider:
- 1.4 What the law and practice is as to admissibility of tendency and coincidence evidence, and when joint trials are allowed, in Australia;
- 1.5 Whether and how a particular case would be treated differently in different Australian jurisdictions; and
- 1.6 Whether and which non-legal factors affect the likelihood of tendency and coincidence evidence being admitted or a joint trial permitted (e.g. Practical factors such as strategic and resource considerations, requirements for notice, etc.).
- 1.7 These will be addressed in the body of this opinion.

2 Introduction to advice

- 2.1 The inferential reasoning processes involved in tendency/propensity and coincidence/similar fact evidence, although of potentially high probative value, have long been recognized as inherently dangerous in criminal trials because they permit a person to be judged by his or her conduct on other occasions rather than by evidence directly or indirectly focused on the subject event, thus giving rise to

‘inevitable prejudice’.¹ Such reasoning may be particularly prejudicial in trials with multiple complainants. In all jurisdictions in Australia legislation permits the use of this type of evidence in circumstances more permissive than the common law. However the evidence and associated reasoning that we will refer to as ‘tendency and coincidence evidence’ is often misunderstood, and as a result can be under- or ineffectively- utilised, or else results in unfair prejudice to the accused. Tendency and coincidence evidence is therefore associated with an inordinate number of appeals, conflicting appeal judgments (between and within courts), impenetrable complexity and the potential for unfairness to both victims and accused.

- 2.2 In our view, this does not appear to be the result of poor legislative drafting or ineffective laws. Observation and experience suggests that under utilisation and misuse may stem from a failure on the part of practitioners (and at times the judiciary) to appreciate that the legislative provisions which now control the use of tendency and coincidence evidence do not replace the underlying reasoning processes of pre-existing common law categories of tendency and coincidence evidence. Understanding the underlying reasoning (as opposed to rules of admissibility) is essential to the fair and effective use of tendency and coincidence evidence and has not been made obsolete by the introduction of statutory rules of admissibility.
- 2.3 Tendency and coincidence reasoning can apply in different ways to different circumstances in different cases. As such, creating artificial rules or model directions, or overly prescriptive categories, in this area of evidence can be quite problematic. The proper and effective use of tendency and coincidence evidence requires an identification of the strengths and limits of the evidence sought to be adduced in the context of the rest of the case, an understanding of the reasoning processes behind the use of tendency and coincidence reasoning in support of an accused’s guilt and flexibility in thinking about the evidence and its use. What works in one case may not work in another and each case will present its own unique problems. Legal education for practitioners and judges (both trial and appellate) on the process of reasoning behind tendency and coincidence evidence and flexibility of applying this process of reasoning to the facts in a particular case can assist in increasing the proper and effective use of this type of evidence.
- 2.4 The myriad categories and ways of reasoning about tendency and coincidence and related evidence preclude the development of an effective model jury direction. Existing attempts tend to oversimplify the reasoning process, which, when applied to real fact scenarios, conversely results in a direction of impenetrable complexity (and illogical and unfair reasoning). In place of a model direction, we have tentatively proposed a list of prompt questions to aid in the preparation of a jury

1. *Sutton v The Queen* (1984) 152 CLR 528 at 563 per Dawson J.

direction (which could also be used by prosecutors at the very outset of trial preparations, and throughout the trial as the evidence is adduced and tested).

- 2.5 This document continues in three parts. First, it is necessary to ground any discussion of tendency and coincidence evidence in an understanding of the common law. Even though recent common law is notoriously conflicted in this area (for example, the ‘leading’ case of *HML* produced separate judgments from each member of the Court), useful observations about the reasoning underlying tendency and coincidence evidence, and practical considerations that should be brought to bear in every case, emerge from an examination of these judgments. This is Part A.
- 2.6 In Part B we set out how, in our view, the reasoning underlying tendency and coincidence evidence works. It is inherently difficult to provide such advice in the abstract; indeed, one of the features of our advice is that such analysis must always and necessarily be conducted by close regard to the peculiarities of a given fact scenario. Many of the divergent authorities can be explained by factual differences. Therefore it is generally a folly to attempt to extract from a particular case a broad statement about what type of tendency will or will not be admissible. A class example is the tendency to have a sexual interest in children. Whether such a broadly framed tendency can be significantly more probative than prejudicial in a given case will depend on the specific facts of that case; a dogmatic statement either way is of little practical utility. Nevertheless, an understanding of the tendency or coincidence reasoning at work at the abstract level assists in the application to a given fact scenario and underpin the ability of practitioners and the bench to clearly articulate the permissible and impermissible uses of such evidence to the jury.
- 2.7 We conclude Part B with a draft ‘Tendency and Coincidence Notice and Directions Prompt’ document. This is a working document which could be used as a starting point for the development of a tool that could be used by practitioners and judiciary at the outset of the preparation of a prosecution which will employ tendency and coincidence reasoning or otherwise discreditable conduct. The intention is that such a document would prompt the practitioner to think through each of the relevant considerations prior to drafting the tendency and/or coincidence notice(s) and considering applications for joint or separate trials, such that all parties and the trial judge will have a clear framework for how the evidence is proposed to be used throughout the trial.
- 2.8 It should be noted that Part B does not purport to reflect all of the case law in respect of which tendency and coincidence evidence has been held to be available and appropriately summarised to the jury. For example, we have previously articulated to our instructing solicitors how and why the directions to the jury in *Doyle v R* [2014] NSWCCA 4 involved, in our view, erroneous logic, despite the appeal being dismissed in that case. In our view, in spite of the outcome, *Doyle* remains a useful example of potentially illogical legal reasoning. Given the myriad and heavily fact-

specific approaches to tendency and coincidence evidence expressed in intermediate appellate courts around Australia, we have expressed our views as to the appropriate application of tendency and coincidence rules by stating positively how those rules should be applied having regard to the underlying logical reasoning, as opposed to a view necessarily consistent with all intermediate case law (which would, in any event, be all but impossible).

- 2.9 In Part C, the rules of admissibility and joint trials are set out in respect of each Australian jurisdiction. The significant differences between the jurisdictions are identified. Despite these differences, by and large the considerations across the jurisdictions remain similar and informative. We identify only a few areas in which we consider change is warranted. The rules governing the factors that the trial judge may take into account in determining relevance and probative value should not be proscriptive. We favour rules which provide trial judges with broad discretion to take into account those factors they may consider relevant, and reject rules which prohibit considerations (such as reliability and chance of concoction) from any consideration.
- 2.10 Given our view that the Uniform Evidence Act is workable when regard is had to the underlying legal reasoning, and that there are some difficulties in each of the non-Uniform Evidence Act jurisdictions, the adoption of the uniform approach in all jurisdictions is desirable. This is particularly so in Queensland, in which the common law is all but irreconcilable.

A Tendency and Coincidence at Common Law ('Propensity' and 'Similar Fact')

3 Propensity and similar fact evidence

3.1 Under the common law similar fact and propensity evidence was considered highly prejudicial. It was thought, and remains generally accepted, that, uninstructed, a jury were liable to place weight on such evidence beyond its logical limit.² Its admission was exceptional.³ Part of the rationale for the general exclusionary rule was the presumption of innocence: the admission of propensity evidence was liable to erode the presumption of innocence by substituting trial by prejudice and suspicion.⁴

3.2 An appropriate starting point in reviewing the development of the common law test for admissibility is the decision in *Makin v Attorney General (NSW)* [1894] AC 47. In *Makin* Lord Herschell said:⁵

It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purposes of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew 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.

3.3 The precise scope and application of this exclusionary rule was the subject of much debate. One area of confusion was whether the rule rendered all propensity evidence inadmissible unless it was relevant in some other way.⁶ The position eventually adopted in Australia under the common law is that such evidence can be admitted for the purpose of establishing a propensity provided it passes the necessary test.⁷

2. *Pfennig v The Queen* (1995) 182 CLR 461 at 484, *Sutton v The Queen* (1983-1984) 152 CLR 528 at 534.

3. *Sutton v The Queen* at 533.

4. *Sutton v The Queen* at 558.

5. *Makin v Attorney General (NSW)* at 65.

6. This was the view favoured by Gibbs ACJ in *Markby v The Queen* (1978) 140 CLR 108 at 116.

7. *Pfennig v The Queen*.

- 3.4 The leading authority on the common law test for the admissibility of propensity and similar fact evidence is *Pfennig v The Queen* (1995) 182 CLR 461.⁸ Prior to the decision in *Pfennig* the test for admissibility of similar fact or propensity evidence was that it must have strong probative value in relation to the offence charged and that the probative value must transcend the prejudicial effect of the evidence.⁹ In *Pfennig*, Mason CJ, Deane and Dawson JJ set out the test for the admissibility of similar fact evidence:¹⁰

[The] basis for the admission of similar fact evidence lies in its possessing a particular probative value of cogency such that, if accepted, it bears no reasonable explanation other than the inculcation of the accused in the offence charged. In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged.

- 3.5 Their Honours quoted *Hoch v The Queen* (1988) 165 CLR 292 in which Mason CJ, Wilson and Gaudron JJ said:¹¹

Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of its admissibility is the strength of its probative force ... That strength lies in the fact that the evidence reveals 'striking similarities', 'unusual features', 'underlying unity', 'system' or 'pattern' such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.

- 3.6 Striking similarity is not required before similar fact evidence can meet the test, however the evidence may lack the necessary probative force in the absence of a striking similarity.¹²

- 3.7 The test for admissibility set out in *Pfennig* recognised that propensity and similar fact is a 'special class of circumstantial evidence' having 'prejudicial capacity of a high order'.¹³ Accordingly, the test for admissibility required the trial judge to apply the same test the jury had to apply when dealing with circumstantial evidence namely, 'whether there is a rational view of the evidence that is consistent with the

8. The test in *Pfennig* first appeared in *Hoch v The Queen* (1988) 165 CLR 292 which itself adopted the test set out by Dawson J in *Sutton v The Queen* at 563 and *Harriman v The Queen* at 602.

9. *Sutton v The Queen*; *Perry v The Queen* (1982) 150 CLR 580 and *Harriman v The Queen* (1989) 167 CLR 590; and see *Pfennig v The Queen* at 477.

10. *Pfennig v The Queen* at 481, citing *Hoch v The Queen* at 294.

11. *Pfennig v The Queen* at 482, citing *Hoch* at 294.

12. *Pfennig v The Queen* at 484.

13. *Pfennig v The Queen* at 482-3.

innocence of the accused'.¹⁴ Only when the evidence met that test could it be said that the probative value of the evidence outweighed its prejudicial effect.¹⁵

- 3.8 The test for admissibility was derived from *Hoch* which considered similar fact evidence not propensity evidence.¹⁶ In *Pfennig* their Honours noted that similar fact evidence is different to propensity evidence:¹⁷

There has been a tendency to treat evidence of similar facts, past criminal conduct and propensity as if they raise the same considerations in terms of admission into evidence. The difficulty is that their probative value varies not only as between themselves but also in relation to the circumstances of particular cases. Thus, evidence of mere propensity, like a general criminal disposition having no identifiable hallmark, lacks cogency yet is prejudicial. On the other hand, evidence of a particular distinctive propensity demonstrated by acts constituting particular manifestations or exemplifications of it will have greater cogency, so long as it has some specific connexion with or relation to the issues for decision in the subject case.

- 3.9 These observations remain pertinent to the admissibility of tendency and coincidence evidence under the Evidence Acts.

- 3.10 The earlier case of *Hoch* considered the admissibility of similar fact evidence in circumstances where the occurrence of the similar acts was in dispute and there was evidence of concoction. The value of the evidence in this circumstance 'lies in the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred.'¹⁸ However, if there is a possibility (not a probability or a real chance) of concoction the evidence is rendered inadmissible.¹⁹

- 3.11 The relevance of the similar fact evidence in multiple complaint trials is two fold: first, to corroborate the evidence given by the other complainants; second, to serve as circumstantial evidence of the happening of the event or events in issue.²⁰ The evidence has probative value for both of these functions only if there is no reasonable explanation consistent with the innocence of the accused.²¹ Where there is a possibility of concoction, there is another rational view of the evidence which is inconsistent with the guilt of the accused and the improbability of the complainants' having concocted similar lies.²² The evidence of concoction 'thus

14. *Pfennig v The Queen* at 483.

15. *Pfennig v The Queen* at 483.

16. *Pfennig v The Queen* at 483.

17. *Pfennig v The Queen* at 483.

18. *Hoch v The Queen* at 295.

19. *Hoch v The Queen* at 296.

20. *Hoch v The Queen* at 296.

21. *Hoch v The Queen* at 296.

22. *Hoch v The Queen* at 296.

destroys the probative value of the evidence which is a condition precedent to its admissibility.²³

- 3.12 The decision in *Phillips v The Queen* (2006) 225 CLR 303 refocused attention on identifying the relevance of the similar fact evidence in the proceedings. The accused was tried on six counts of rape and other offences arising from separate incidents involving six complainants. The primary fact in issue was consent although there were other subsidiary issues. At the trial the judge instructed the jury that the evidence of one complainant could be used in relation to the counts involving other complainants on the issue of the reliability of the evidence of each complainant that she did not consent to the accused's conduct. The case is a good example of the importance of closely analysing the facts in issue in the proceedings and the purpose for which the evidence will be used.
- 3.13 The similar fact evidence could have no probative value as to whether one of the other complainants consented and was therefore irrelevant.²⁴ The Court emphasised that similar fact evidence (and propensity evidence) is used to assist on issues relating to the conduct of an accused not a complainant.²⁵ The narrow purpose for which the evidence was admitted also limited the probative value of the evidence while leaving open the risk of the evidence having a prejudicial effect on issues other than consent.²⁶
- 3.14 Additional comments were made regarding the similarities said to exist between the acts. The asserted similarities were not 'striking' and were 'entirely unremarkable' in the context of the facts of that case:²⁷

That a male teenager might seek sexual activity with girls about his own age with whom he was acquainted, and seek it consensually in the first instance, is not particularly probative. Nor is the appellant's desire for oral sex, his approaches to the complainants on social occasions and after some of them had ingested alcohol or other drugs, his engineering of opportunities for them to be alone with him, and the different degrees of violence he employed in some instances.

- 3.15 Guidance on the application of the *Pfennig* test was also given. First, the test must be applied by viewing the similar fact evidence in the context of the prosecution case. Second, the test must be applied on certain assumptions: that the similar fact evidence is true and that the prosecution case may be accepted. The test requires the judge to exclude the evidence if, viewed in that context and on those

23. *Hoch v The Queen* at 296.

24. *Phillips v The Queen* at [47], [50].

25. *Phillips v The Queen* at [46].

26. *Phillips v The Queen* at [45].

27. *Phillips v The Queen* at [56].

assumptions, there is a reasonable view of the similar fact evidence which is consistent with innocence.²⁸ However, the similar fact evidence standing alone need not demonstrate the guilt of the accused for the offences charged.²⁹

3.16 Their Honours final comments also remain apt in all jurisdictions:³⁰

Criminal trials in this country are ordinarily focussed with high particularity on specified offences. They are not, as such, a trial of the accused's character or propensity towards criminal conduct. That is why, in order to permit the admission of evidence relevant to several different offences, the common law requires a high threshold to be passed. The evidence must possess particular probative qualities; a strong degree of probative force; a really material bearing on the issues to be decided. That threshold was not met in this case. It was therefore necessary that the allegations, formulated in the charges brought against the appellant, be separately considered by different juries, uncontaminated by knowledge of other complaints. ... No other outcome would be compatible with the fair trial of the appellant.

3.17 The *Pfennig* test appears to set a higher threshold for the admissibility of propensity and similar fact evidence compared to the Acts currently in force everywhere but Queensland, namely the strong or substantial probative force of the evidence must outweigh its prejudicial effect. However, the threshold in *Pfennig* must also be seen in light of the circumstances in which it is applied, namely on an assumption that the propensity or similar fact evidence will be accepted and in the context of the whole of the prosecution case (accepting that the prosecution case without the similar fact evidence might not remove all reasonable doubt). When the test in *Pfennig* is applied to propensity or similar fact evidence in child sexual assault cases, and in particular to other unproven acts, the context and assumptions upon which that determination is made mean that such evidence will rarely be inadmissible. So much was accepted in *HML v The Queen* (2008) 235 CLR 334.³¹ Unfortunately the decision in *HML* failed to clarify the complexities of the law regarding the admissibility of propensity or similar fact evidence and served to further confuse the application of the test for admissibility.

3.18 *HML* considered the admissibility of 'uncharged' acts in child sexual assault cases. A number of significant questions were raised by the appeal, including:

- Whether the test in *Pfennig* applied to evidence that happened to show a propensity but was not used for that purpose;

28. *Phillips v The Queen* at [63].

29. *Phillips v The Queen* at [63].

30. *Phillips v The Queen* at [79].

31. *HML v The Queen* per Gleeson CJ at [27], Hayne J at [118] and [171], Kiefel J at [510].

- Whether, and in what circumstances, relationship evidence had to satisfy the test in *Pfennig*; and
- Whether the uncharged acts had to be established beyond reasonable doubt before the jury could take them into account in reasoning towards guilt.

3.19 *HML* notoriously resulted in seven different judgments and a lack of clear majority on key issues. Nevertheless, an analysis draws out some useful considerations that can be taken into account in all cases.

3.20 The Court divided on the question of whether relationship evidence (in this context, the sort of evidence that is also called ‘guilty passion’ or ‘motive’ evidence) had to pass the *Pfennig* test to be admitted as evidence regardless of the purpose for which it was tendered. The distinction was drawn between context evidence, relationship evidence showing a sexual interest in the complainant (i.e. motive) and relationship evidence showing a propensity to act on a sexual interest in the complainant.³²

3.21 Hayne J (Gummow J and Kirby J agreeing) said that any evidence which discloses the commission of criminal acts not charged in the indictment must pass the test in *Pfennig* before it can be admitted regardless of the use for which the evidence is proffered.³³

3.22 Gleeson CJ held that the *Pfennig* test does not apply to all evidence which reveals the commission of criminal offences.³⁴ The admissibility of ‘context’ evidence was dependent on its probative value outweighing its prejudicial effect.³⁵ The test in *Pfennig* applies where the evidence is used as evidence of motive i.e. a particular propensity involved in a sexual interests of a parent in a child (aka ‘guilty passion’).³⁶ Where the evidence is relied upon to provide context or a relationship but not motive or propensity, it will be necessary to warn the jury against employing the latter reasoning.³⁷

3.23 Crennan J was of the view that the test in *Pfennig* did not apply to evidence led for a purpose other than to establish a propensity.³⁸ While her Honour appeared to

32. See for example Gleeson CJ at [6], [7].
 33. *HML v The Queen* at [106], [114]-[116].
 34. *HML v The Queen* at [24].
 35. *HML v The Queen* at [24].
 36. *HML v The Queen* at [26].
 37. *HML v The Queen* at [26].
 38. *HML v The Queen* at [455].

imply that a higher threshold of probative value was required to be met,³⁹ she ultimately concluded that the threshold did not need to be met in this case.⁴⁰

- 3.24 Kiefel J was of the view that the use of relationship evidence or context evidence may not involve tendency reasoning and if it is not tendered for a tendency purpose then the test in *Pfennig* need not apply.⁴¹ However, if it is tendered for both purposes, the test in *Pfennig* must be satisfied.⁴²
- 3.25 Heydon J found it unnecessary to decide whether the admissibility of relationship or context evidence regardless of its use was to be determined by the test in *Pfennig* as he was of the view it was admissible as propensity evidence applying the *Pfennig* test.⁴³
- 3.26 The Court also divided as to whether the uncharged acts had to be proved beyond reasonable doubt before they could be taken into account by the jury. Hayne, Gummow and Kirby JJ all thought the acts had to be proved beyond reasonable doubt before they could be used in any way.⁴⁴ Gleeson CJ held that the uncharged acts need not be proved beyond reasonable doubt however it may be necessary to so direct the jury if the acts are an indispensable link in the reasoning towards guilt.⁴⁵ In child sexual assault cases, this distinction is likely to make little difference, as tendency and coincidence reasoning is often essential to the Crown case.
- 3.27 The more recent decision in *BBH v The Queen* (2012) 245 CLR 499 also consists of divergent reasons. The case involved questions of the admissibility of evidence of a complainant's brother that on a camping trip he witnessed the complainant undressed and bending down in front of the accused and the accused had his hand on her waist and his face close to her bottom. The complainant did not remember the incident. In cross-examination the witness proffered an innocent explanation of the incident which he had thought up after the event (that the accused might have been looking for a bee sting or ant bite). However, the accused denied it took place at all. The evidence was admitted at trial as evidence tending to show guilty passion or sexual interest by the accused for the complainant. By majority the High Court held that the evidence was admissible as propensity evidence as there was no rational view of the evidence that was consistent with the accused's innocence.

39. *HML v The Queen* at [466].

40. *HML v The Queen* at [467].

41. *HML v The Queen* at [503].

42. *HML v The Queen* at [503].

43. *HML v The Queen* at [335].

44. *HML v The Queen* at [339].

45. *HML v The Queen* at [30]-[32]; see also per Crennan J at [477] and Kiefel J at [506].

3.28 Heydon J rejected the argument that the evidence was not relevant, on the basis that challenges to the truthfulness of the testimony do not affect relevance.⁴⁶ His Honour concluded that the evidence, if accepted, did have the capacity to support a finding beyond reasonable doubt that the applicant had either committed an offence of a sexual nature or carried out conduct revealing his sexual passion for the complainant.⁴⁷ The evidence was not admissible unless it satisfied the *Pfennig* test but his Honour considered that the test was satisfied.⁴⁸

3.29 Crennan and Kiefel JJ said:⁴⁹

It should be accepted, in cases of this kind, that a finding of a sexual interest held by an accused father towards his daughter is evidence of the accused's motive or propensity to engage in sexual acts with the daughter, and it might be employed by a jury in propensity reasoning towards guilt. In such a case as this little, if any, distinction may be drawn between motive and propensity. Where sexual interest is demonstrated, the test in *Pfennig* is attracted.

3.30 This has been held, in the Uniform Evidence Act jurisdictions, to generally be the case in relation to a sexual interest in a particular child, but not necessarily in the case of a general sexual interest in (for example) a class of adults. Their Honours also held:⁵⁰

Pfennig applies to evidence of propensity. The strong probative force spoken of in *Pfennig* in connection with propensity evidence is its force as propensity evidence and in propensity reasoning. *Pfennig* is not directed to the question whether evidence is probative of propensity....

When a finding of fact is made that an accused has a sexual interest in a complainant who is his daughter, propensity is thereby demonstrated. However, the fact of propensity inheres in the finding of sexual interest, not each piece of evidence which supports it. The test in *Pfennig* may therefore not apply to the evidence.

3.31 Crennan and Kiefel JJ found that the evidence satisfied the test in *Pfennig* but went on to imply that it was not necessary for the evidence to satisfy that test.

3.32 Bell J said that the evidence in question was adduced to prove that the accused possessed a particular propensity, i.e. an unnatural sexual interest in the complainant and a tendency to act upon that interest.⁵¹ Her Honour said that '[t]he suggested character of the camping incident as equivocal is pertinent to the determination of admissibility under the *Pfennig* test, but it does not deprive the

46. *BBH v The Queen* at [99]-[101].

47. *BBH v The Queen* at [104].

48. *BBH v The Queen* at [106], [108].

49. *BBH v The Queen* at [153].

50. *BBH v The Queen* at [164], [167].

51. *BBH v The Queen* at [172].

evidence of its relevance'.⁵² Her Honour found that the evidence was relevant, and that it was required to satisfy the *Pfennig* test.⁵³ She concluded:⁵⁴

the reasonableness of the inferences to be drawn from the camping incident involves the assessment of probabilities... In light of the whole of the evidence, a possible explanation may cease to be a rational one.... It may involve, as Crennan and Kiefel JJ explain, a legitimate consideration of the improbability of events occurring by coincidence.

- 3.33 Some of the divergence in approaches in *HML* and *BBH* are reminiscent of the current division between NSW and Victoria in the interpretation of the Uniform Act. The divergence relates to whether or not, in order to assess probative value for the purpose of the balancing exercise, the court should consider the evidence at its highest and leave all questions of reliability to the jury.
- 3.34 Without purporting to resolve so many divergent High Court opinions, the following useful logical considerations can be derived from the facts and observations in *HML* and *BBH*:
- 3.35 As with any test for admissibility, relevance is always the anterior question. However, the considerations applicable to probative value and relevance invariably overlap and inform one another. Therefore, as the nature of the tendency or coincidence evidence is being considered and refined (in particular, as will happen as the balancing between probative value and prejudicial effect is conducted in the statutory jurisdictions) questions of relevance should remain live and be revisited throughout. Even where the evidence is to be taken at its highest and not considered for reliability, the logical inferences the evidence can bear will be shaped by other evidence in the case, and so relevance remains a live and ongoing question.
- 3.36 The assessment of relevance, probative value and possible prejudicial effect does not take place in a vacuum; assessment must take place by reference to the rest of the available evidence. As with (1), this is so even where the evidence is taken at its highest. In such cases, even if other evidence is not consulted for reliability purposes, that other evidence may reveal that the relevant fact is no longer in issue or is of such peripheral significance that the probative value, at its highest, could not outweigh the prejudicial effect. This does not mean that all of the evidence which would tend to support the existence of the tendency or non-existence of the coincidence (because it is otherwise consistent with guilt) is itself required to pass the tests of admissibility for tendency or coincidence evidence. However, where the tendency or coincidence is required to be proved beyond reasonable doubt (as is

52. *BBH v The Queen* at [196].

53. *BBH v The Queen* at [197].

54. *BBH v The Queen* at [199].

generally the case in historic child sexual assault trials), any facts essential to that finding must be so proved.

- 3.37 Categorising evidence (i.e. relationship, guilty passion, etc.) is helpful for understanding the logical reasoning processes that give the evidence its probative value. However, categories are not ultimately determinative of admissibility status independent of the underlying reasoning. Boundary lines between categories are ever changing and fact specific, therefore a full logic analysis will often reveal possible use in multiple categories. Admissibility must therefore be determined by reference to all of the possible reasoning processes that the evidence gives rise to, both logical (valid) and illogical (invalid), in order to determine: (1) relevance, (2) probative value and (3) possible prejudicial effect.

B Tendency and coincidence in historic child sexual assault trials: Logical underpinning and recommended practice

4 Tendency and coincidence reasoning

- 4.1 Tendency and coincidence evidence is not a single, intellectual discipline. Different logical techniques need to be employed to look at the various types of reasoning from evidence that can fall within the tendency and coincidence umbrella. Indeed, prior to *R v Boardman* [1975] AC 421, the common law treated ‘propensity’ evidence as a series of separate evidentiary problems; i.e. cases about an accidents, cases about signature modus operandi, cases about ongoing relationships, cases involving corroboration, etc. Thus, even though the Evidence Acts and recent common law wrap up (to varying degrees) ‘tendency or propensity and/or relationship’ and ‘coincidence or similar fact’ evidence, within each category very different logical reasoning processes may be involved from one case to another. That said, certain reasoning patterns can be identified within each overarching category.
- 4.2 An assessment of what the evidence directly proves, what inferences can be drawn from it, and the way it can be used to reason towards guilt will assist in identifying the purpose for which the evidence is to be admitted and what test for admissibility it must pass. Such an assessment will also assist in assessing its probative value, prejudicial effect and the logical limits of the evidence,⁵⁵ and inform the directions to be given to the jury in relation to the evidence.

Tendency reasoning

- 4.3 In *Elomar v R*,⁵⁶ the NSW Court of Criminal Appeal (comprised of Bathurst CJ, Hoeben CJ at CL and Simpson J) recently explained:

Tendency evidence is evidence that provides the foundation for an inference. The inference is that, because the person had the relevant tendency, it is more likely that he or she acted in the way asserted by the tendering party, or had the state of mind asserted by the tendering party on an occasion the subject of the proceedings. Tendency evidence is a stepping stone. It is indirect evidence. It allows for a form of syllogistic reasoning ... Tendency evidence is a means of proving, by a process of deduction, that a person acted in a particular way, or had a particular state of mind, on a relevant occasion, when there is no, or inadequate, direct evidence of that conduct or that state of mind on that occasion.

55. *Phillips v The Queen* at [26], *Perry v The Queen* at 609, *Sutton v The Queen* at 549

56. *Elomar v R* (2014) 316 ALR 206 at [359]-[360].

4.4 Earlier, Simpson J in *Gardiner v R*⁵⁷ had also explained that:

Underlying s 97 [the Uniform Acts tendency provision] is an unstated but obvious premise. That is that proving that a person has a tendency to act in a particular way or to have a particular state of mind in some way bears upon the probability of the existence of a fact in issue. The fact in issue is the conduct, or state of mind, on a particular occasion relevant to the issues in the proceedings, of the person whose tendency is the subject of the evidence tendered. That is, evidence that a person has or had a tendency to act in a particular way or to have a particular state of mind is not tendered in a vacuum. It is tendered for the purpose of further proving (or contributing to proving) that, on a particular occasion, that person acted in that way or had that state of mind. Proof of the tendency is no more than a step on the way to proving (usually by inference) that the person acted in that way, or had that state of mind, on the relevant occasion.

4.5 The reasoning process anterior to questions of admissibility associated with any individual ‘tendency evidence’ can be broken down into four steps, each of which must have rational foundation in order to satisfy basic relevance (that is, before it is possible to whether the probative value is strong or substantial, and before asking what the prejudicial effect will be, it must be established that the reasoning process behind the evidence is in fact logical). These steps are:

4.6 **First, should the evidence which will be said to give rise to the tendency be accepted?** The jury may reason from either ‘end’ of these four steps; if they consider that the alleged tendency, if proved, is not probative of a fact in issue (step (4)), they don’t need to concern themselves with whether or not the evidence is proved (if it was only relevant to the tendency). However, there is a risk that by not commencing with this step (or at least, by not remembering where in the reasoning chain it comes), the alleged tendency will be used to prove the evidence upon which it depends (as for example may have occurred in *Doyle*, discussed immediately below this list).

4.7 **Second, one must ask what tendencies the evidence can bear. Does the evidence prove the alleged tendency/ies?** For example, could multiple instances of a priest taking great interest in a group of alter boys when undressing (the evidence) give rise to a legitimate inference that the accused has a tendency to be sexually interested in one or more members of that group; in alter boys; in boys of that age; or a tendency to assault alter boys (the relevant tendency)?

4.8 The fact of mere presence (for example) could never be enough to found a sexual interest tendency, but details about the individual instances of presence (whether it was unnecessary, organised by the accused, accompanied by unnecessary proximity, etc) will inform which, if any of the possible tendencies, the evidence

57. *Gardiner v R* (2006) 162 A Crim R 233 at [124], and see *R v Cittadini* [2008] NSWCCA 256 at [21].

could give rise to. However, presence while changing, could never, on any view, give rise to a tendency to assault alter boys. This is not to say that the tendency to have a sexual interest in alter boys may not provide the foundation for an inference that the accused had the motivation to sexually assault a particular boy on a particular occasion (reasoning step 3).

4.9 **Third, one must ask what inference(s) the tendency can bear. What does the tendency make more likely?** For example, would a tendency of the accused to have a sexual interest in alter boys support the inference that the accused had a motive to sexually assault a particular complainant on a particular occasion? In this example, the tendency is to have a particular state of mind, which would give rise to an inference that there was a motive to commit the act. It does not give rise directly to an inference that the act was committed. Alternatively, an established tendency to engage in sexual acts with alter boys, may give rise to an inference that the alleged act was committed.

4.10 **Fourth, is/are the inference(s) available from the tendency probative of a fact in issue?** Steps three and four are usefully divided (rather than asking simply where the tendency gives rise to a probative inference) for two reasons. First, because the inference the tendency gives rise to may be to an element of the offence that, after the defence case becomes apparent, is no longer in issue (this will affect the balancing exercise undertaken when considering admissibility). Second, because there may be multiple tendencies available on the evidence and/or multiple inferences available from the tendency/ies, some of which will, and some of which will not be, probative of a fact in issue. This basic relevance test (step four) is less likely to be a source of confusion in child sexual assault trials where the tendency alleged involves sexual interest or acts giving rise to inferences that are almost certainly to be relevant to facts in issue, than it is in trials for sexual assaults committed against adults where the sexual act or interest is not in issue. Thus, in *Phillips v The Queen* it was overlooked that the fact in issue was consent, and proof of the fact of a complainant's lack of consent could not be assisted by the tendency or improbability that emerged from assaults of other women.

4.11 Although these seem obvious and therefore unproblematic steps in tendency reasoning, the case law reveals that they can be problematic when overlooked or the subject of assumption. Deliberately working through this preliminary reasoning process is a useful discipline in order to identify and avoid potential logical fallacies.

4.12 For example, the tendency notice in *Doyle v R* [2014] NSWCCA 4 particularized tendencies to act in a particular way or have a particular state of mind, namely to:

- (1) have a sexual interest in young male employees,
- (2) to engage in sexual activities with young male employees; and

(3) to use his position of authority to obtain access to young male employees so that he could engage in sexual activity with them.

4.13 In *Doyle*, activities said to evince the ‘proclivity’ of the accused were then listed in the tendency notice as demonstrating these tendencies, some of which, if accepted by the jury, may have been capable on their own of demonstrating such tendencies, and others which were not. For example: ‘to touch young male employees on the genitals’ was capable of demonstrating such tendencies. However, ‘to be alone with young male employees in a cinema [in which the accused and complainants worked]’, to ‘engage young male employees to undertake work beyond their employment at the cinema’, ‘giving gifts to young male employees’ and driving young male employees home alone in his car, were not capable, without being considered together with evidence of sexual acts, of evidencing such tendencies.

4.14 The jury were told that in deciding whether the alleged act said to give rise to the alleged tendency took place (step one), they should not look at the acts in isolation but consider all the evidence to determine if the acts took place. Critically, there appears to have been a failure to guard against the risk that the jury would understand this to mean that tendency reasoning could be adopted from the alleged acts – essentially from their number and similarities – before any one of those acts was proved beyond reasonable doubt. That is, that the tendency revealed in the other (unproven) acts made it more likely that the particular act took place. (Such reasoning may have been available as coincidence reasoning – but critically no coincidence notice was given. As to this see [4.22].)

4.15 ‘There is no doubt that to the extent reliance [is] placed on uncharged sexual conduct in establishing the tendency, that conduct [has] to be proved beyond reasonable doubt’.⁵⁸ There is no relevant difference between charged and uncharged acts in this context; both are ‘unproven’. The fact that acts have been charged does not relieve the burden of requiring that they be proved beyond reasonable doubt before any tendency to which they give rise can be used in respect of other charges.

4.16 It is uncontroversial that an allegation must not prove itself. There must be a foundation – a starting point – that does not presume the truth of the allegation (otherwise, there is a reversal of the onus of proof). In *Sutton*, Brennan J described it as ‘a canon of logic, rather than of law, that one cannot prove a fact by a chain of reasoning which assumes the truth of that fact.’⁵⁹ See also the type of logical fallacy

58. *Doyle v R* at [129] citing *HML v The Queen* at [41], [46] and [196] and *DJV v R* [2008] NSWCCA 272 at [19] and [30].

59. *Sutton v The Queen* at 532.

discussed in *R v Gale; R v Duckworth* [2012] NSWCCA 174 at [37]-[38] (albeit in that instance relating to coincidence reasoning).

- 4.17 In *Doyle*, it would have been permissible to look at all of the evidence surrounding the first considered alleged act to determine if it took place, but, in the absence of legitimate coincidence reasoning (which, by reason of the lack of notice, was not available), before any one act which could give rise to tendency reasoning had been proved, it was not permissible to look to other unproven alleged acts that were not necessary to the context of the first considered act (and in particular, acts against other complainants) to determine whether the first considered act was proved. To say otherwise allows the multiplicity of unproven allegations to be probative of guilt, or else permits coincidence reasoning without notice. Where allegations come independently from different complainants, a probative improbability does arise – however this is coincidence reasoning subject to its own notice requirements and rules of admissibility. When allegations come from the same complainant, the mere fact that multiple complaints are made says nothing probative. Once one or more of the instances are proved, however, a probative (indeed, very highly probative) tendency may begin to emerge in respect of such acts against that complainant. Similarly, depending on the nature and circumstances of the acts proved, they may give rise to a highly probative tendency in relation to acts alleged against other complainants.
- 4.18 There is a necessary sequence to the use of tendency evidence. Once there is an independent basis for the tendency, that may be taken into account when considering a subsequent act or charge which itself increases the strength and probative value of the tendency. However, the building up of the tendency cannot start from an assumption that the unproven evidence as a whole gives rise to the alleged tendency; this is circular and illogical.
- 4.19 The tendency ‘sequence’ does not need to be temporal; i.e. a tendency demonstrated by a proven act later in time may make it more likely that the tendency was present at the time an act alleged earlier in time occurred; although there is obviously a greater inference available when the tendency can be demonstrated to have existed earlier in time than the act to be proved. The critical issue is that, in contrast with coincidence evidence, the relevance of tendency evidence cannot emerge out of the facts of the allegations themselves. It emerges out of the proof of an action or state of mind of the accused at another time, which suggests a tendency on the part of that accused, which, if present at the time of the alleged offence, would be probative of guilt.
- 4.20 In *Doyle* (in which only tendency was relied upon and therefore s 95 prohibited coincidence reasoning), the jury should have been instructed (in lay terms) that they could look only to the evidence surrounding the first alleged act they considered in order to determine if it took place, and that, if they found that act proved beyond

reasonable doubt having regard to the evidence, they could, when they came to consider the next act(s), ask whether the first proved act could support a tendency that was probative of the next act(s), and so on. The strength of the tendency reasoning could increase the more acts they considered proved. It would also have been permissible for the Crown to invite the jury to consider first the alleged act which the Crown considered was most supported by the evidence without the alleged tendency, or to invite a particular chain of reasoning which built sequential evidence for the alleged tendency in the strongest and most effective way.

- 4.21 The trial judge's summing up in *Doyle* also suggested that the jury could find the tendency proved if it accepted any one of the activities said to evidence the 'proclivity', including those that had no sexual content and which appellant conceded (such as driving the employees home alone or being alone with them at the cinema). This failed at the second stage of reasoning: those facts, if accepted, could not independently, bear any of the alleged tendencies (although, taken together, they were capable of probative value in proving the tendency).
- 4.22 The evidence in *Doyle* was not sought to be admitted as coincidence evidence, and no notice was given; however, it was effectively put as coincidence evidence in the closing address of the prosecutor. It arguably had strong probative value as coincidence evidence and should have been the subject of a notice.

Coincidence reasoning

- 4.23 Coincidence evidence may arise out of the very same circumstances as tendency evidence, however its use as coincidence evidence is quite different. In most multiple complainant child sexual assault cases, it will be the similarity in the complaints that gives the evidence its probative value. It is the improbability that two complainants reported similar facts or in similar circumstances (in the absence of concoction) that tends to support an inference of guilt in both instances.
- 4.24 Coincidence evidence is evidence of two or more events that is tendered for the purpose of showing that it is improbable that the events occurred coincidentally having regard to the similarities of the events or the circumstances in which they occurred, where this improbability is probative of whether a person did a particular act or had a particular state of mind. The process of reasoning is dependent on the similarity of the events (tendency evidence may be bolstered by, but does not require, similarity).
- 4.25 Coincidence reasoning involves the following steps, prior to considerations of specific rules of admissibility.
- 4.26 **First, is there a similarity in events such that it appears improbable that the events occurred by coincidence?** Coincidence reasoning rarely works in the case

of a single complainant. There is no improbability in a single complainant making more than one complaint against an accused that makes a coincidence unlikely; the mere fact of a number of allegations cannot make any one of those allegations more likely.

- 4.27 **Second, does the similarity only exist if the accused is found guilty? That is, does the reasoning involve circularity?** Generally speaking, the relevant similarity in historic child sexual assault cases with multiple complainants is not the similarity between the charged acts per se. This would reverse the onus of proof by assuming the truth of the allegations. Coincidence reasoning in child sexual assault cases generally works by asking how likely it is that two independent individuals would make similar complaints about a person if their complaints were not true. The events of the complaints are the probative similarities. Therefore, the coincidence reasoning is not presuming the existence of the thing that gives it its probative value. The fact that a complainant made a complaint will generally not be in issue, although if it is in issue, the fact of complaint can be proved without proving the truth of the allegation (therefore, the reasoning does not depend upon the proof of the allegation).
- 4.28 For example, if a boy walks out of a particular classroom and says, ‘the teacher touched my bottom’, and later a different boy walks out of the same classroom and says ‘the teacher touched my bottom’, the coincidence to be disproved is not that the teacher in that classroom touched both boys inappropriately (this assumes the truth of what is sought to be proved); the coincidence is that both boys made complaints about being touched on the ‘bottom’ by the teacher in that particular classroom. This coincidence reasoning, in this example derived from the evidence of the circumstances and content of each complaint, is then used to bolster the credibility of the complainants and make their accounts more probable.
- 4.29 **Third, what inference can the improbability bear?** Where other inferences are available on the evidence, these must be taken into account in assessing the probative value of the evidence, as such other inferences can set the bounds of what the evidence can be capable of proving. Generally, in child sexual assault cases with multiple complainants, the coincidence evidence will be the similarity in the complaints. The obvious inference is that the complaints are therefore true.
- 4.30 The real possibility of collaboration or contamination also operates at this preliminary reasoning step, before any consideration of significant probative value or prejudicial effect. If there is a real possibility of contamination, the ‘improbability’ does not bear much of an inference at all.
- 4.31 **Fourth, is the inference probative of a fact in issue?** This will generally be a given in child sexual assault trials where the inference from improbability is said to be the truth of the complaints.

4.32 How the tendency or coincidence evidence is defined in a given case (that is, the reasoning process that the jury will be invited to adopt, implicitly or explicitly in accordance with the steps set out above) will have significant impacts upon the probative value of the evidence (and therefore its admissibility and use). For example, evidence sought to be adduced may be highly probative of a tendency to have a sexual interest but not highly probative of a tendency to act on that interest. In such an instance, it may be preferable to rely on the tendency to have a sexual interest only, and to use that tendency as a motive for the alleged act(s). The specificity of a tendency may also affect its probative value. A tendency of the kind suggested in *HML*, being a tendency to have a certain sexual interest and possibly to act on that interest, is much less probative of a specifically alleged act than a tendency to, for example, commit a particular type of assault in a particular place or way, or to use a particular turn of phrase when doing so.⁶⁰ Similarly, tendency to have a sexual interest (evidenced, for example, by the possession of child pornography, or by the circumstances surrounding the commission of the offences) has lower probative value in relation to an alleged assault, than a tendency to act on such an interest, such as a particular tendency have a sexual interest in child parishioners and to act on it, in recent years, in the confessional, which is what is presently alleged. Obviously practitioners are constrained by the evidence as it presents itself; nevertheless careful thought as to how precise the tendency can be framed may improve its overall efficacy (this is not the same thing as listing every similarity between two alleged incidents in a *tendency* notice; often, this practice reveals a failure to properly understand the evidence).

60. This does not mean that the more generally framed tendency will not be admissible, just that increased degrees of particularity are likely to increase the probative value. We note here an issue that may be of interest to the Commission and could be given further consideration in due course if required. It may be that empirical evidence that supports the probative value of a general sexual interest in children, or of different kinds of sexual activity with children than that alleged, could be sought to be put before the Court on the voir dire; cf A Cossins, 'The Behaviour of Serial Child Sex Offenders: Implications for the Prosecution of Child Sex Offences in Joint Trials' (2011) 35 *Melbourne University Law Review* 821. However, the probative value of the empirical evidence must itself be scrutinized in accordance with the requisite standards of proof. For example, proof of various crossover behavior by a particular accused (i.e. targeting both genders, different ages, or inter- and extra- family victims), aside from the alleged act(s), may have the requisite probative value if empirical evidence can demonstrate that there is an overwhelming correlation between crossover behavior and recidivism: cf Cossins *ibid* p 840. In other words, the empirical evidence may demonstrate that the prejudicial inference is legitimate and so not unfair. On the other hand, query to what extent empirical evidence that suggests that a significant minority or even majority (i.e. 'between one fifth and two thirds') of child sex offenders engage in crossover behaviours is capable of making specific behavior targeting a victim of a wholly different class of that the subject of current charges, probative to a requisite degree: cf Cossins *ibid* p 840. Indeed, if this suggests that one-third to four fifths do not engage in such behaviours, the probative value of evidence of assaulting a child of a wholly different class as supportive of a tendency or coincidence is decimated.

5 Relevance and probative value

5.1 The above steps explain how tendency and coincidence reasoning logically works; however, for the purposes of admissibility, that reasoning must be subjected to tests of relevance and probative value which are conducted by reference to the whole of the Crown case. The process of assessing relevance may also reveal that the evidence sought to be put to the court is not for the purpose of tendency or coincidence reasoning at all, but establishes the context or relationship necessary to fairly assess the complainant's evidence.

Discreditable conduct generally

5.2 Where there is evidence of the accused's misconduct available to the prosecution which is not the subject of charges or the prosecution seeks to have evidence relating to one charge taken into account on another charge, the first question which must be asked is whether the evidence is relevant.⁶¹ It may be relevant for a tendency or coincidence, or other, purpose.

5.3 The test for relevance 'depends upon whether the evidence could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings'.⁶² The relevance of the evidence will depend on identification and analysis of the following:

- the facts in issue in the proceedings (for example, whether the acts constituting the offence occurred);
- the circumstances which bear upon the existence of a fact in issue (for example, an assessment of the complainant's credibility or the likelihood of the accused committing the acts); and
- the process of reasoning by which the information could rationally affect the assessment of probabilities of the existence of a fact in issue⁶³ (for example, tendency or coincidence reasoning).

5.4 In determining the relevance of the evidence consideration must first be given to what direct facts are established by the evidence. Proof of the fact of prior misconduct will rarely be relevant to the existence of a fact in issue of itself (where

61. *Perry v The Queen* at 609; *Phillips v The Queen* at [26] and *HML v The Queen* at [155].

62. *Washer v Western Australia* (2007) 243 CLR 492 at [5] per Gleeson CJ and s 55 of the Uniform Evidence Acts; see also *Roach v The Queen* (2011) 242 CLR 610 at [12] and *HML v The Queen* at [4]-[11]. The Uniform Acts test is technically a lower threshold, because it demands only *logical* relevance, not *legal* relevance; however the same effect of demanding legal relevance is achieved through the remaining admissibility provisions in the Uniform Evidence Acts, in particular as relate to probative value and unfair prejudicial effect.

63. *Washer v Western Australia* at [5].

they are, they are exempted from the tendency and coincidence admissibility requirements). Its relevance and probative value will depend upon the inferences to be drawn from such evidence, for example, an inference that the accused had a tendency to behave in a particular way or an inference that the accused had a sexual interest in the complainant such as to provide a motive for the offence. Coincidence reasoning also relies upon drawing an inference, namely an inference of improbability. Context evidence does not necessarily rely on the drawing of an inference but rather displacing an inference adverse to the complainant from being drawn (for example, to explain why immediate complaint was not made). It will also be necessary to point to the features of the evidence which give rise to the particular inference sought to be drawn or the use for which the evidence is tendered.

- 5.5 The reliability of the evidence in the context of the prosecution case is an important consideration in determining its relevance and probative value both in its capacity to support the inference of tendency or coincidence and in reasoning towards guilt. By reliability we do not mean credibility. Nor do we mean questions as to its truthfulness. These are properly questions for the jury. What we mean is whether the evidence is reliable in the sense that it can legitimately be relied upon in supporting the tendency or coincidence and the accused's guilt. It is well established that if a person maintains that they had already identified the accused before they saw the accused in Court, but then there was incontrovertible evidence that the identification in fact only took place after court, this necessarily crosses over from a dispute of fact into an assessment of the probative value the identification evidence is capable of bearing.⁶⁴ Similar examples can be posited in respect of child sexual assault cases, particularly relating to the possibility of contamination or suggestion.
- 5.6 If a complainant gives evidence of an uncharged act that he or she says definitely occurred on a particular day but independent evidence in the prosecution case proves that the accused was not in the same city as the complainant on that day, then that would bear on the reliability of the complainant's evidence of the uncharged act and should be taken into account in assessing its relevance and probative value. An assessment of the reliability of the evidence includes an assessment of not only the allegation but of other evidence in the prosecution case which may bear on it. However, there is one limitation. Where the evidence requires a further inference (or additional evidence) to be drawn before it can be considered tendency or coincidence evidence or before it is probative of guilt, that further inference cannot be supplied by the complainant's evidence of the allegations the subject of the charges.

64. See, eg *Alexander v The Queen* (1981) 145 CLR 395 at 399 per Gibbs CJ.

- 5.7 The evidence must be capable of sustaining the inference of tendency, improbability (or coincidence) or relationship or negating the inference in relation to ‘context evidence’. Each inference and the strength of each inference to be drawn from the evidence must be carefully analysed. In some cases, two competing inferences will be open on the evidence: one consistent with guilt, the other consistent with innocence. In other cases, there may only be one inference that can properly be drawn from the evidence but a further inference may be able to be drawn from combining that piece of evidence with another piece of evidence. In this latter case, care must be taken to avoid circular reasoning and not use the direct evidence of the offence as the additional piece of evidence supporting the inference.⁶⁵ For example, it is logically erroneous to draw an inference that the accused had a sexual interest in the complainant from a piece of evidence which itself discloses no sexual interest but only when combined with the direct evidence of the commission of the offences could be interpreted as disclosing a sexual interest.⁶⁶ However, if there are multiple complainants and the direct evidence of the commission of offences against one complainant is accepted, evidence relevant to that complainant that in the context of the commission of the offences reveals a sexual interest in the complainant (for example, non-sexual grooming behaviours) may give rise to a logical inference that the accused had a tendency to engage in grooming behaviour and/or that such behaviour is evidence of sexual interest.
- 5.8 Where other inferences are available on the evidence, these must be taken into account in assessing the probative value of the evidence.⁶⁷ Such other inferences set the bounds of what the evidence can be capable of proving. The alternative possible explanations for the evidence said to give rise to tendency or coincidence reasoning may, taken with other evidence, rob it of its capacity to significantly prove the Crown case.⁶⁸
- 5.9 There must also be a sufficient connection or nexus between the direct evidence of a particular offence and the evidence of the accused’s misconduct which is not the subject of a particular charge and/or the inference to be drawn from that evidence.⁶⁹
- 5.10 Child sexual assault trials can be separated into two broad categories: single complainant trials and multiple complainant trials. The nature of the trial has ramifications for the use of the evidence of the accused’s prior misconduct and assessing its probative value and prejudicial effect.

65. *Perry v The Queen* at 589-590 and *Sutton v The Queen* at 550.

66. cf. *BBH v The Queen*.

67. *DSJ v R; NS v R* (2012) 84 NSWLR 758 at [98] and [132].

68. *DSJ v R* at [132].

69. *Perry v The Queen* at 609, *Sutton v The Queen* at 548, *Pfennig v The Queen* at 483-485 and *Phillips v The Queen* at [54].

- 5.11 Single complainant trials are more amenable to the use of context evidence and relationship evidence and less amenable to coincidence evidence that arises only from the complainant. Evidence of multiple unproved incidents from a single complainant cannot provide coincidence evidence relevant to each of those incidents; there is nothing inherently coincidental in a complainant making multiple complaints. (This is not to say that coincidence reasoning from evidence other than unproven acts cannot be used to prove one or more of the allegations.) Multiple complainant trials are more likely to involve the use of coincidence reasoning; that is, to rely on the improbability of a number of complainants making similar allegations against the one person unless those allegations were true. Tendency reasoning may be available in both single and multiple complainant trials.
- 5.12 Evidence of an accused's misconduct may also take various forms. The evidence may be in the form of uncharged acts or offences which are not the subject of a charge on an indictment. The evidence may be direct evidence of one of the charges that the prosecution seeks to have taken into account as evidence on another charge. Or the evidence may disclose discreditable conduct which indicates a sexual interest in the complainant; for example, purchasing a G-string for the complainant or other evidence of grooming. The form of such evidence will have ramifications for assessing its probative value, as well as the directions to the jury.
- 5.13 In some respects, evidence of 'uncharged acts' presents less practical difficulties for admission and directions to the jury. This is because the evidence may establish a tendency on the part of the accused to behave or think in a particular way or give rise to coincidence reasoning independently of the evidence regarding the offences which are the subject of the indictment. Accordingly, its use does not as readily give rise to the risks associated with circular reasoning and using acts which are the subject of the charge to establish a tendency or coincidence to prove the charge itself.
- 5.14 Finally, the evidence may either be in the form of general allegations of the commission of similar offences against the complainant or it may be a more specific and detailed account of the commission of similar offences. Where the evidence is of a more general nature it will more likely fall within the category of 'relationship evidence' and its use by the jury will be limited. The more detailed the evidence regarding the uncharged acts the more amenable it is to tendency or coincidence reasoning.
- 5.15 Not all tendency and coincidence reasoning relies on discreditable conduct. For example, evidence may be led that an accused, while engaged in consensual, adult sexual conduct, tended to exhibit a particular and unusual patterns of behaviour which is similar to that reported by the complainant in a child sexual assault allegation.

Context or relationship evidence

5.16 Evidence disclosing uncharged acts generally will fall within one or more of the following broad categories, which we have called: ‘context’ evidence; ‘relationship’ evidence (or ‘guilty passion’); tendency evidence or coincidence evidence. Relationship evidence can also employ tendency reasoning and careful attention must be paid to precisely what the evidence discloses, what inferences can be drawn from it and how it can or will be used by the jury in reasoning towards guilt (this is discussed further below). Many cases discussing context and relationship evidence use those terms interchangeably. We define what we mean by each category below.

5.17 Hodgson JA categorised possible uses of evidence of past assaults by an accused against a complainant into three (often overlapping) categories:⁷⁰

[W]here a man is charged with particular sexual assaults against a complainant, evidence that he committed similar assaults against the complainant on other occasions could be relevant in at least three different ways, only one of which would be tendency evidence:

- (1) It may be relevant to the extent of removing implausibility that might otherwise be attributed to the complainant’s account of the assaults charged if these assaults were thought to be isolated incidents, in particular implausibility associated with the way each party is said to have behaved on these particular occasions.
- (2) It may be relevant in supporting an inference that the accused was sexually attracted to the complainant, so that he had a motive to act in a sexual manner towards the complainant.
- (3) It may be relevant in supporting an inference that the accused not only had the motivation of sexual attraction, but also was a person who was prepared to act on that motivation to the extent of committing sexual assaults.”

5.18 Later authority of the same court has held that (2) is or at least can be tendency evidence required to pass the admissibility requirements, particularly where the sexual attraction is to a particular child.⁷¹

5.19 Purpose (1) is what we call ‘context evidence’, purpose (2) is what we have called ‘relationship evidence’ (it is also sometimes called ‘guilty passion’ or ‘motive’ evidence; confusingly, ‘relationship evidence’ is also frequently called a subset of ‘context evidence’, however, for the purposes of this advice we mean it only in the sense of (2)) and purpose (3) is straightforward tendency evidence. On the one hand it may be said that if there is evidence of similar assaults committed against the complainant then this may more properly be characterised as tendency evidence as it shows a willingness to act on the sexual attraction towards the complainant.

70. *Leonard v R* (2006) 67 NSWLR 545 at [49].

71. See, e.g., *Colquhoun v R (No 1)* [2013] NSWCCA 190 at [21]-[22].

However, that will depend on the generality or specificity of the evidence of the other acts. The more general the allegations the less likely they are to establish a particular tendency on the part of the accused such as to justify admission for that purpose. In those circumstances, the evidence may still be relevant but should be limited to showing only a sexual interest in the complainant and not a tendency to act on that interest.

5.20 Context evidence is evidence of other instances of discreditable conduct towards the complainant which place the allegations the subject of the charges into context to assist the jury in understanding the particular allegations. Context evidence may answer questions raised by the jury about the allegations in the indictment, for example, it may overcome false impressions that the incident was isolated or came out of the blue and may explain the lack of resistance or complaint by the complainant.⁷²

5.21 Context evidence can be difficult to distinguish from relationship/guilty passion evidence or tendency evidence.⁷³ Whether the proposed evidence is actually being adduced for a tendency purpose has been said to depend ‘on whether or not proof of the tendency of a person to act in a particular way is a necessary link in the reasoning making the evidence relevant to a fact in issue’.⁷⁴ In *RWC v R*, Simpson J contrasted evidence tendered for a tendency purpose with that tendered for a ‘context’ or ‘background’ purpose:⁷⁵

Evidence that is called context evidence is not tendered as going directly to the guilt of the accused person. It is tendered to explain the relationship between the complainant and the accused, or to explain what may otherwise be unexplained, or raise questions in the minds of the jury concerning the behavior of the complainant in response (or non-response) to the conduct of the accused the subject of the charge or charges. Commonly, evidence of a history of sexual abuse or misconduct is tendered to explain why a complainant passively yields to the abuse, shows no surprise, or makes no complaint...

5.22 In most cases the evidence will disclose the commission of other offences committed by the accused against the complainant. If the evidence is used only to explain why the complainant behaved in a particular way or to put the allegations into context so that they do not appear to be improbable because they were isolated offences then it is properly characterised as context evidence. However, if the

72. *Roach v The Queen* at [42] and *HML v The Queen*.

73. See, for example, the differing conclusions as to whether evidence was tendency evidence in *R v Cakovski* (2004) 149 A Crim R 21 and the opinion of Simpson J on these conclusions in *Elias v R* [2006] NSWCCA 365 at [31]. See also *Christian v R* [2013] NSWCCA 98 at [44]-[54].

74. *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51 per Sackville J, Whitlam and Mansfield JJ agreeing.

75. *RWC v R* [2010] NSWCCA 332 at [122]-[123] per Simpson J. See also *R v MM* [2014] NSWCCA 144 at [44]-[47]; *ES v R (No 1)* [2010] NSWCCA 197; *Murdoch v R* [2013] VSCA 272 at [12] per Redlich and Coghlan JJA; *PCR v R* (2013) 279 FLR 257 at [36] per Buchanan JA.

evidence is used to explain or show why the accused behaved in a particular way towards the complainant then it is more properly characterised as relationship and/or tendency evidence.

5.23 Relationship or ‘guilty passion’ evidence in child sexual assault cases is, broadly speaking, evidence which discloses a sexual interest of the accused in the complainant. Such evidence may be relevant to establish a motive of the accused to act in a particular way, namely sexual desire. Where this evidence reveals both a motive and a willingness to act on his or her sexual desire, straightforward tendency reasoning is engaged. Where guilty passion evidence reveals only a motive, there is some dispute as to whether this reveals as tendency that must pass the relevant admission test. More recent authority appears to favour treating this type of relationship or ‘guilty passion’ as tendency evidence (particularly where the interest is in a child as opposed to an adult), however, given the divergence of views, it should be carefully assessed on a case-by-case basis as to whether a probative ‘tendency’ can really be said to be present.

5.24 Where the prosecution is seeking to have the evidence from one charge taken into account on another charge the appropriate use for that evidence is as tendency and/or coincidence, not relationship or context. Attention must then be paid to whether the evidence does establish a tendency or is amenable to coincidence reasoning.

5.25 In all jurisdictions in Australia bar Queensland the admissibility of tendency and coincidence evidence (and in South Australia, evidence of any ‘discreditable conduct’) must be determined by assessing its probative value and comparing it to its prejudicial effect. There is no precise formula for assessing the probative value of the tendency or coincidence evidence.⁷⁶ However the following considerations are useful (subject to jurisdiction-specific limitations on relevant considerations, such as risk of concoction, which we address separately).

- The other evidence that has been or will be adduced;
- Whether the evidence is disputed. For example, where the evidence is insufficiently cogent because there is a real chance that the complainants collaborated to concoct allegations of sexual assault (where this is a permissible consideration);

76. *Perry v The Queen* at 610.

- Whether the evidence goes to a critical fact in the prosecution case, in which case the probative value may need to be higher to be significant;⁷⁷
- When the other conduct occurred (a more recent occurrence can increase the probative value);
- The number of incidents establishing the tendency. Although a single other instance of conduct does not prevent it constituting tendency evidence, an increase number of incidents will logically increase the strength of the alleged tendency and so its probative value;⁷⁸
- the specificity with which the alleged tendency is described;⁷⁹
- whether the evidence discloses unusual features or an underlying unity, system or pattern;⁸⁰
- ‘the strength of the inference that can be drawn from that evidence as to the tendency of the person to act in a particular way and the extent to which that tendency increases the likelihood that the fact in issue occurred’;⁸¹
- the degree of similarity between other incidents, and also between the other incident/s and the subject event (this factor is given far more emphasis with regard to coincidence evidence than it is with tendency evidence);⁸² and
- the onus and standard of proof on the party adducing the evidence.

77. For example, see *R v Familic* (1994) 75 A Crim R 229; *BP v R* [2010] NSWCCA 303; and *Bryant v R* (2011) 205 A Crim R 531.

78. See *RHB v R* [2011] VSCA 295; *R v F* (2002) 129 A Crim R 126 and *Reeves v R* [2013] VSCA 311 at [56].

79. *CEG v R* [2012] VSCA 55 at [14]; *Sokolowskyj v R* [2014] NSWCCA 55 at [40]; and *El-Haddad v R* [2015] NSWCCA 10 at [70]-[72].

80. See, for example, *R v Fletcher* (2005) 156 A Crim R 308 referring to a pattern of behaviour, or modus operandi. See also *Reeves v R* [2013] VSCA 311 at [51]-[52]; *R v Ellis* (2003) 58 NSWLR 700; 144 A Crim R 1 and *Saoud v R* [2014] NSWCCA 136 at [39], [42] per Basten JA.

81. *Jacara Pty Ltd v Perpetual Trustees WA Ltd*. See also *Ibrahim v Pham* [2007] NSWCA 215 at [264] where Campbell JA observed (Hodgson and Santow JJA agreeing generally) that the general nature of the tendencies alleged was a handicap to the evidence having ‘significant probative value’.

82. See *Velkoski v R* [2014] VSCA 121 at [3]: ‘The principle consistently applied in this Court is that the evidence must possess sufficient common or similar features with the conduct in the charge in issue so as to demonstrate a pattern that cogently increases the likelihood of the occurrence of that conduct’. A degree of divergence between NSW and Victoria has been suggested (with NSW requiring less similarity), but this divergence has been called ‘more apparent than real’: see *Velkoski* at [34] and *Saoud v R* at [35]-[37].

5.26 The evidence will not be strongly probative of the offence charged if it only shows bad character or a propensity to commit crime of the sort of crime charged.⁸³

5.27 Some guidance may also be found in *Sutton v The Queen* where Dawson J said:⁸⁴

In considering the admissibility of similar fact evidence the inference to be drawn from the fact when proved is one thing; the strength of the evidence required to prove the fact is another. There must be clear evidence which if accepted by the jury establishes that fact. No difficulty will ordinarily arise where the evidence, if accepted, directly establishes that fact but where the fact itself is a matter of inference then the inference must be capable of being clearly drawn from the evidence relied upon before the evidence is admissible. If it were not so, the requirement that evidence of similar facts should have strong probative force before being admissible would be considerably undermined.

5.28 Although striking similarity between the evidence of misconduct and the conduct the subject of the charge is not necessary, the higher the similarity the more probative the evidence.⁸⁵ In *Perry v The Queen* (1982) 150 CLR 580, Brennan J said ‘evidence of a series of occurrences exhibiting a more attenuated similarity may be admissible because the frequency of the occurrence of the similar facts enhances the probative force of the evidence, though the necessary probative force would be lacking if the similar fact had occurred but once or on a few occasions only’.⁸⁶ This is particularly so with respect to coincidence reasoning.

5.29 Similarity between the elements of the offences is not sufficient. Nor is similarity sufficient where the acts alleged to be similar ‘are themselves so common place that they can provide no sure ground for saying that they point to the commission by the accused of the offence under consideration’.⁸⁷ For example, in *Phillips v The Queen* it was said that ‘[t]he similarities relied on were not merely not “striking”, they were entirely unremarkable’.⁸⁸ The Court went on to say that although it is not necessary for striking similarities or unusual features to be present before the evidence was admitted, in that case there was no other basis for concluding that the evidence was of high probative value.⁸⁹ Further, the similarities between the acts or the features of the evidence said to give rise to a tendency must be an attribute of the accused not merely describe a class of person.⁹⁰

83. *Sutton v The Queen* at 534.

84. *Sutton v The Queen* at 565.

85. *Perry v The Queen* at 610, *Sutton v The Queen* at 549, *Pfennig* at 478 and 484

86. *Perry v The Queen* at 610.

87. *Sutton v The Queen* at 535 per Gibbs CJ.

88. *Phillips v The Queen* at [56].

89. *Phillips v The Queen* at [58].

90. *Stubley v Western Australia* at [66].

- 5.30 The probative value of the evidence can also vary depending on whether it is in dispute. Evidence which is not in dispute will have greater probative value (provided of course it is probative of a fact in issue; if the fact of which it is probative is also not in dispute it can have no relevance).
- 5.31 The probative value of the evidence and its prejudicial effect are inversely proportionate. Generally the greater the probative force the lower the risk of unfair prejudice.⁹¹ Much of what diminishes the probative value of the evidence will increase the prejudicial effect of the evidence.

6 Identifying prejudice

- 6.1 The unfair prejudicial effect of propensity or similar fact evidence at common law was long said to be that the jury might attach too much importance to it.⁹² This was the rationale behind the exclusionary rule and led to the development of the strict test in *Pfennig*. The evidence will usually raise difficult questions about whether the accused was in fact guilty of the other offences and may distract the jury's attention from considering the real issues in the trial.⁹³ In *Pfennig* it was said that 'the prejudicial effect that the law is concerned to guard against is the possibility that the jury will treat the similar facts as establishing an inference of guilt where neither logic nor experience would necessitate the conclusion that it clearly points to the guilt of the accused.'⁹⁴
- 6.2 There is a risk that the jury may be more easily persuaded as to the accused's guilt where evidence of other misconduct is admitted because the evidence shows the accused to be a bad person; or that the evidence persuaded the jury that the accused is the sort of person who ought to be punished.
- 6.3 Unfair prejudicial effect, however, means the danger of improper use of the evidence by the jury, not the capacity of the evidence to legitimately inculcate the accused.⁹⁵
- 6.4 Where evidence of uncharged acts from a single complainant is admitted, there may be an additional and real risk of unfairness from the form the evidence takes. The evidence may be a general assertion that that similar conduct occurred on other

91. *Pfennig v The Queen* at 488, *Sutton v The Queen* at 534.

92. *Perry v The Queen* at 585, 586, *Pfennig v The Queen* at 478, *Sutton v The Queen* at 545 and 547.

93. *Perry v The Queen* at 586, *Sutton v The Queen* at 547.

94. *Pfennig v The Queen* at 482.

95. *HML v The Queen* at [12].

occasions or it may be a detailed account of specific acts.⁹⁶ If it is the former, the accused's ability to test those allegations may be seriously limited.⁹⁷

- 6.5 Assessment of the prejudicial effect will always likely require a consideration of whether directions can overcome the prejudicial effect. However, in some cases, particularly where the probative value of the evidence is relatively low, the directions may not be sufficient to overcome the risk of unfair prejudice and may serve to confuse the jury as to the proper use of the evidence.

Concoction or contamination

- 6.6 The possibility of concoction or contamination is prima facie relevant to the probative value of tendency or coincidence evidence. While it will in many cases be appropriate for a judge to leave the question of concoction or contamination to the jury, in other cases, the possibility will deprive the evidence of its logic as coincidence reasoning. For example, there is nothing 'coincidental' that it is necessary to rebut about similar allegations coming from children of families who got together to discuss the possibility of sexual assaults occurring in their local parish and questioned the children, who later became the complainants, in front of each other. In this circumstance, the similar fact is explained either by the truth of the allegations or the contamination, the improbability of coincidence is rebutted.
- 6.7 If the Crown cannot negative the possibility of contamination or suggestion in particular may, in many cases, this also deprives the accused of the ability to test the evidence of the complainant(s). This must be a relevant assessment to the prejudicial value of the evidence that is squarely within the remit of the trial judge.
- 6.8 The possibility of concoction is not relevant to an assessment of the probative value of the evidence in Queensland, South Australia and Western Australia.⁹⁸ The effect of the statutory abrogation of *Hoch v The Queen* in these jurisdictions is to make the possibility of concoction a question for the jury in assessing the evidence. This is problematic. If the evidence is admitted as coincidence or tendency evidence and during the course of the trial evidence emerges that there was concoction or contamination then the force of that evidence is completely lost. Not only is the force of the evidence lost but the jury can find that none of the offences were proved by using reverse coincidence reasoning. In any event, in jurisdictions where that evidence is put before the jury, the jury will still need to be directed that they cannot use the evidence unless satisfied of it beyond reasonable doubt. A reasonable possibility of concoction would not permit the jury to be satisfied of it beyond reasonable doubt. The result is that rather than these issues being considered prior

96. *HML v The Queen* at [13].

97. *HML v The Queen* at [13].

98. cf. *Hoch v The Queen*.

to the trial they are ventilated during the trial, prolonging the trial and distracting the jury from the task at hand.

- 6.9 In our view it makes far more sense to legislatively provide that the real possibility of concoction does not necessitate inadmissibility or separate trials; however, where the possibility of concoction is such that a jury could not be satisfied of a tendency or improbability beyond reasonable doubt, it should not be admitted.

7 Separate trials

- 7.1 Conventional wisdom is that joint trials are always more likely to result in conviction. To the extent this is true, it demonstrates the potency of tendency and coincidence reasoning. However, this is also a reflection of the fact that the evidence tendered in the joint trial has convinced the trial judge of its significant probative value, etc. That is, the strength and probative value of the evidence permits the joint trial; the joint trial does not give the evidence its strength and probative value.
- 7.2 A few practical factors also challenge the conventional wisdom in certain cases.
- 7.3 Where some of the charges are significantly weaker than others, it may be strategic to try the strongest charges separately, and then use the proved acts from that trial as significant tendency or coincidence evidence of the unproven acts in the trial on the weaker charges. This also prevents weaknesses in the weaker charges from infecting the stronger charges.
- 7.4 Where there is a possibility of collusion, a joint trial can enable the defendant to challenge all charges on this basis; where the possibility of collusion is strong enough, the accused may prefer a joint trial.
- 7.5 Joint trials with multiple complainants each with multiple counts (and even more so, trials with multiple accused), with various tendencies and/or coincidences, can be inordinately complicated. The chances of unfairness and misdirection (and successful appeal) are compounded, as are the time and resources required to attempt to mitigate those risks (in some cases undoing much of the perceived efficiency of a joint trial).
- 7.6 The rules applicable to joint trials in each Australian jurisdiction are set out in Part C. In short, in our view it is appropriate that separate trials be ordered where prejudicial evidence is not cross-admissible. It is unrealistic and contrary to common sense to suppose that a jury will be capable of putting from their minds clear evidence of a probative tendency that emerges on one count but that is too prejudicial to be admitted in respect of another count.

8 Directions and warnings

- 8.1 Any direction given to the jury as to the use it can make of context, relationship, tendency or coincidence evidence will need to be moulded to the facts and circumstances of each particular case. Not all matters raised below will be relevant to a particular case.
- 8.2 In accordance with *Alford v Magee* (1952) 85 CLR 437, the trial judge will need to identify the real issues in the case that must be determined by the jury and explain to them the law regarding those issues. The law must be explained to the jury in a way which relates it to the facts of the particular case.
- 8.3 The relevance of the evidence, the matters going to its probative value and the possible forms of prejudice will affect and inform the directions to the jury on its use of the evidence.⁹⁹
- 8.4 The jury should be told to consider each charge separately and the trial judge should identify all of the evidence that is relevant and admissible to a consideration of that charge.¹⁰⁰ In some cases, it may be appropriate to direct the jury that they need not decide whether the other sexual conduct occurred and it may be persuaded of the accused's guilt without considering whether that conduct occurred.¹⁰¹ The jury may need to be told that they may entertain a reasonable doubt of guilt even if they are persuaded that the conduct occurred.¹⁰²
- 8.5 The jury should be told how it may use the evidence and that if they are persuaded beyond reasonable doubt that some or all of the other acts occurred that may assist them in deciding whether the charge under consideration is established.
- 8.6 The trial judge should identify for the jury the following:
 - the matters bearing on the reliability and credibility of the evidence of the accused's misconduct which is not the subject of the charge(s);
 - all inferences which can properly be drawn from the evidence;
 - the permissible process of reasoning which it may use to consider the evidence;
 - warnings as to any impermissible process of reasoning;

99. *HML v The Queen* at [128].

100. *HML v The Queen* at [130].

101. *HML v The Queen* at [131].

102. *HML v The Queen* at [131].

- the logical limits of the evidence;
 - matters affecting the probative value of the evidence;
 - warnings to eliminate or ameliorate any unfair prejudicial effect of the evidence;
 - a warning not to use the evidence of the other conduct in substitution for the evidence of specific allegations in the indictment;
 - warnings as to circular reasoning and using evidence of one charge to establish a tendency (or support coincidence reasoning) to support the proof of that charge.
- 8.7 Phrases such as ‘relationship evidence’, ‘context evidence’, ‘propensity’, or ‘disposition’, and ‘uncharged acts’ should be avoided in the directions.¹⁰³ ‘Unproven acts’ may be helpful in identifying the logical premise that the jury must start with where either charged or uncharged acts are relied upon to found a tendency; namely, that only once a foundational act is proven can the incremental tendency reasoning commence.
- 8.8 Even where tendency evidence is admitted the jury will usually need to be warned not to use the evidence as showing the accused is the type of person likely to have committed the offences because he had done so on other occasions. Such a warning distinguishes between the existence of a mere criminal tendency or propensity and a propensity to commit a particular type of acts.
- 8.9 Where the evidence is admitted as context evidence or relationship evidence limited only to prove motive and not tendency to commit a particular act, the jury will need to be warned in strong terms against using tendency or propensity reasoning in respect of the evidence. They should be told that they must not use the evidence to reason that the accused was the kind of person who was likely to engage in the conduct the subject of the offences.
- 8.10 Where the evidence regarding one charge is admitted as evidence regarding a different charge as tendency evidence or coincidence evidence it will be unnecessary to direct the jury that it must be satisfied of the occurrence of the offence beyond reasonable doubt before it can be taken into account as evidence in relation to another offence. Where the tendency or coincidence evidence is evidence of uncharged acts the jury should be directed that they cannot take those acts into account as tendency or coincidence evidence unless they are satisfied that they

103. *HML v The Queen* at [125], [129].

occurred beyond reasonable doubt. The position is less clear with relationship and context evidence (see *HML*). In certain cases it will be necessary for the trial judge to direct the jury that they must be satisfied of the acts said to demonstrate a relationship (i.e. sexual interest) or provide context beyond reasonable doubt where those acts are essential in the process of reasoning towards guilt.

9 Draft tendency and coincidence prompt

9.1 The following is proposed for use by practitioners to assist in identifying relevant issues at the outset of any trial (prior to the formulation of tendency and/or coincidence notices and any application for separate trials) in which discreditable conduct will be sought to be adduced or tendency or coincidence reasoning otherwise not dependent on discreditable conduct is sought to be adduced.

Tendency and Coincidence Notice and Directions Prompt

The following questions should be answered at the commencement of preparations for prosecution.

- 1) Type of case:
 - a. Single complainant?
 - b. Multiple complainants?
- 2) Form of evidence:
 - a. Uncharged acts?
 - b. Cross-admissibility of charged acts?
 - c. Proven acts (prior convictions)?
 - d. Evidence of sexual interest not constituting an offence?
- 3) Relevance:
 - a. What are the facts in issue in the proceedings?
 - b. What are the circumstances which bear on the probability of the existence of a fact in issue?
 - c. What is the process of reasoning by which the evidence can affect the probability of a fact in issue?
 - i. Context evidence?

ii. Relationship evidence?

iii. Tendency evidence?

1 What tendency can the evidence bear?

2 What inferences can the tendency bear?

iv. Coincidence evidence?

1 Is there a similarity in events such that it appears improbable that they occurred by coincidence?

2 Does the similarity only exist if the accused is found guilty?

3 What inferences can the similar facts bear?

d. What facts are directly established by the evidence?

e. Is the evidence general or specific?

f. What (other) inferences can be drawn from the evidence?

g. Is other evidence required to support the inference sought to be drawn?

h. Does the evidence have a sufficient connection or nexus to the evidence of the charge?

4) Probative value:

a. What is the strength of the inference(s) sought to be drawn?

b. How strong is the connection between the inference of relationship, tendency or coincidence to the charge?

c. What are the similarities between the evidence and the evidence in support of the charge?

d. Are those similarities more than just the commission of the elements of the offence?

- e. Are those similarities unusual?
 - f. What other evidence is available in support of the inference?
 - g. What other evidence is available to support the guilt of the accused?
 - h. How does other evidence diminish or contradict the inference?
 - i. Is there a real possibility of contamination or concoction?
- 5) Unfair prejudicial effect:
- a. Is there a risk the jury will give the evidence too much weight?
 - b. Is there a risk the jury will reason in an impermissible way having regard to the use to which the evidence is to be admitted?
 - c. Are there any other matters that might give rise to unfair prejudice?
 - d. Can the unfair prejudice be overcome with directions?
 - e. Will the directions to the jury be misleading and/or confusing?
- 6) Directions: - in addition to the matters identified above
- a. Any issues affecting the reliability of the evidence.
 - b. Any direction to overcome specific prejudice identified.

C Tendency and Coincidence around Australia

10 Introduction

10.1 There are four distinct ‘Tendency and Coincidence’ jurisdictions in Australia:

- 1) Queensland (which follows the common law as partially abrogated by the *Evidence Act 1977 (Qld)*);
- 2) The Uniform Act jurisdictions (the Commonwealth, New South Wales, Victoria, Tasmania, the Australian Capital Territory and Northern Territory); however division has emerged between New South Wales and Victoria as to how probative value is to be assessed and some variations exist between these jurisdictions as to secondary issues such as the rules governing joint or separate trials;
- 3) South Australia (governed by the *Evidence Act 1929 (SA)*); and
- 4) Western Australia (governed by the *Evidence Act 1906 (WA)*).

10.2 Each jurisdiction is briefly summarised below, with emphasis on substantive distinctions between them. In our view, those distinctions do not undermine the core premise of this advice: that understanding the underlying logic of tendency and coincidence evidence should enhance its fair and effective use in trials in all jurisdictions.

10.3 The only divergence upon which we express our opinion as to which should be preferred is the restriction in many jurisdictions on the factors that may be considered in exercise of the judicial discretion to admit or reject the evidence.

11 Queensland

11.1 Queensland is the only jurisdiction in which the common law test for the admissibility of propensity and similar fact evidence still applies (see above). However, the principle in *Hoch v The Queen* has been abrogated to the extent that it provided that similar fact evidence is not to be admitted where there is a real possibility of concoction or collusion. Section 132A of the *Evidence Act 1977 (Qld)* thus states:

132A Admissibility of similar fact evidence

In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may

be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

- 11.2 On its face, this provision is ambiguous. It appears not to prohibit the possibility of collusion or suggestion being taken into account in determining whether the probative value of the evidence outweighs its prejudicial effect; only once it has been determined that it does have such probative value notwithstanding that possibility, the possibility of collusion or suggestion cannot be the factor that provides that the evidence is capable of bearing an inference consistent with innocence such that it must necessarily be excluded. This is a far less troubling interpretation of this provision than the alternative, which is that the possibility of collusion cannot be taken into account at all in determining admissibility. The result of this is that evidence which, because of the possibility of suggestion, cannot bear a rational probative inference, is rendered admissible.
- 11.3 Removing judicial consideration of whether the chance of concoction offers an explanation consistent with innocence represents significant legislative trust in the ability of a jury to apply legal reasoning (that is, reasoning that must operate not on the basis of probabilities, but on the basis of beyond reasonable doubt) and to put to one side biases that may be engaged by evidence of past discreditable conduct, in the face of evidence of concoction. This may be an appropriate matter for the jury in many cases. However, the judge who is familiar with rest of the Crown case, who is aware of the practical and legal difficulties concoction or contamination can pose, and who can gauge the probity of the contamination or concoction risk, is in the best position to determine – at the outset and before expending resources on the whole of a trial – whether the possibility of contamination or concoction is such that no jury could fail to have a reasonable doubt as to the alleged acts, for example.
- 11.4 For the reasons given above, in our view it makes far more sense to provide that the real possibility of concoction does not necessitate inadmissibility or separate trials; however, where the possibility of concoction is such that a jury could not be satisfied of a tendency or improbability beyond reasonable doubt, it should not be admitted.
- 11.5 In our view, the uncertain state of the common law is unsatisfactory. The Uniform Evidence Act provisions are workable, and (subject to what is said below as between New South Wales and Victoria) would be an improvement if introduced in Queensland. This should include the requirements for notice to be given.
- 11.6 Charges for more than one indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of

offences committed in the prosecution of a single purpose.¹⁰⁴ Charges against multiple complainants can only be tried together if the evidence in respect of each is cross-admissible.¹⁰⁵ If the court is of opinion that the accused person may be prejudiced or embarrassed in their defence by multiple charges or that for any other reason it is ‘desirable’, the court may order a separate trial of any count or counts in the indictment.¹⁰⁶ The possibility of collusion or suggestion is also a precluded consideration in relation to the decision to order separate trials.¹⁰⁷

11.7 In our view, it is appropriate that the question of joint trials is determined by reference to the cross-admissibility of the evidence, and we repeat our opinion in respect of the exclusion of collusion or suggestion from judicial consideration.

12 Uniform Jurisdictions (Cth, NSW, Vic, Tas, ACT, NT)

12.1 In Uniform Act jurisdictions, the common law cases, including *Hoch*,¹⁰⁸ *Pfennig*¹⁰⁹ and *BRS*,¹¹⁰ have been overtaken by the Acts’ tendency and coincidence provisions.¹¹¹ However, the common law cannot be completely disregarded. There may be cases in which on the facts the evidence will only meet the statutory test if it also meets the common law standard.¹¹² Further, the pre-existing common law categories (and the reasoning they reveal) are still useful, and, to an extent, necessary, to an understanding of how the Uniform tendency provisions will apply, if at all, in a given case.

12.2 The tendency and coincidence provisions in the Uniform Act jurisdictions are in the following form:

97 The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind, unless:

(a) the party seeking to adduce¹¹³ the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence; and

104. *Criminal Code* (Qld) s 567(2).

105. *Phillips v The Queen* (2006) 225 CLR 303, 307 [7] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

106. *Criminal Code* (Qld) s 597A(1).

107. *Criminal Code* (Qld) s 597A(1).

108. *Hoch v The Queen*.

109. *Pfennig v R*.

110. *BRS v R* (1997) 191 CLR 275/

111. *R v Ellis* at [72], [83]-[84]; *O’Keefe v R* [2009] NSWCCA 121 at [47].

112. *O’Keefe v R* at [48], citing *Ellis*.

113. In the ACT Act ‘present/ed’ replaces ‘adduce/d’ throughout.

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Paragraph (1)(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note: The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98 The coincidence rule

(1) Evidence that 2 or more events occurred¹¹⁴ is not admissible to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally unless:

(a) the party seeking to adduce¹¹⁵ the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and

(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

Note: One of the events referred to in subsection (1) may be an event the occurrence of which is a fact in issue in the proceeding.

(2) Subsection (1)(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

114. In the ACT Act 'happened' replaces 'occurred' throughout.

115. In the ACT Act 'present/ed' replaces 'adduce/d' throughout.

- 12.3 **Probative value of evidence** means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.
- 12.4 **Tendency evidence** means evidence of a kind referred to (ACT: mentioned) in section 97(1) that a party seeks to have adduced (ACT: presented) for the purpose referred to in that subsection.
- 12.5 **Coincidence evidence** means evidence of a kind referred to in section 98(1) that a party seeks to have adduced for the purpose referred to in that subsection.
- 12.6 Sections 99 and 100 set out the requirement for notices and the court's discretion to dispense with notices. Section 101 adds an important safeguard on the use of tendency and coincidence evidence in criminal trials:

101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced¹¹⁶ by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

- 12.7 The effect of these provisions in historic CSA cases is to require the probative value of evidence tendered against the accused that would tend to prove a tendency of the accused or disprove a coincidence which tends to prove the accused did a particular act or had a particular state of mind, to substantially outweigh any prejudicial effect on the defendant.
- 12.8 The Uniform Act provisions are 'contingent exclusionary rules';¹¹⁷ the evidence is excluded only if the court forms the view that the evidence would not have significant probative value capable of outweighing the prejudicial effect. They are also purposive exclusionary rules, meaning such evidence is only excluded if the purpose for which it is sought to be adduced is to prove the particular tendency or

116. In the ACT Act 'present/ed' replaces 'adduce/d' throughout.

117. *Jacara Pty Ltd v Perpetual Trustees WA Ltd* at [48].

improbability alleged. Thus ss 97 and 98 are rendering ‘impermissible a chain of reasoning and not necessarily a state of facts’.¹¹⁸

12.9 The Act makes the giving of ‘reasonable notice’ of proposed tendency or coincidence reasoning a condition of admissibility unless dispensed with under s 100. A notice must identify how the evidence is said to give rise to the tendency, and how the tendency, if proved, is probative of guilty.¹¹⁹ The notice requirements thus increase the probability of careful preparation of the Crown case and reduce the risk of unfairness to the accused.

12.10 The provisions do not apply to evidence relevant to credibility only, or where the evidence of a person’s character, reputation, conduct or tendency where such a matter is itself a fact in issue (s 94).

12.11 Even where evidence is admitted for another purpose, it cannot be used for a coincidence or tendency purpose unless it satisfies ss 97 or 98, and s 101 (see s 95). Thus where there is a risk that a jury would use evidence adduced for another purpose in a tendency or coincidence reasoning way, serious thought must be given to the form of judicial direction that would prevent such reasoning, and whether it could be effective. If the evidence sought to be adduced for a non-tendency or coincidence purpose poses such a risk its use will either be limited by a direction or excluded entirely as a result of the unfair prejudice which will result (ss 95, 136 and 137).

12.12 A large number of cases have considered s 95 in the context of ‘background evidence’ that is not relied upon as tendency evidence. The weight of authority favours the giving of a stringent judicial warning to the jury. In these instances, the courts are clear that a trial judge must identify the evidence relied upon to establish the relationship between the parties (where it use used by way of context and not ‘guilty passion’; the latter being the context in which we have used the term ‘relationship evidence’) and direct the jury that they may use it for no purpose other than to establish the relationship between the parties.¹²⁰ In particular, they must not use the evidence to establish the accused’s propensity to commit the crime charged. Howie J in *R v ATM*¹²¹ suggested that, in addition, it will be generally necessary for a judge to warn the jury that they should not substitute the evidence of any other

118. *KJR v R* (2007) 173 A Crim R 226 at [44] per Rothman J.

119 See, e.g., *Velkoski* at [22].

120. *Steadman v R (No 1)* [2013] NSWCCA 55 at [6]-[11], [19]-[23] per Macfarlan JA (Hall and Campbell JJ agreeing); *Steadman v R (No 2)* [2013] NSWCCA 56 at [11], [19]-[21] per Macfarlan JA (Hall and Campbell JJ agreeing); *Rodden v R* [2008] NSWCCA 53 at [119]-[136] per Hall J (Beazley JA and Fullerton J agreeing); *Qualtieri v R* (2006) 171 A Crim R 463; *R v MM* (2000) 112 A Crim R 519; *R v Marsh* [2000] NSWCCA 370 per Adams J, Spigelman CJ and Newman J agreeing; *R v ATM* [2000] NSWCCA 475 per Howie J, Sully and Whealy JJ agreeing; cf *R v Van Dyk* [2000] NSWCCA 67.

121. *R v ATM* [2000] NSWCCA 475.

sexual activity for the specific activity which is the subject of a charge in the indictment, or reason that because the accused may have done something wrong to the complainant on some other occasion that he must have done so on an occasion which is the subject of a charge.¹²²

12.13 Thus particular care must be taken where (as is often the case) a non-tendency or -coincidence reasoning overlaps with a tendency or coincidence reasoning. Thus, In *Rodden v R*,¹²³ both ‘tendency’ and ‘relationship’ evidence (of the sort we have called ‘context evidence’) was adduced by the prosecution to prove its case against the defendant in relation to multiple child sexual assault offences. On appeal, the Court of Criminal Appeal emphasised that there had to be clear directions as to the legitimate uses of the tendency evidence and the restricted use of the context evidence. In particular an important restriction was that the context evidence could not be used to prove that the defendant had improper sexual feelings for the complainant such that it was more likely that he committed the sexual assaults upon her. The directions given by the trial judge had been inadequate for the jury to effectively distinguish between the different types of greatly prejudicial evidence with the result that it was ‘quite possible that the jury (impermissibly) reasoned to the appellant’s guilt of the offences charged by reason of their satisfaction that he did have an ongoing sexual relationship with the complainant as she claimed’.

12.14 For the purposes of the determining whether the evidence possesses significant probative value, the trial judge takes the evidence at its highest and determines whether, so taken, it has the capacity, having regard to other evidence that has been or will be adduced, to be of importance or consequence in establishing the fact in issue. Hypotheses alternative to the Crown case that would provide an innocent explanation for the evidence may be taken into account by the trial judge in determining whether the evidence has the *capacity* to have significant probative value in the eyes of the jury,¹²⁴ however, at least in New South Wales and Tasmania, it is not for the judge to make his or her own finding as to whether or not to accept the available inference or give the evidence particular weight.¹²⁵ In Victoria, the trial judge can go further and take into account, in assessing probative value, the weight that the jury could, acting reasonably, give to the evidence having regard to its credibility and reliability.¹²⁶

122. *R v ATM* [2000] NSWCCA 475.

123. *Rodden v R* [2008] NSWCCA 53 at [46]-[56] and [108]-[131]

124. *DSJ v R* (2012) 84 NSWLR 758 at [10] per Bathurst CJ, [11] per Allsop P and [132] per Hoeben CJ at CL; *R v XY* (2013) 84 NSWLR 363 per Hoeben CJ at CL at [86]-[88] and Blanch J at [207]. Price J went further (in dissent, accepting the *Dupas* approach) at [224].

125. *R v XY* at [66] and [86].

126. See *Dupas v R* (2012) 218 A Crim R 507 at [63]. However, see the judgment of Basten JA in *R v XY* at [50]-[62], in which his Honour reconciles much of what is said in *Dupas* with *Shamouil*, and narrows the point(s) of divergence considerably. See also *Murdoch v R* [2014] NTCCA 20 at [47]-[51] where

12.15 The apparent divergence of views between the States affects a number of sections of the Uniform Acts. In NSW, Spigelman CJ in *R v Shamouil* held that issues of credibility and reliability should not be taken into account by a court considering the probative value of evidence.¹²⁷ In Victoria, the Court of Appeal in *Dupas v R* held that the reliability or otherwise of the evidence is a factor to be taken into account in determining the probative value of the evidence.¹²⁸ It considered that *Shamouil* was ‘manifestly wrong’ and should not be followed. Nevertheless, *Shamouil* has been extensively followed in NSW¹²⁹ and was affirmed by a majority of a five-member bench of the Court of Criminal Appeal in *R v XY* after the Victorian Court of Appeal decision in *Dupas*.¹³⁰ However, in *R v XY*, Basten JA made the following observation:¹³¹

On the facts of *Shamouil*, the jury would be asked, if the evidence were admitted, to choose between an apparently clear and firm opinion of the witness as to who his assailant was and what he looked like and his subsequent retraction. As the Chief Justice noted, a jury ‘could well take the view that the attempt to retract the identification evidence was unconvincing and a manifestation of either a threat of reprisals or of a desire, within a close knit ethnic community, to resolve matters amongst themselves, without the interference of the State’: at [42]. It was the resolution of that dispute that the Chief Justice correctly held was a matter for the jury and not for the trial judge, even on an assessment under s 137. However, to suggest that Spigelman CJ rejected as inappropriate any reference to the weight of the proffered evidence, if accepted, was to mischaracterise what followed in a consideration of the ‘weighing’ exercise, at [70]–[78]. Thus, *Dupas* (2012) erroneously treated *Shamouil* as concluding, inflexibly and without qualification, that the weight of the evidence was irrelevant.

12.16 On either view, other available inferences from the evidence are not only permissible, but required to be taken into account by the trial judge in assessing probative value. The alternative possible explanations for the evidence said to give rise to tendency or coincidence reasoning may, taken with other evidence, rob it of its capacity to significantly prove the Crown case.¹³²

12.17 In our view (regardless of the extent to which there is a real or apparent divergence between New South Wales and Victoria) there should not be imposed (and the Uniform Acts do not, in our view, impose), inflexibly and without qualification, a

Kelly J (Riley CJ and Hiley J agreeing) observed: ‘I am not convinced that these two lines of authority are irreconcilable ...’.

127. *R v Shamouil* (2006) 66 NSWLR 228; [2006] NSWCCA 112 at [59]–[67] per Spigelman CJ, Simpson and Adams JJ agreeing. This ruling concerned s 137, but would have equal applicability to ss 97, 98 and 101.

128. *Dupas v R* at [184]. Also considering s 137, with equal applicability to ss 97, 98 and 101.

129. See, for example, *R v Mundine* (2008) 182 A Crim R 302; *Lodhi v R* (2007) 179 A Crim R 470.

130. *R v XY* at [66] per Basten JA, at [86]–[88] per Hoeben CJ at CL, at [175] Simpson J, at [207] Blanch J. Price J at [224] dissenting. See also *LP v R* [2013] NSWCCA 330 at [83]–[89] and the commentary to s 137.

131. *XY* at [62].

132. *DSJ* at [132].

prohibition on the trial judge from having regard to the potential weight of the proposed evidence. Such matters are appropriately matters for the jury; and the voir dire is not the appropriate place to run complex reliability arguments. However, where such issues are patent and may have significant impact on the assessment of probative value and/or prejudicial affect, it is appropriate for the trial judge to have regard to them as part of the overall factual matrix in which a decision must be made, while bearing in mind the importance of leaving the real factual disputes to the jury.

Separate trials

12.18 In New South Wales, Tasmania, the ACT and the Northern Territory, separate trials will be ordered if an accused will be prejudiced or embarrassed in his or her defence by being charged with more than one offence or if it is otherwise ‘desirable’ to do so.¹³³ In Victoria a separate trial may be ordered if the case of an accused may be prejudiced or if for any other reason it is appropriate to do so.¹³⁴

12.19 Separate trials may be sought on the basis that a jury direction will be insufficient to overcome the inclination of the jury to adopt forbidden reasoning that arises from the accused being tried at the same time for a series of offences with similar alleged facts.¹³⁵ In Victoria and the Northern Territory, there is a presumption in favour of joint trials for sexual offences and the mere fact that evidence is cross-admissible does not rebut the presumption in favour of joint trials.¹³⁶ Evidence may be admissible in respect of one charge and not in respect of another because it is irrelevant to the other charge. Generally, probative or prejudicial evidence that is not cross-admissible should and will result in an order for separate trials, as it will rebut the presumption.¹³⁷ We consider this appropriate.

13 South Australia

13.1 In 2012, Part 3 of Division 3 of the *Evidence Act 1929* (SA) was inserted to set out statutory provisions regarding the admissibility of propensity and similar fact evidence. Section 34P of the *Evidence Act* (SA) provides:

34P—Evidence of discreditable conduct

133. *Criminal Procedure Act 1986* (NSW) s 21(2); *Criminal Code* (Tas) s 326(3); *Crimes Act 1900* (ACT) s 264(2) and *Criminal Code* (NT) s 341(1). In New South Wales, separate trials must be ordered if this is in the interests of justice (*Criminal Procedure Act 1986* (NSW) s 29). In practice, this is unlikely to create much difference across the jurisdictions, as a judge is unlikely to order a joint trial if he or she considers it not in the interests of justice.

134. *Criminal Procedure Act 2009* (Vic) s 193(3).

135. See, e.g., *El-Haddad v R* [2015] NSWCCA 10 at [43]-[44].

136. *Criminal Procedure Act 2009* (Vic) s 194(3); *Criminal Code* (NT) s 341A(2)(a).

137. See, e.g., *R v TJB* [1998] 4 VR 621 at 631, also *Sutton* at 541-3.

(1) In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence (*discreditable conduct evidence*) —

- (a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and
- (b) is inadmissible for that purpose (**impermissible use**); and
- (c) subject to subsection (2) is inadmissible for any other purpose.

(2) Discreditable conduct evidence may be admitted for a use (the "permissible use") other than the impermissible use if, and only if—

- (a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and
- (b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue—the evidence has strong probative value having regard to the particular issue or issues arising at trial.

(3) In the determination of the question in subsection (2)(a) the judge must have regard to whether the permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose.

(4) Subject to subsection (5) a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.

(5) The court may, if it thinks fit, dispense with the requirement in subsection (4).

13.2 Discreditable conduct is not defined but is not limited to evidence disclosing the commission of an offence.

13.3 It would be preferable if notice was also required in respect of coincidence reasoning; the benefits of notices (set out above at [12.9]) apply equally to coincidence reasoning.

13.4 Section 34Q provides that evidence that is not admissible under s 34P for that use must not be used in that way in even if it is relevant and admissible for another use (s 34Q *Evidence Act*).

13.5 Section 34R(1) provides that if evidence is admitted under s 34P, the judge must identify and explain the purpose for which the evidence may, and may not, be used. Further, if the evidence is essential to the process of reasoning leading to guilt the evidence cannot be used unless on the whole of the evidence, the facts in proof of

which the evidence was admitted are established beyond reasonable doubt and the judge must give a direction accordingly (s 34R(2)).

13.6 Section 34S provides that evidence may not be excluded under this Division if the only grounds for excluding the evidence would be either (or both) of the following:

(a) there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant;

(b) the evidence may be the result of collusion or concoction.

13.7 Section 34S, accordingly, expressly abrogates the test for the admissibility of similar fact and propensity evidence in *Pfennig* and the principle in *Hoch v The Queen* regarding the inadmissibility of similar fact evidence where there is a possibility of concoction. However, unlike in Queensland, consideration of these factors are not prohibited; they are merely insufficient as sole grounds. A more critical analysis of effect of the evidence in the whole of the case is demanded. In our view, this comes much closer the striking the correct balance. However, a preferable formulation (which preserves the discretion of the trial judge in extreme cases) would only do the minimum necessary to abrogate *Pfennig* and *Hoch*, and provide that either (a) or (b) do not, of themselves, necessarily require exclusion of the evidence.

13.8 The impermissible use that s 34P of the *Evidence Act* guards against is a general finding of sexual offending and any impermissible propensity reasoning.¹³⁸ This accords with the common law position,¹³⁹ apart from the effect of s 34S.¹⁴⁰

13.9 Section 34P(3) is concerned with the risk that the tribunal of fact will be distracted by the impermissible use of evidence (i.e. forms of reasoning) if that use cannot be sufficiently differentiated from its permissible use.¹⁴¹ Kourakis CJ in *R v C, CA* said (at [76]):

Section 34P of the Evidence Act prohibits reasoning that a person who has engaged in discreditable conduct is, by reason of that bare fact alone, more likely than not to have committed the offence. Put another way, it is impermissible to reason that a person who has engaged in any form of discreditable conduct is likely to have a predisposition to commit the crime charged whether or not, as a matter of human experience, there is any probative connection between the conduct and the crime by way of predisposition or proclivity.

138. *R v March* [2014] SASFC 54 at [20] citing *R v Maiolo (No 2)* (2013) 117 SASR 1.

139. *R v March* at [20].

140. The provisions prevail over any relevant common law rule of admissibility to the extent of any inconsistency (s 34O(1) *Evidence Act*).

141. *R v C, CA* [2013] SASFC 137 at [76].

13.10 Improbability reasoning is permissible where its probative value outweighs any prejudicial effect.

13.11 In *R v MJJ; R v CJN* (2013) 117 SASR 81 Kourakis CJ said that s 34O implicitly accepts the continued operation of common law principles which are not inconsistent with the division.¹⁴² Accordingly, the common law authorities considering the probative force of the discreditable conduct and the weighing of it against its prejudicial effect continue to inform the application of s 34P of the *Evidence Act*.¹⁴³ The probative value of the evidence can only be assessed in the context of all of the evidence on which the prosecution relies and to which it has a relevant connection.¹⁴⁴

13.12 In *R v MJJ; R v CJN* Vanstone J considered that the changes made by Division 3 of the *Evidence Act* meant that:¹⁴⁵

- (a) the test in *Pfennig* and *Hoch* no longer applies to the admissibility of the evidence under s34P;
- (b) the possibility of concoction or collusion is no longer a sole ground for exclusion;
- (c) the exclusionary rule which formerly regulated the admission of propensity or disposition evidence is now extended so that it applies to discreditable evidence introduced for non-propensity purposes; and
- (d) the criterion for admission is that the evidence have strong probative value having regard to the particular issue or issues arising at trial.

13.13 (c) does represent a difference from the Uniform jurisdictions, however the reality is that in most child sexual assault cases the context evidence which discloses discreditable behaviour will be of such probative value as to significantly outweigh the prejudicial effect. However, in the interests of clarity and unity, we recommend the adoption of the approach of the Uniform Evidence Acts, including as to notice, in South Australia.

13.14 Separate trials can be ordered if an accused will be prejudiced or embarrassed in their defence by being charged with more than one offence if or of it is otherwise 'desirable' to do so.¹⁴⁶ The only circumstance in which a separate trial may be

142. *R v MJJ* at [13].

143. *R v MJJ* at [13].

144. *R v MJJ* at [15].

145. *R v MJJ* at [244].

146. *Criminal Law Consolidation Act 1935* (SA) s 278(2).

ordered where multiple sexual offence counts involving different victims form part of the same information, is where ‘evidence relating to that count is not admissible in relation to each other count relating to a different alleged victim’.¹⁴⁷ However, separate trials will typically be ordered where there is evidence that is not cross-admissible.¹⁴⁸ This is appropriate, subject to our views in respect of the prohibition on finding evidence inadmissible where the only grounds are possible concoction or collusion and reasonable explanation consistent with innocence.

14 Western Australia

14.1 In 2005 Western Australia introduced a statutory test for the admissibility of propensity and similar fact evidence. Section 31A of the *Evidence Act 1906* (WA) provides:

31A. Propensity and relationship evidence

(1) In this section —

propensity evidence means —

- (a) similar fact evidence or other evidence of the conduct of the accused person; or
- (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;

relationship evidence means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.

(2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers —

- (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
- (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

147. *Criminal Law Consolidation Act 1935* (SA) s 278(2a).

148. *Sutton v The Queen; R v N* [2010] SASCFC 74at [44] per Sulan, Anderson and David JJ.

(3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

14.2 Unlike the Uniform Evidence Acts, s 31A of the *Evidence Act* (WA) applies to propensity evidence or ‘relationship’ evidence as defined (which includes both what we have termed ‘context’ evidence and ‘relationship’ or ‘guilty passion’ evidence) regardless of its use at trial. However, an assessment of its probative value as required by s 31A(2) requires regard to be had to the use for which it is sought to be adduced. Therefore, as with South Australia, in our view in most child sexual assault cases the probative value of context evidence will be such that it will generally meet this test.

14.3 Like Queensland and South Australia, Western Australia has also abrogated part of the principle in *Hoch v The Queen* (s 31A(3) *Evidence Act*). Our views in this respect are the same as those we expressed in relation to Queensland and South Australia.

14.4 In *Stublely v Western Australia* (2011) 242 CLR 374, Gummow, Crennan, Kiefel and Bell JJ held that s 31A of the *Evidence Act* had abrogated the common law test for the admissibility of similar fact or propensity evidence and specifically the test in *Pfennig*.¹⁴⁹ The Court appeared to adopt what Steytler P said in *Dair v Western Australia* (2009) 36 WAR 413 at [61] that (*Stublely* at [11]):

Before evidence can have significant probative value it must be such as ‘could rationally affect the assessment of the probability of the relevant fact in issue to a significant extent: i.e. more is required than ... mere relevance significant probative value is something more than mere relevance but something less than a ‘substantial’ degree of relevance and that it is a probative value which is ‘important’ or ‘of consequence’. ... the significance of the probative value of the evidence must depend on the nature of the facts in issue to which it is relevant and the significance which that evidence may have in establishing the fact.

The Court did not consider the scope of s 31A(2)(b).

14.5 The Court held that the evidence of uncharged acts against three witnesses was capable of proving a tendency on the part of the accused to engage in sexual relations with his patients during consultations.¹⁵⁰ It was said that proof of that tendency was ‘rationally capable’ of affecting the assessment of the complainant’s evidence that the accused had engaged in sexual relations with them during consultations.¹⁵¹ The evidence was admitted at trial to establish the circumstances

149. *Stublely v The Queen* at [11].

150. *Stublely v The Queen* at [64].

151. *Stublely v The Queen* at [64].

in which the sexual conduct occurred, said to be relevant to the assessment of the complainants' evidence that they had not consented to the various acts charged.¹⁵² The trial was conducted on the basis that the accused had engaged in sexual activity alleged by the complainants. This was material to the consideration of the admissibility of the uncharged acts.¹⁵³ It was said that:¹⁵⁴

The probative value of the evidence to prove that the sexual acts charged in the indictment occurred... ceased to be significant once it was known that [the complainants'] evidence that the appellant had sexual relations with them during consultations was not challenged. Furthermore, evidence of sexual misconduct not charged in the indictment committed against other women led in order to prove an issue that was not live in the trial, would not meet the test in sub-s(2)(b).

14.6 The Court noted that it was conceded that the evidence was propensity evidence at trial and on appeal to the Court of Appeal it was said that the evidence was propensity evidence or relationship evidence. The Court said that only one aspect of the 6 features identified by Buss JA on appeal was an attribute of the accused:¹⁵⁵

The remaining features might be thought to describe a class of persons: younger, vulnerable female patients. Perhaps for this reason his Honour considered the evidence of [the other witnesses] was 'relationship evidence'. That characterisation was not in issue on the appeal.

14.7 The term 'significant' means 'of importance' or 'of consequence' but need not be substantial.¹⁵⁶ Its probative value must be assessed taking the evidence at its highest.¹⁵⁷

14.8 The application of s 31A(2)(b):¹⁵⁸

requires the court to assess the degree of risk of unfairness at trial that will be occasioned by the admission of the evidence in question, the court having already found under s31A(2)(a) that the evidence has significant probative value. ... when assessing the risk of an unfair trial for this purpose, the court must take into account any directions that might be given to the jury in an attempt to overcome the prejudice, and their likely effect on the jury...after identifying the probative value of the evidence in question and the degree of risk of an unfair trial, the court must consider the conclusion that fair-minded people would draw from a comparison of these issues. Although fair-minded people are reasonable members of the general community who are not lawyers, it must be assumed

152. *Stubley v The Queen* at [64].

153. *Stubley v The Queen* at [65].

154. *Stubley v The Queen* at [65].

155. *Stubley v The Queen* at [66].

156. *Dair v Western Australia* (2009) 36 WAR 413 at [61].

157. *Donaldson v Western Australia* (2005) 31 WAR 122 at [153].

158. *Roncevic v Western Australia* [2010] WASCA 213 at [54] citing *Dair v Western Australia* at [60]-[61], approved in *Horsman v Western Australia* (2008) 187 A Crim R 565 at [23], and *Buiks v Western Australia* (2008) 188 A Crim R 362 at [46].

that such people have informed themselves of ‘at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances’.

14.9 In *Dair v Western Australia* Steytler P said:¹⁵⁹

Once the evidence is found to have significant probative value, either by itself or taken with other evidence, the court must engage in the process contemplated by s 31A(2)(b). Because there will already have been an assessment of the probative value of the evidence (taking into account the purpose for which it is adduced and its likely effect when considered together with the other evidence), it is necessary, next, to assess the degree of risk of unfairness in the trial that will be brought about by the admission of the evidence.

14.10 Steytler P then set out the types of prejudice that can be occasioned by the admission of propensity evidence (a useful list for all Australian jurisdictions):¹⁶⁰

- the strong tendency to believe that the defendant is guilty of the charge merely because he is a likely person to do such acts; see *R v Bailey* [1924] 2 KB 300 at 305 where it was said ‘it is easy to derive from a series of unsatisfactory allegations ... an accusation which at least appears satisfactory ... to collect from a mass of ingredients, not one of which is sufficient, a totality which will appear to contain what is missing’;
- the tendency to condemn not because the defendant is believed guilty of the present charge but because he has escaped punishment from other offences; and
- that the jury might become confused or distracted as it concentrates on resolving whether the accused actually committed the similar acts.

14.11 When assessing the risk of unfair prejudice the court will take into account any directions that might be given to the jury to overcome the prejudice.¹⁶¹

14.12 The Court in *Stubbley v Western Australia* said the assessment must be done in the context of the live issues at trial (consistent with the decision in *Phillips v The Queen*) which suggests the inquiry is to be conducted having regard to the context of the prosecution case.

14.13 The balancing act required between the probative value and the degree of risk of an unfair trial, is to be conducted ‘such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the

159. *Dair v Western Australia* at [62].

160. *Dair v Western Australia* at [62]-[63].

161. *Dair v Western Australia* at [64].

risk of an unfair trial’, is of little utility. It suggests, for example, that there can be a public interest in an unfair trial in some circumstances; or that the judge would, but for the section, have some view other than that shared by ‘fair-minded people’. We note also that the definition of propensity evidence is manifestly too broad, including ‘similar fact evidence or *other evidence of the conduct of the accused person*’ (emphasis added); read literally, any evidence of the conduct of an accused person is propensity evidence requiring significant probative value outweighing the degree of risk of an unfair trial. Neither of these drafting curiosities are likely, in practice, to adversely impact upon the admissibility of probative evidence or the fair trial (which is not to say they couldn’t have been drafted better). However, in the interests of clarity and unity, we recommend the adoption of the approach of the Uniform Evidence Acts, include as to notice, in Western Australia.

14.14 Separate trials can only be ordered if multiple charges are ‘likely’ to prejudice the accused.¹⁶² Cross-admissibility does not determine whether a joint trial is available or should not be ordered, and the Court is precluded from having regard to the possibility that similar fact evidence (the probative value of which outweighs its potentially prejudicial effect) may be the result of collusion or suggestion.¹⁶³

14.15 This legislation has been interpreted as ousting the common law position that separate trials should generally be ordered for sexual offence charges where evidence is not cross-admissible.¹⁶⁴ In our view, this should be the general position where the non-cross admissible evidence is cross-probative and prejudicial.

15 Summary and significance of jurisdictional variations

15.1 The significant jurisdictional distinctions are:

- (1) Test for admissibility, being:**
 - (a) no rational explanation consistent with innocence (Qld);**
 - (b) whether the evidence has significant probative value that outweighs its prejudicial effect (Uniform jurisdictions; or ‘strong’ probative value in the case of South Australia); or**
 - (c) whether the significant probative value of the evidence outweighs the risk of an unfair trial, such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.**

15.2 In our view, although the tests vary in the apparent height of the barrier to admissibility, there is not a significant practical difference between the

162. *Criminal Procedure Act 2004* (WA) s 133(3)-(4).

163. *Criminal Procedure Act 2004* (WA) s 133(5)-(6).

164. *Donaldson v Western Australia* (2005) 31 WAR 122, 144-5 [112] (Roberts-Smith JA, Wheeler JA and Miller AJA agreeing).

jurisdictions. All bar Queensland still involve a balancing exercise comparing probative value to the prejudicial effect. Further, even though Queensland prima facie appears to have the highest barrier, the legislative prohibition on considering the impact of the possibility of concoction and the prohibition on considering reliability generally when assessing rational views consistent with innocence decreases the height of that barrier. And the reality is that in most historic child sex offence cases, the *Pfennig* barrier is met in any event. Similarly, whether or not relationship evidence (of a ‘guilty passion’ or ‘motive’ type) that does not of itself reveal a tendency to act upon that tendency should be subject to the tendency and coincidence admission requirements would not, in our view, be a determinative factor of admissibility in many historic child sexual assault trials. While the view is favoured that a sexual interest in a particular child *is* tendency evidence, even if it were not, such evidence is so inherently prejudicial and a lay jury is so likely to engage in propensity reasoning from that evidence, that ordinary rules of admissibility would be likely to bite to much the same effect as proscriptive tendency and coincidence rules.

15.3 Having said that, a direct comparison of admissibility in the various jurisdictions would be of very limited utility having regard to the inevitably esoteric nature of each cases’ fact scenario.

(2) Whether background evidence capable of establishing a tendency or coincidence but not tendered for that use must meet the admissibility test for tendency and coincidence evidence (the point on which the Court in *HML* split evenly).

15.4 Although this would prima facie appear to be a significant difference, in our view the practical difference are, again, slight. If evidence of background or relationship does not need to pass the tendency and coincidence specific admissibility tests, but would have failed them if it had, it is likely to be unfairly prejudicial under ordinary rules of admissibility.

(3) Whether, for the purposes of considering admissibility, the evidence is assessed at its highest, or whether it must be assessed having regard to factors bearing upon its reliability (including by reference to the possibility of collusion).

15.5 In our view, the myriad factual scenarios in which such evidence arises, it is preferable to enable the judge to consider all relevant factors (including reliability and the possibility of concoction) when making risk-of-prejudice admissibility rulings. Questions of reliability are ordinarily in the remit of the jury, and that too can be a factor taken into account by the trial judge in determining whether the weight of the evidence and its weaknesses are appropriately a matter for them. However, just as cognitive biases that are widely accepted to prevent jurors from correctly scrutinizing statistical evidence (for example, of DNA or identification

evidence) are taken into account by a trial judge in determining admissibility, so should the trial judge be entitled to consider the added danger of an unfair conviction posed by evidence of such an inherently prejudicial nature where issues of reliability are significant. (Were this to become the case in all jurisdictions, our view in respect of Queensland expressed at (1) may change).

(4) Divergent approaches to joint trials.

15.6 Just as with factors relevant to admissibility, in our view, while probative and/or prejudicial non-cross-admissible evidence should generally militate against a joint trial, ultimately no single factor should mandate a particular outcome, and the trial judge should not be proscribed from taking into account all relevant factors (including the consideration that, in general, questions of reliability are properly for the jury) when deciding whether or not to permit a joint trial.

16 Conclusion

16.1 We are of the view that the tests regarding the admission of tendency and/or coincidence in Australia evidence are for the most part appropriate and strike the right balance between ensuring relevant and probative evidence is placed before the jury and protecting an accused's right to a fair trial. This is particularly so of the Uniform jurisdictions. The Western Australia, South Australian and Queensland provisions should, in our view, not proscribe factors the trial judge can take into account in determining admissibility. Other differences between the jurisdictions may be, in the case of historic child sexual assault trials, of little practical significance.

16.2 The problem with the use of tendency and coincidence evidence in child sexual assault trials is not the threshold for admissibility but rather difficulties in identifying the logical limits of the evidence. The above discussion is intended to raise issues that should be addressed by prosecutors, defence counsel and trial judges when dealing with this kind of evidence. Early identification of the evidence sought to be admitted, the inferences to be drawn from the evidence and the process of reasoning is vital to reduce delays associated with trying these types of offences. We would caution against any change in the threshold for admissibility of tendency and coincidence evidence in child sexual assault trials. Any lowering of the threshold will merely put the burden on the jury to decide difficult questions regarding the probative value of the evidence and will lead to lengthier trials whereby collateral issues are explored and quite possibly a higher incidence of successful appeals.

16.3 The admission of context evidence or limited relationship evidence should not be seen as a means to have the evidence admitted without having to show significant probative value. If the evidence is capable of establishing a tendency or give rise to

coincidence reasoning it should be put before the jury on that basis. Any limited purpose for which the evidence is admitted will always require strong warnings not to use that evidence for another impermissible purpose.

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